

THE MALAYSIAN JUVENILE JUSTICE SYSTEM

A Study of Mechanisms for
Handling Children in Conflict with the Law



Ministry of Women,
Family and Community Development



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The report was written by [Child] Frontiers, an international consulting company focusing on child protection issues.

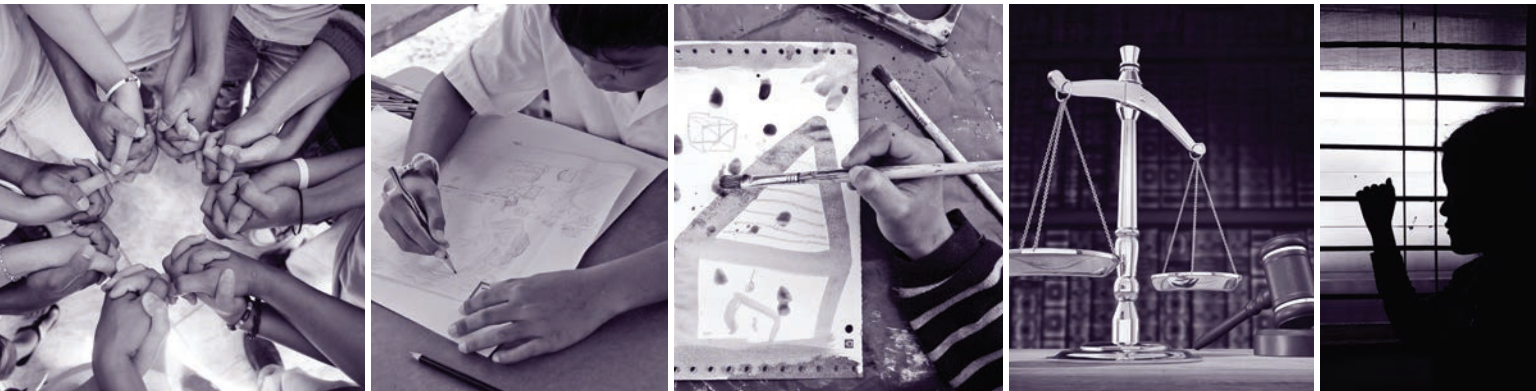
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THE MALAYSIAN JUVENILE JUSTICE SYSTEM



**A Study of Mechanisms for
Handling Children in Conflict with the Law**

FOREWORD

SECRETARY GENERAL, MINISTRY OF WOMEN, FAMILY AND COMMUNITY DEVELOPMENT



*Ministry of Women,
Family and Community Development*



According to Articles 37 and 40 of the Convention on the Rights of the Child (1989), children in conflict with the law have the right to treatment that promotes their sense of dignity and worth, taking into account their age and their reintegration into society. Also, placing children in conflict with the law in a closed facility should be a measure of last resort, to be avoided whenever possible.

As such, the Malaysian Juvenile Justice System report, prepared by the Ministry of Women, Family and Community Development in collaboration with UNICEF is another significant initiative towards evaluating the current practice as well as highlighting challenges and issues of children in conflict with the law in Malaysia. The term “juvenile justice” often refers to legislation, norms and standards, procedures, mechanisms and provision, institutions and bodies specifically applicable to juvenile offenders.

Key findings and recommendations from the report will enable the Ministry of Women, Family and Community Development to develop a more holistic solution in addressing matters relating to children in conflict with the law. This includes diversion (directing children away from judicial proceedings and towards community solutions), restorative justice (promoting

reconciliation, restitution and responsibility through the involvement of the child, family members, victims and communities), and alternatives to custodial sentencing (counselling, probation and community service).

In addition, there is a need for a multi-disciplinary approach and for proper recruitment and training of personnel who work with children. This will reduce incarceration of young offenders and provide a second chance for the juveniles. In other words, children are provided with opportunities to change their behaviour and attitudes.

DATO' SRI DR. NOORUL AINUR MOHD. NUR



FOREWORD

UNICEF REPRESENTATIVE, MALAYSIA



There are many reasons why children come in conflict with the law.

Child offenders often come from broken homes or troubled families or have been abused or neglected. Poverty is also a factor that puts children at risk. Some children come into conflict with the law as they struggle with learning disabilities and mental health problems. Others become involved in gang activity or with drugs and alcohol, at a young age, which eventually paves the way to juvenile crime.

Each time children come into conflict with the law, they are at a crossroads. And each crossroad is an opportunity to turn a life around – from one of poor decisions, missed opportunities and future crime, to one of fulfilment of potential and societal integration. The Malaysian Government has recognised that a comprehensive juvenile justice system is the key to capitalising on these opportunities. In collaboration with UNICEF, the Ministry of Women, Family and Community Development undertook a study to examine the mechanisms for handling children in conflict with the law in Malaysia, with the aim of identifying concrete steps to strengthen the juvenile justice system.

Rooted in the principles of the Convention on the Rights of the Child, which recognises that the human rights of the child should be respected throughout the juvenile justice process, this report outlines some specific recommendations for strengthening the Malaysian juvenile justice system. Key among them is the need for a high-level, inter-agency Child Justice Working Group to develop an integrated national

Juvenile Justice Reform Strategy and Plan of Action that incorporates prevention and early intervention measures.

As the Malaysian Government moves forward with this agenda, it is useful to learn from new global strategies, which are moving away from formal police, court-based interventions. Evidence has clearly shown that institutionalising children has proven to be ineffective, and in fact may increase the chances that the child will go on to commit further crimes. Approaches focused on diversion, which channels children away from the formal justice system into programmes that make them accountable for their actions and other community-based responses, have achieved better results.

Thus, a holistic reform of the country's juvenile justice system is not just in the best interest of children in conflict with the law, but is also in the best interest of Malaysian society.

With this publication, UNICEF reaffirms its continued commitment to work together with the Government, NGOs, civil society and other partners, to strengthen the Malaysian juvenile justice system.

A handwritten signature in black ink, appearing to read "W. Belmonte".

WIVINA BELMONTE

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ABBREVIATIONS AND ACRONYMS

2M	Kelas Intervensi Awal Membaca dan Menulis (reading and writing)
Asrama	Probation Hostel
Beijing Rules	UN Minimum Rules for the Administration of Juvenile Justice
CID	Criminal Investigation Division
CPC	Criminal Procedure Code
CPT	Child Protection Team (Pasukan Perlindungan Kanak-Kanak)
CRC	Convention on the Rights of the Child
CWC	Child Welfare Committee
DPP	Deputy Public Prosecutor
ESCAR	Essential (Security Cases) Regulations 1975
FGC	Family Group Conference
FIPA	Firearms (Increased Penalties) Act 1971
ISA	Internal Security Act 1960
ILKAP	Institut Latihan Kehakiman dan Perundangan (Judicial & Legal Training Institute)
ISM	Institut Sosial Malaysia (Social Institute of Malaysia)
JDLs	UN Rules for the Protection of Children Deprived of Liberty
JKM	Jabatan Kebajikan Masyarakat (Department of Social Welfare)
JKMN	Jabatan Kebajikan Masyarakat Negeri (State Social Welfare Department)
KSU	Secretary General
LPPKN	Lembaga Penduduk dan Pembangunan Keluarga Negara (National Population and Family Development Board)
PMR	Penilaian Menengah Rendah (Lower Secondary School Certificate)
MWFCD	Ministry of Women, Family and Community Development (Kementerian Wanita, Keluarga dan Masyarakat)
OCPD	Officer-in-Charge of the Police District
PAKK	Pusat Aktiviti Kanak-Kanak (Child Activity Centre)
PPKK	Pasukan Perlindungan Kanak-Kanak (Child Protection Team)
RMP	Royal Malaysian Police (Polis Diraja Malaysia)
SPM	Sijil Pelajaran Malaysia (Malaysian Certificate of Education)
STB	Sekolah Tunas Bakti (Approved School)
STPM	Sijil Tinggi Persekolahan Malaysia (Malaysian Higher School Certificate)
SUHAKAM	Suruhanjaya Hak Asasi Manusia Malaysia (Human Rights Commission of Malaysia)
UKM	Universiti Kebangsaan Malaysia (National University of Malaysia)
UNICEF	United Nations Children's Fund

EXECUTIVE SUMMARY

In December 2006, Malaysia submitted its first periodic Country Report to the UN Committee on the Rights of the Child outlining the progress made in implementing the Convention on the Rights of the Child. In its Concluding Observation regarding Malaysia's report, the Committee acknowledged the positive measures that the country has taken to promote children's rights, and to comply with international standards regarding juvenile justice. However, it also highlighted some areas of concern with respect to the handling of children in conflict with the law, and strongly encouraged the Government of Malaysia to seek technical assistance from UN agencies, including UNICEF, to address these issues. In response to the Committee's recommendations, the Ministry of Women, Family and Community Development sought assistance from UNICEF to undertake a comprehensive study of the juvenile justice system. The objectives of the study are to: a) present an overview of the nature and extent of juvenile offending in Malaysia; and b) take stock of current practices and identify opportunities to apply innovative new approaches based on international best practices.

The study found that, in accordance with the CRC and international best practices, the Malaysian government has recognised the need to have a separate and distinct approach to handling children in conflict with the law. Special legislation governing children who commit crimes has been in place since 1947 and, in both in law and practice, measures are taken at all stages of the criminal justice process to ensure that children are separated from adults and afforded special care and protection. However, there are some statutory exceptions, resulting in lesser protection for children who commit security offences, who are not formally charged until after they turn 18, or who commit offences together with adults.

Malaysia has also met the CRC requirement of setting a minimum age below which children are considered too young to be held criminally responsible for their actions. However, the current minimum age is low by international standards. In its Concluding Observations, the UN Committee on the Rights of the Child noted with concern the low minimum age of criminal responsibility and recommended that Malaysia raise the age to at least 12. Since very few children under the age of 12 are currently involved in crime, the age could be raised without compromising public security.

While the Child Act was enacted in 2001, the State's fundamental approach to children in conflict with the law has remained fundamentally the same since it was first introduced in 1947. As a result, new global strategies, such as diversion, are not adequately reflected in law and practice. Drawing largely from the UK system of the day, Malaysia's approach to juvenile justice is grounded in formal police and Court-based interventions and institution-based rehabilitation. However, this approach has been demonstrated to be the most costly and least effective way of dealing with child offending. The trend globally has been to shift away from these formalised approaches, investing instead in the development of diversion and other community-based responses to child offending. There are currently a significant number of children's cases being processed through the formal court system that could be handled more effectively, and cost-efficiently, through diversion. Diverting these less serious cases from the Court system would reduce Court backlogs and result in significant savings in terms of transport, logistics and remand costs.

For children who are being formally processed through the criminal justice system, Malaysia has introduced some important protections designed to safeguard children, starting from the very initial stages of arrest

and investigation. However, it has yet to develop a comprehensive, specialised police response to children in conflict with the law. While the Child Act includes some provisions on the arrest of children, it provides limited guidance with respect to issues such as alternatives to arrest, restrictions on use of force or restraints, duration and conditions in police custody, and the presence of parents, probation officers, or lawyers during investigative procedures. While the police are generally cognizant of the need to handle children's cases more sensitively, they have not been provided the necessary skills, directives, facilities, and oversight to ensure that this happens in all cases. As a result, complaints of police abuse persist.

Malaysia currently has a relatively moderate rate of pre-trial detention or remand. However, the significant number of children who are held on remand for very minor offences is cause for concern, as is the consistently high percentage of children in prisons who have not yet been found guilty of a crime. This is not only harmful to the child, but also costly to the State and contrary to long-term public safety, as it can result in increased rates of recidivism. Available statistics suggest that in most cases, children on remand have their cases dealt with within the maximum six-month time frame recommended by the UN Committee on the Rights of the Child. However, due to the lack of legislated standards and systemic monitoring practices, there are cases of children being held on remand for lengthy periods of times, sometimes in excess of the term of imprisonment they would be subjected to if sentenced as an adult. In its Concluding Observations, the UN Committee on the Rights of the Child expressed concern with regard to the long pre-trial detention periods and delays in dealing with cases involving children.

Malaysia has also made significant progress in promoting separated court proceedings for children

in conflict with the law by dedicating special days for children's cases to be heard by designated Magistrates. In most districts, the current volume of cases would not justify a fully separate Court for Children; however, the number of days per week that the Court for Children sits should be closely monitored and adjusted to meet the volume of cases being registered. In addition, greater measures could be taken, using existing infrastructure, to make the court experience more child-friendly and less intimidating, thereby encouraging more substantive participation of children and their parents.

In both law and practice, Malaysia currently employs a different approach when sentencing children. When deciding on the appropriate order to impose, consideration is given not just to the seriousness of the offence, but also the background and circumstances of the child. However, the principles and criteria to be considered when imposing an order on children are not clearly articulated in either law or judicial precedent, resulting in differing interpretations and application. The CRC principles of proportionality and institutionalisation as a last resort are not adhered to consistently, resulting in children being subjected to lengthy custodial orders, often for very petty crimes such as theft.

Malaysia has made progress in recent years in improving community-based supervision and rehabilitation programmes for child offenders, particularly through the introduction of interactive workshops. However, these programmes remain under-resourced and the volunteer mechanisms meant to support this process are not functioning effectively or as per their mandate. Programmes tend to be ad hoc and focus primarily on the parent-child relationship, with limited emphasis on inter-active, experiential learning programmes for the children themselves. Malaysia currently has a cadre of highly dedicated district-level probation

officers and professional counsellors tasked with supporting children in conflict with the law and their families. However, due to a shortage of staff, training and resources, most have limited ability to provide individual guidance and support to children.

Malaysia has also developed a range of custodial institutions aimed at the rehabilitation of children in conflict with the law, including both low security facilities under the JKM, as well as more secure rehabilitative schools and correctional centres under the Prisons Department. In all custodial institutions, boys are now fully separated from adult inmates. However, girls continue to be detained together with adult women, contrary to the requirements of the CRC. Both JKM and Prisons Department facilities have developed education and vocational training programmes designed to assist children with their reintegration after release. In particular, the recent collaboration between the Malaysian Prisons Department and the Ministry of Education represents a significant step forward in the government's efforts to fulfil its obligations under the CRC. However, in both JKM and Prisons Department facilities, the approach to rehabilitation is based largely on a standardised regime of discipline, religious instruction and vocational training. There is no individualised assessment or care planning, and all children follow the same standard programme and daily routine. In general, all institutions for children are large in size, which limits the ability for individualised treatment and the development of trusting relationships between children and staff.

In order to facilitate children's reintegration and prevent re-offending, children released from institutions spend an additional year under the supervision of a probation officer, or in the case of children released from prisons, the police. However, emphasis seems to be largely on monitoring and surveillance, rather than providing support. There are no written reintegration

support plans, and as with children under other forms of supervision, probation officers have limited time and resources for individualised guidance. Children released from prison facilities do not have access to ongoing support, other than the requirement to report periodically to a police station.

In order to strengthen existing initiatives and modernise its approach to child offending, it is recommended that Malaysia undertake a holistic reform of its juvenile justice system. As a first step, it is recommended that a high-level, inter-agency Child Justice Working Group be formed to develop an integrated national Juvenile Justice Reform Strategy and Plan of Action. This strategy should draw on international standards and global best practices in the administration of juvenile justice, while at the same time ensuring the system is relevant and appropriate to the Malaysian context. It is recommended that the Juvenile Justice Reform Strategy aim to:

Strengthen the legal framework for the administration of juvenile justice by amending the Child Act to:

- Raise the minimum age of criminal responsibility to 12;
- Include a statement of guiding principles drawn from the CRC and international standards;
- Provide a complete code for the handling of all children in conflict with the law, not just those appearing before the Court for Children;
- Extend the scope of special juvenile justice protections to all children under the age of 18 at the time the offence was committed;
- Introduce diversion and regulate the types of offences for which diversion may be used, the criteria and procedures for decision-making and the types of diversionary programs that should be available;

- Include more detailed procedures regulating arrest and police custody of children;
- Allow bail in all cases, depending on the background and circumstances of the child and nature and circumstances of the case. Introduce a broader range of alternatives to remand and provide guidance on the factors to be taken into account when making decisions about pre-trial release.
- Include strict time limits for completing children's cases, particularly where children are on remand;
- Provide a wider range of non-custodial sentencing options;
- Eliminate the fixed, three-year term for STB and Henry Gurney School orders, and ensure that the duration of all custodial placements is in accordance with the principle of proportionality;
- Prohibit life imprisonment and indefinite detention, and set a maximum term of imprisonment in line with international standards.

Improve Arrest and Investigation Practices by:

- Developing detailed Standing Orders for police;
- Establishing specialized police units in major cities to handle all child suspects and designating child specialists in other locations;
- Developing a short course for police specialists and a brief session on children for all new police recruits;
- Involving probation officers (or trained volunteers) from point of arrest;
- Requiring a parent, probation officer, lawyer, or some other supportive adult to be present whenever a child is questioned by the police;
- Ensuring proper monitoring and oversight of cases involving children;
- Establishing more centralized lock-ups for children, with appropriate facilities.

Reduce the Number of Children Being Formally Arrested and Tried by:

- Giving police, DPP and Magistrates greater discretion to refer children to a diversion programme, rather than initiating or continuing with formal charges;
- Introducing a formal screening processes to identify cases that are appropriate for diversion as soon as possible after arrest;
- Developing diversion programmes that will hold children accountable for their actions, and address underlying factors that contributed to their misbehaviour.

Improve Court Proceedings for Children by:

- Developing a practice directive, handbook and training programme for Magistrates and DPP;
- Designating specialized Magistrates and DPP in each district to hear all children's cases;
- Using Magistrates Chambers or modifying courtroom furniture when sitting as the Court for Children;
- Developing handbooks and training programmes for defence counsel;
- Introducing a duty counsel system in the Court for Children.

Reduce the Number of Children in Institutions by:

- Training Magistrates, DPP and probation officers on principles of sentencing;
- Strictly enforcing the principle of institutionalisation as a last resort;
- Building the capacity of probation officers to provide in-depth probation reports;
- Strengthening community-based alternatives for supervision and rehabilitation of child offenders;
- Ensuring timely appointment of Board of Visitors / Visiting Justices and requiring regular, periodic and independent reviews of all children who are in institutions;
- Introducing new strategies for handling "beyond control" children without institutionalization.

Strengthen community-based supervision and rehabilitation of child offenders by:

- Appointing more probation officers and/or amending the Child Act to allow trained volunteer probation officers to provide assistance;
- Building the skills and capacity of probation officers to develop structured, written intervention plans for children subject to community orders, based on a comprehensive assessment of both the child and family.
- Promote an individualised and multidimensional approach to intervention planning, with support aimed at addressing not just the parent/child relationship, but also the child's cognitive and social skills, peer network, as well as education, training or employment needs;
- Designing more structured, inter-active experiential learning programmes to replace the existing ad hoc motivational programmes;
- Introducing a mentoring programme;
- Developing an "attendance centre" model using existing Child Activity Centres. This will likely require some additional guidance and skills training for Centre staff;
- Consider introducing a more intensive support and supervision programme for high-risk children who need more guidance and support;
- Reconsider the role and functions of the Child Welfare Committees, which are currently not functioning effectively.

Improve conditions in detention by:

- Promoting the development of smaller, decentralised open custody facilities to replace the current model of large-scale STBs and hostels;
- Reforming the overall regime and physical layout of STBs and hostels to be more home-like and therapeutic, rather than the current focus on discipline, drills and prison-like regimentation;
- Allowing all children in STBs and Hostels to access education and vocational training programmes in the community;

- Drafting new regulations for STBs, Henry Gurney Schools and Juvenile Correctional Centres that conform with international standards;
- Introducing individualised assessment and case planning for all children;
- Exploring international models and new practices in institution-based rehabilitation of child offenders and developing new programmes more specifically aimed at addressing offending behaviour;
- Providing travel allowance for parents who cannot afford to visit their children;
- Developing specialised training programmes for all institution staff.

Improve prevention and early intervention measures by:

- Developing parenting skills training and peer support programmes that parents who are experiencing difficulties with their adolescents can access voluntarily;
- Establishing greater coordination and referral mechanisms between school counsellors and social welfare officers so that children and parents who are experiencing difficulties are identified early and referred to appropriate support services;
- Developing specialised, non-stigmatising programmes for teenagers who are involved in substance abuse or exhibiting behaviour problems, such as mentoring and inter-active, experiential life skills programmes;
- Promote greater opportunities for adolescents to engage in positive social and recreational activities, particularly in low-income and high-crime neighbourhoods;
- Improve access to vocational skills training, career counselling and job placement support for school-leaving adolescents.



INTRODUCTION

Background

Every day, throughout the world, children come into conflict with law enforcement officials because they are alleged or accused of having committed a criminal offence. How these children are handled can have a profound impact on their future prospects, and may be determinative of whether they grow up to become productive citizens or fall into a life of crime. For this reason, the Convention on the Rights of the Child (CRC)¹ requires States parties to develop specialised responses for dealing with children in conflict with the law that take into account their young age and are aimed at promoting their reintegration and development as productive citizens.

In December 2006, Malaysia submitted its first periodic Country Report to the UN Committee on the Rights of the Child outlining the progress made in implementing the CRC. In its Concluding Observation regarding Malaysia's report², the Committee acknowledged the positive measures that the country has taken to promote children's rights and to comply with international standards regarding juvenile

“States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”

-CRC, Article 40

justice. However, it also highlighted some areas of concern with respect to the handling of children in conflict with the law and strongly encouraged the Government of Malaysia to seek technical assistance from UN agencies, including UNICEF, to address these issues.

In response to the Committee's recommendations, the Ministry of Women, Family and Community Development sought assistance from UNICEF to undertake a comprehensive study of the juvenile justice system. The objectives of the study are to: a) present an overview of the nature and extent of juvenile offending in Malaysia; and b) take stock of current practices and identify opportunities to apply innovative new approaches based on international best practices. The study includes an analysis of the legal and normative framework for juvenile justice; the government structures, processes and procedures for responding to child offending; and the measures and services available to promote children's rehabilitation and prevent re-offending.

In broad terms the study considered:

- The nature and extent of and trends in youth offending in Malaysia;
- National laws, policies and standards pertaining to children in conflict with the law at all stages of the criminal justice process;³
- The structures, processes and procedures in place to put these laws into practice; and
- Programmes and services to support children in conflict with the law, including institution-based rehabilitation programmes, as well as community-based alternatives.

1 Ratified by Malaysia in 1995, with reservations relating to several articles, including Article 37 (torture, punishment and deprivation of liberty), but not Article 40 (administration of juvenile justice).

2 CRC/C/MYS/CO/1, 25 June 2007, available at: <http://www2.ohchr.org/english/bodies/crc/crcs44.htm>.

3 Note: the scope of the study is restricted to the formal criminal justice system and excludes proceedings before the Syariah Courts and Native Courts, both of which have some limited criminal jurisdiction.

It is hoped that reviewing juvenile justice practices will help ensure that policies and programmes evolve to take into account national and international expertise about what is most effective, thus positioning Malaysia as a leader in the region. In doing so, Malaysia joins a host of other countries such as UK, Canada, US, New Zealand, Australia, and South Africa, which have recently begun to re-think and reform the fundamental principles and approaches to the State's response to youth offending.

Methodology

The Study was undertaken by Child Frontiers, an international child rights research company. The research team consisted of one international researcher and three national researchers, who were advised throughout by a technical committee consisting of local academics and juvenile justice experts. The study, undertaken over a three month period in 2009, used a mix of qualitative and quantitative methods and involved the following key components:

Desk Review of existing reports, studies, evaluations, and other information pertaining to the juvenile justice system;

Analysis of Legal and Policy Framework governing the juvenile justice system;

Analysis of Statistics to present a general picture of the nature and extent of youth offending and the State response; and

Field Research consisting of semi-structured interviews and group discussions with key informants, including key officials from relevant national ministries

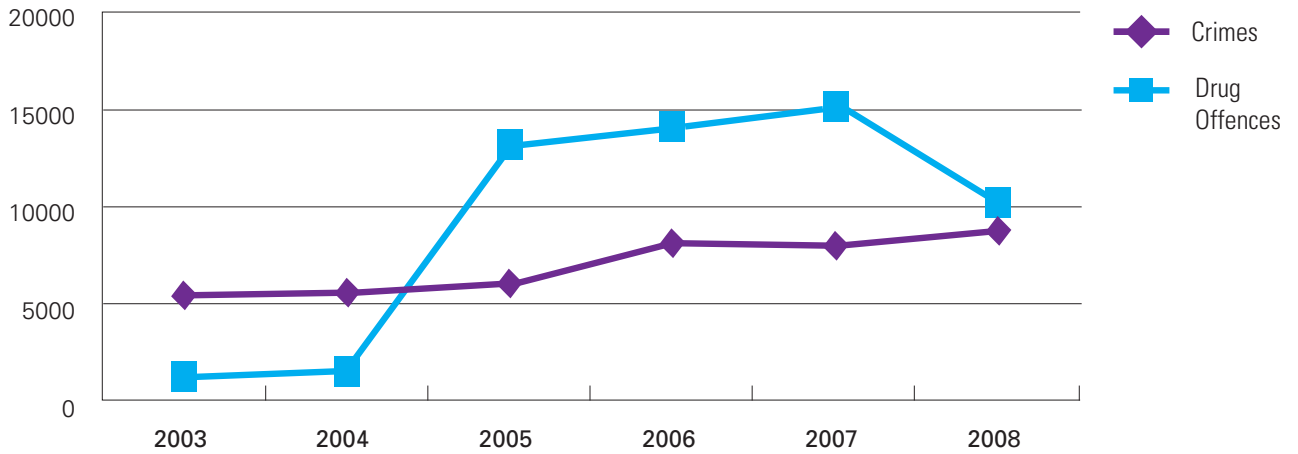
and agencies, academics and NGO representatives, front-line service providers, and children and their families. In addition, site visits were undertaken to selected institutions for children in conflict with the law. Field work was carried out in Putrajaya, Kuala Lumpur, Selangor (Kajang prison), Melaka, Sabah (Kota Kinabalu), and Johor (Johor Bahru).

Nature and Extent of Juvenile Offending

Malaysia has a fairly young population, with 60 percent of its population below 30 years of age. The general perception amongst stakeholders is that child offending has increased in recent years and that the types of crimes that children are committing have become more serious. However, assessing patterns of offending is difficult due to gaps in data collection and inconsistencies in statistics collected by the different agencies. It is also difficult to measure the extent to which changes in child crime statistics reflect an actual change in rates of child offending, or merely changes in policing and data collection practices.

Police statistics show a steady increase in the number of children subjected to arrest for criminal code offence between 2003 and 2008. During that same period, the number of children arrested for drug offences increased dramatically, though it is unclear whether this represents an increase in drug-related crimes committed by children, or simply increased police focus on drug activities.

Number of Children Arrested for Criminal Code Offence (2003 - 2008)⁴

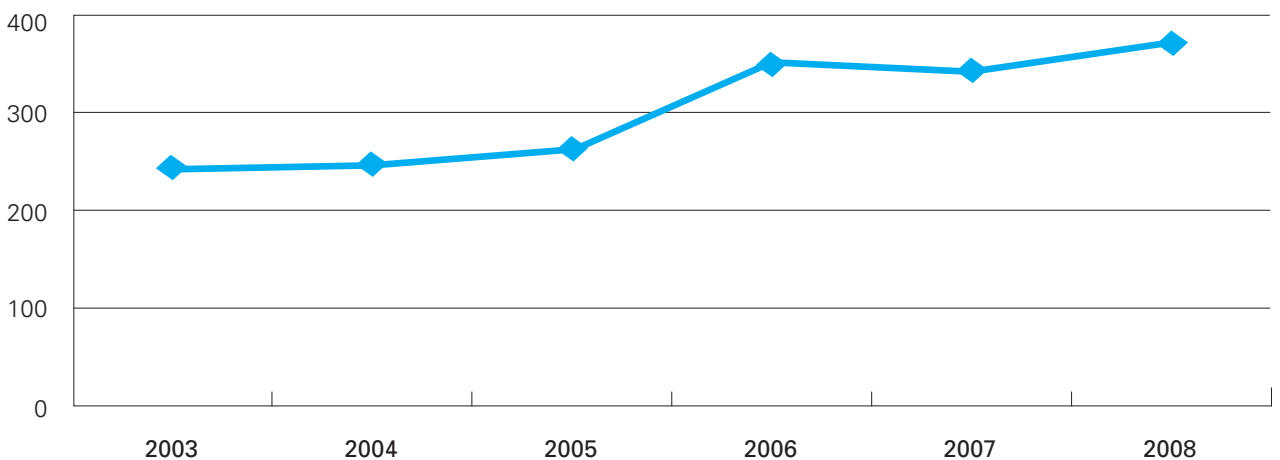


Source: Royal Malaysia Police, 2003 - 2008

The trend in criminal arrests is slightly less dramatic when figures are adjusted to reflect the growth in the number of children between the ages of 10 and 18 in the Malaysian population. Statistics show that from

2003 to 2008 the rate of arrests for children between the ages of 10 and 18 who committed criminal offences rose marginally from 240, to 370 per 100,000 population from the age group.

Rate of Children Arrested, per 100,000 of Children Age 10 - 18 (2003 - 2008)



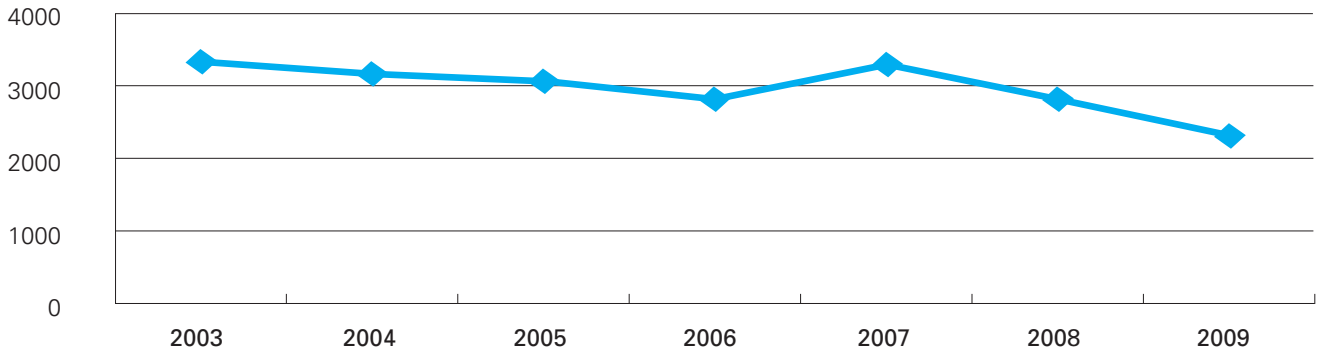
Source: Court Registrar, 2003 - 2008

4 Note: Refers to children charged with offences under the Penal Code and with drug offences, and excludes children charged with traffic violations and other minor infractions.

In contrast to police statistics, data from the Court shows significantly lower rates of child offending for the same time period, as well as a decrease in the number of child offender cases registered before the

Courts. It is not clear whether this is the result of errors or differences in data collection, or the fact that many children who have been arrested are never formally charged and brought before the court.⁵

Number of Children’s Cases Registered with the Court (2003 - 2009)

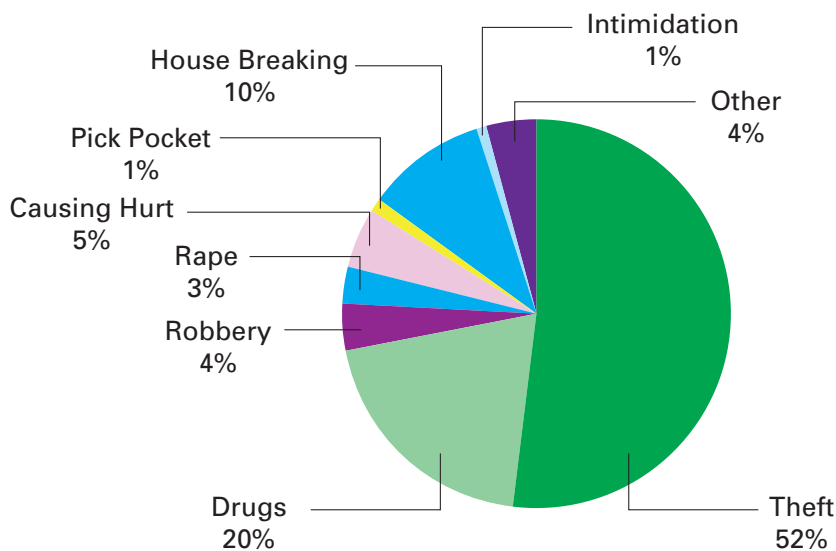


Source: Court Registrar, 2003 - 2009

Data from the Court reveals that the majority of children convicted by the court have committed petty crimes such as theft, rather than crimes of violence.

The percentage of children who have committed violent crimes such as rape and causing hurt is very low.

Percentage of Children Convicted by the Court, by Type of Offence (2003 - 2009)



Source: Court Registrar, 2003 - 2009

5 The Court was requested to provide statistics on the number of children registered before all levels of court, however it is unclear whether the information provided relates only to the Court for Children. If so, this may explain some of the inconsistencies, since it would exclude children charged with serious offences that are within the jurisdiction of the High Court, and children co-accused with adults.

Statistics also show that the vast majority of children arrested for a criminal offence are between the ages of 16 and 18. Few children under the age of 12 have been arrested between 2003 and 2008.

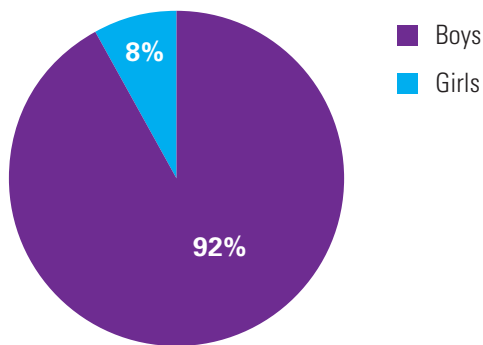
Data was not available on the percentage of crimes committed by children, as compared to adults.

Number of Children Arrested for a Criminal Offence, by Age (2003 - 2008)



Source: Royal Malaysia Police, 2003 - 2008

Gender of Children Convicted by the Court (2003 - 2009)



Source: Court Registrar, 2003 - 2009

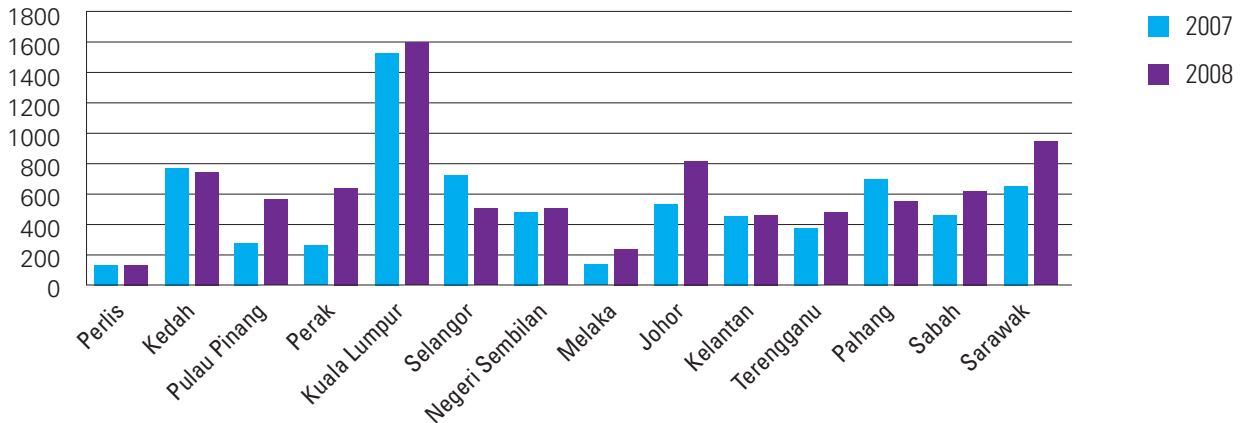
As in most countries, statistics from the Court show that the vast majority of children in conflict with the law are boys. Between 2003 and 2009, girls made up only 8% of children found guilty by the courts.⁶

⁶ Note: this is based on incomplete statistics, as data disaggregated on the basis of gender was not provided from Johor, Melaka and Pulau Pinang.

Statistics from the police suggest that the States with the highest rates of child offending are those with the largest population densities and urban centres. Between 2003 and 2008, Kuala Lumpur and Selangor

consistently had the highest number of children arrested for criminal offences, followed by Sarawak, Johor and Kedah. States with the lowest rates of juvenile crime were Melaka and Perlis.

Number of Children Arrested for a Criminal Offence in 2007 & 2008, by State



Source: Royal Malaysia Police, 2007 - 2008

The Juvenile Justice System: Laws, Structures and Processes

The principal Act governing the handling of children in conflict with the law is the Child Act 2001⁷, which came into force in August 2002. This Act consolidated three former Acts: the Juvenile Courts Act 1947; the Child Protection Act 1999; and the Women and Girls' Protection Act 1973. The current Child Act governs four main categories of children: 1) children in need of care and protection; 2) children in need of protection and rehabilitation; 3) children "beyond control"; and 4) children in conflict with the law. This study focuses mainly on the fourth category, i.e. children in conflict with the law, with some reference to children beyond control. The other categories of children are being addressed under a separate study of the child protection system being

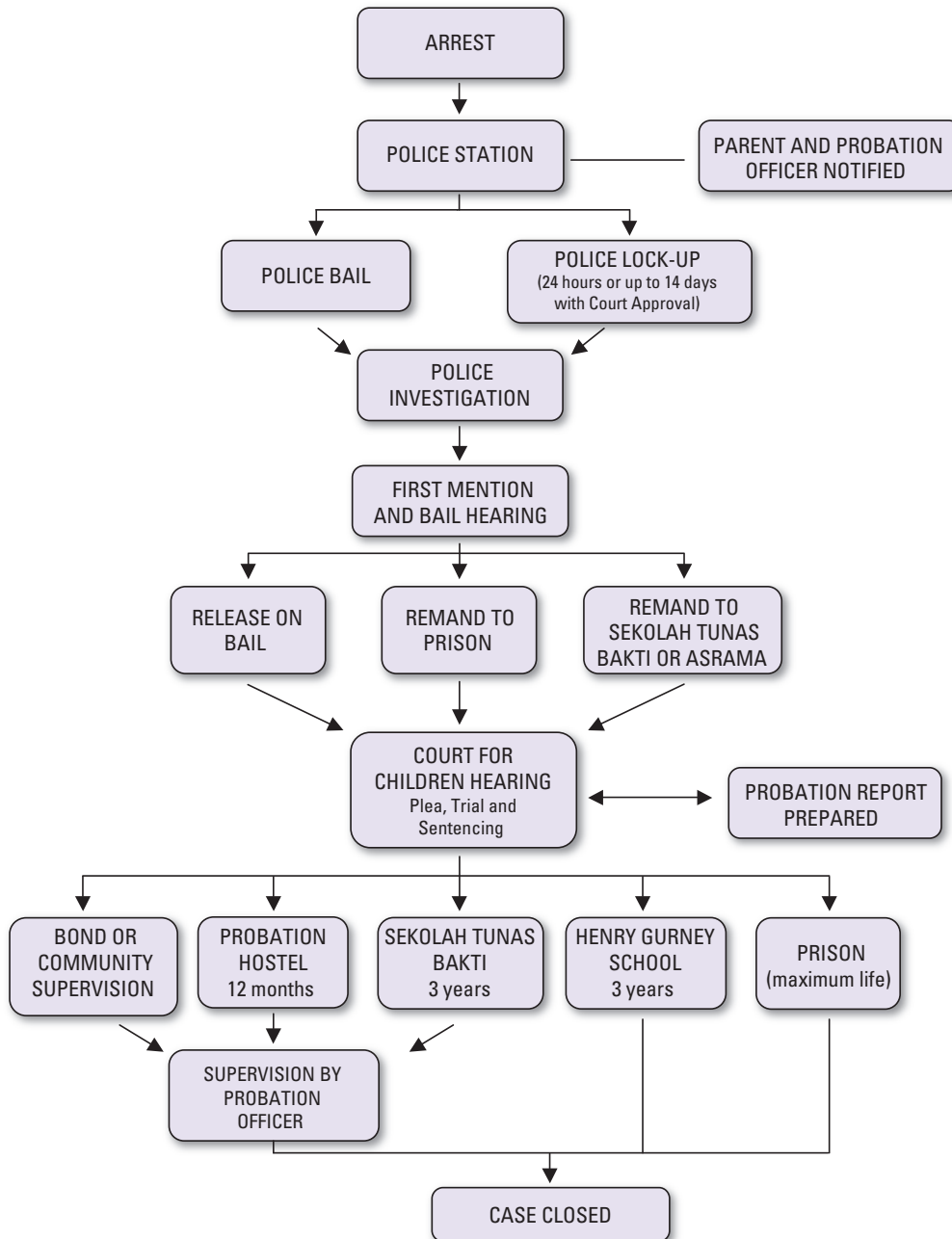
undertaken jointly by the Ministry of Women, Family and Community Development and UNICEF.

The Child Act outlines the main structure, processes and procedures for responding to children who commit criminal offences. Part X of the Act stipulates special procedures for arrest, bail or remand, trial, and sentencing of children, as well as defines the roles and responsibilities of police, probation officers, the Court for Children, and various institutions handling child offenders. Pursuant to section 83(1) of the Act, a child who is arrested, detained and tried for any offence (subject to certain specified limitations) must be handled in accordance with the provisions of the Child Act, rather than the normal procedures applicable to adults. The special procedures under the Child Act modify and take precedent over any written laws relating to procedures for arrest, detention and

trial. However, where the Child Act does not address a specific issue, then reference may be made to the standard procedures under the Criminal Procedure Code.⁸

The following chart presents the general process for handling a child in conflict with the law. Each stage of the process is discussed in more detail in the sections below.

General Process for Handling a Child in Conflict with the Law



⁸ Section 11(6) of the Child Act, which states that “Except as modified or extended by this Part, the Criminal Procedure Code [Act 593] shall apply to Courts for Children as if Courts for Children were Magistrates’ Courts.”



AGE AND CRIMINAL RESPONSIBILITY

International Standards

Pursuant to the CRC, States parties should establish special laws, procedures, authorities, and institutions specifically applicable to all children in conflict with the law. For the purposes of juvenile justice protections, there are two key ages to consider:

The minimum age for criminal responsibility: The CRC requires States parties to establish a minimum age below which children are presumed not to have the capacity to commit a crime.⁹ Children under this age who do commit crimes may be subject to child protection interventions by the social welfare agency if necessary in their best interest, but should not be subject to arrest, investigation, detention, trial, or liability under the justice system. While the CRC does not state a specific age for criminal liability, the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)¹⁰ state that the beginning of that age shall not be fixed at too low an age, and should be based on children’s emotional, mental and intellectual maturity. In its General Comment on Children’s Rights in the Juvenile Justice System, the UN Committee on the Rights of the Child recommended that the age of 12 years be set as the absolute minimum age and that States continue to increase this to a higher age level.¹¹

The UN Committee has also been critical of the practice of the *doli incapax* principle, which was previously used in many common law countries. Under the *doli incapax* principle, children in conflict with the law who are above a specified age (e.g. 10) but below a higher minimum age (e.g. 12) are presumed to be criminally responsible only if they have the required maturity. The assessment of this maturity is left to the judge, often

without the requirement of involving a psychological expert, and in practice generally results in the use of the lower minimum age in cases of serious crimes. The UN Committee has noted that the system of two minimum ages is often confusing, leaves much to the discretion of the judge, and may result in discriminatory practices. It recommends that States parties set the minimum age at the higher of the two ages and not permit exceptions based on subjective assessments that children under that age are mature enough for penal liability.¹²

The upper age for application of special juvenile justice protections: Pursuant to the CRC, a “child” is defined as a person under the age of 18. As such, the UN Committee on the Rights of the Child has interpreted Article 40 of the CRC to mean that every person under the age of 18 at the time of the alleged commission of an offence must be treated under the rules of juvenile justice. In its General Comment on Child Rights in the Juvenile Justice System, the Committee emphasised that special procedural rules and special dispositions should apply to all children who at the time of their alleged commission of an offence have not yet reached the age of 18 years. The Committee therefore recommends that States Parties that allow some children be treated as adult criminals change their laws with a view to achieve non-discriminatory full implementation of their juvenile justice rules to all persons under the age of 18 years.

Status Offences: Another consideration with respect to criminal responsibility of children is so-called “status offences”. A status offence refers to the penalisation of children engaged in behaviour such as vagrancy, truancy, running away, and being “beyond control” that would not be considered an offence if

9 Convention on the Rights of the Child, Articles 1 and 40(3).

10 Adopted by General Assembly resolution 40/33 of 29 November 1985.

11 General Comment No. 10 (2007): Children’s Rights in Juvenile Justice, CRC/C/GC/10, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

12 Ibid.

committed by adults. The UN Committee on the Rights of the Child has been critical of this practice and has commented negatively on the improper use of the juvenile justice system to tackle social or family problems such as street children, truancy, runaways, or difficulties in the parent-child relationship. Countries are now increasingly recognising that these types of behaviour problems are best addressed through non-punitive, social welfare responses. The Committee therefore recommends that States Parties abolish any provisions regarding status offences in order to establish equal treatment under the law for children and adults.¹³ Similarly, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) state that in order to prevent further stigmatisation, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.¹⁴

Malaysian Laws and Policies

The definition section of the Child Act 2001 states that a “child” means a person under the age of eighteen years and, in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code. The Penal Code states that children under the age of 10 years are not criminally responsible for their actions. It also includes a *doli incapax* provision, which states that any act of a child who is above 10 and less than 12 years of age is not an offence if the child has insufficient maturity to understand and judge the

nature and consequences of his/her conduct. Where the Court for Children is in doubt as to the age of the child, an opinion should be sought from a medical officer.¹⁵

In general, the special protections for child offenders under the Child Act apply to all child offenders under the age of 18, with some exceptions:

Children who turn 18 while the proceedings are ongoing: If a child turns 18 while the proceedings are ongoing, the Court for Children must continue to hear the case. However, it is up to the discretion of the Court whether it applies the special sentencing provisions available for children under the Child Act or imposes an adult term of imprisonment.¹⁶

Children who are only formally charged after they turn 18: If a child commits an offence while s/he is under 18 but turns 18 before s/he is formally charged, then the trial is heard by the regular adult criminal courts. The court may choose to apply the special sentencing provisions available for children under the Child Act or impose an adult term of imprisonment.¹⁷

Children charged with adults: If a child commits a crime together with an adult, the trial will be heard in the adult criminal court, rather than the Court for Children. However, the Court must “exercise in respect of the child all the powers which may be exercised under this Act by a Court for Children” and must consider a probation report before sentencing the child.¹⁸

Children charged with very serious crimes: The Court for Children does not have jurisdiction over children charged with an offence punishable with death (murder, certain terrorism offences, hostage

¹³ General Comment No. 10 (2007), CRC/C/GC/10

¹⁴ Article 56

¹⁵ Child Act 2001, s.16

¹⁶ Child Act 2001, s.83 (2)

¹⁷ Ibid, s. 83 (3)

¹⁸ Ibid, s. 83 (4)

taking, waging war, mutiny, kidnapping in order to murder, gang robbery with murder, drug trafficking).¹⁹ However, while the Child Act does not state so explicitly, the special protection for children relating to procedures for arrest, detention, trial, and sentencing should still apply equally, regardless of whether the case is before the High Court rather than the Court for Children.

Children charged under security laws: Although the Child Act states that any arrest, detention or trial of a child must be done in accordance with the special provisions under the Act, “notwithstanding anything contained in any written law relating to the arrest, detention and trial of persons committing any offence,”²⁰ there are provisions in other laws that limit the protection available to children for certain serious offences. Pursuant to the Essential (Security Cases) Regulations, 1975 (ESCAR), children charged with offences under the Internal Security Act 1960 and the Firearms (Increased Penalties) Act 1971 (FIPA) are not afforded the special protections under the Child Act and may be subject to capital punishment.²¹

The Child Act also includes provisions for certain status offences, including being “beyond control”²² and being subject to, or at risk of, sexual exploitation (“moral danger”).²³ Although not classified as offenders, these children are nonetheless subject to similar treatment as children who commit crimes, including temporary detention and the possibility of being deprived of their liberty in a social welfare institution for up to three

years. For child victims of sexual exploitation, the law states that the maximum duration a child may be sent to an institution is three years and allows for a reduction in the period of detention by the Board of Visitors.²⁴ However, the period for detaining “beyond control” children in an Approved School is not specified, nor is it clear whether they may be entitled to early release by the Board of Visitors. As such, there is no clear statutory direction with respect to how long children classified as beyond control can be detained in an Approved School and whether they are entitled to the same process of periodic review and early release as child offenders.

Structures, Processes and Practices

Malaysia has a relatively high rate of birth registration and stakeholders were generally of the view that age determination is not a major challenge. For most children in conflict with the law, a birth certificate or national ID card is easily available to confirm their age. However, challenges do arise when dealing with children who are non-Malaysian, since many have no formal proof of their age or identity. Police advised that, if a child does not have documents to prove his or her age, then age is determined through a medical examination, or by questioning the child’s parents or relatives.

19 Ibid., s. 11(5).

20 Ibid, s. 83(1).

21 Regulation 3(3) of ESCAR. This primacy of ESCAR was challenged and upheld by the Federal Court in *Lim Hang Seoh v. PP*, [1978] 1 MLJ 68.

22 Section 46 of the Child Act provides that if a parent or guardian is unable to exercise proper control over their child, an application may be made to the Court for Children and the child may be committed to a custodial institution (an Approved School, place of refuge, Probation Hostel) or be placed under the supervision of a probation officer.

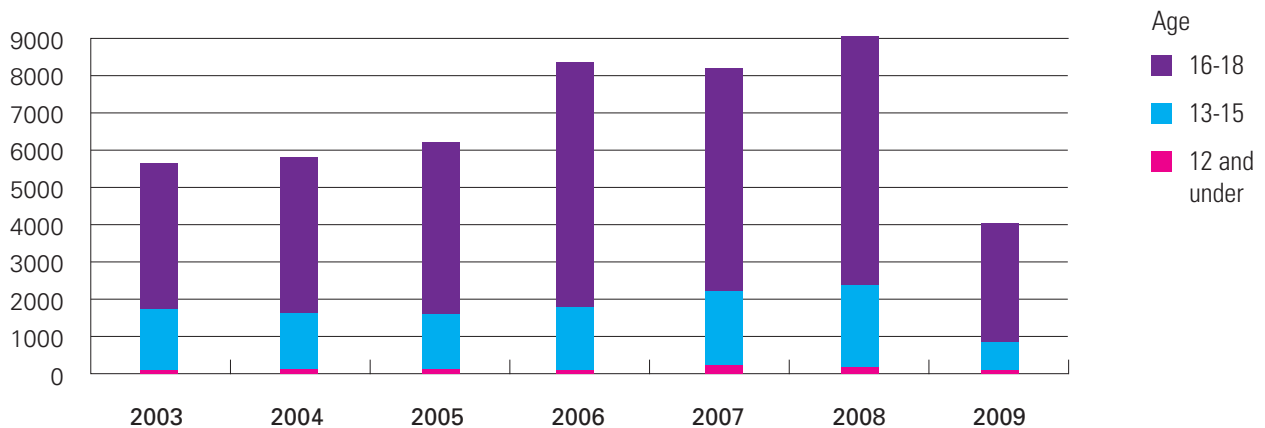
23 Under s. 39 of the Act, children in need of care and protection may be removed by a police officer or Protector and temporarily detained in a place of refuge. After inquiry, the Court may order the child detained in a place of refuge for a set period of three years, place the child in the custody of a relative or other fit person, require the child’s parents to give a bond for the child’s good behavior, or place the child under the supervision of a social welfare officer. If the child is sent to a place of refuge for three years, the Board of Visitors may reduce the period of detention, provided the child spends at least 12 months in the institution.

24 Sections 66-70 governing the use and duration of Approved School orders apply only to children placed in the schools due to the commission of an offence, not those who are beyond control.

Although the minimum age for criminal responsibility is 10, statistics show that few younger children come into conflict with the law. The vast majority of child

offenders are between the ages of 16 and 18 and in general, less than 3 percent of children arrested by the police are aged 12 years or younger.

Number of Children Arrested for a Criminal Offence, by Age (2003 - May 2009)



Source: Royal Malaysia Police, 2003 - May 2009

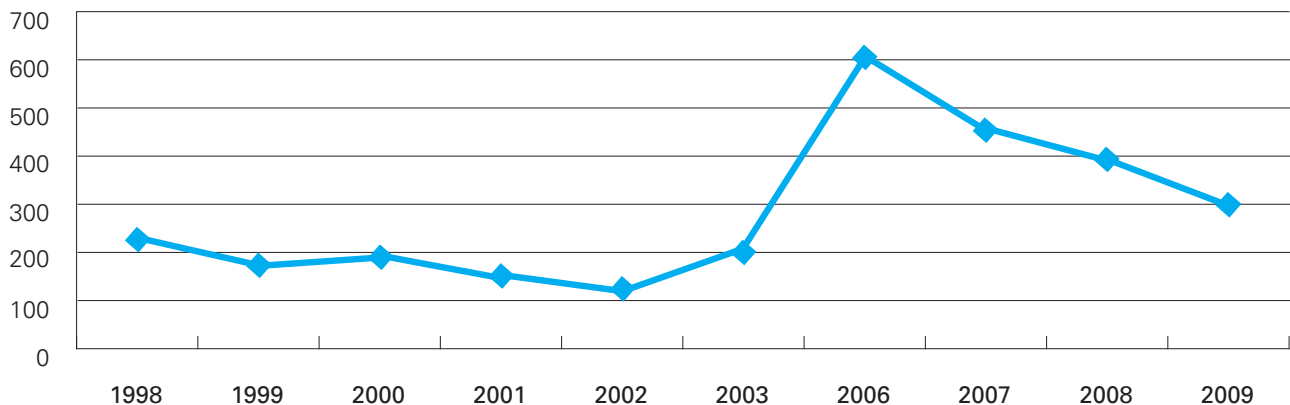
As noted above, the Penal Code states that children between the ages of 10 and 12 are exempt from criminal responsibility if they have insufficient maturity to understand and judge the nature and consequences of their conduct. However, this provision does not appear to be well understood or applied by Magistrates. None of the Magistrates who participated in the study were familiar with the provision and there is currently no standardised inquiry or assessment process used to determine whether a child under the age of 12 has sufficient maturity to be formally tried by the Court. In general, a child's maturity and degree of responsibility are factors taken into account in sentencing, rather than at the outset to determine whether the Court has jurisdiction to hear the case.

Provisions under the Child Act allowing children to be detained for being "beyond control" are regularly used to respond to children committing status offences such as running away from home, engaging in sexual behaviour, being involved in drugs, being repeatedly disobedient to parents, or involvement in motorbike racing (Mat Rempit).²⁵ Girls are more often targeted under these provisions due to the perceived need to control their behaviour and sexuality and because they represent a higher proportion of runaways.²⁶ While girls generally represent only 8 percent of child offenders, they accounted for 56.3 percent of children admitted to an STB for being beyond control between 2006 and 2009. As the chart on page 27 shows, a significant number of children are detained under these provisions each year and this number has grown significantly over the last 10 years.

²⁵ Abdul Hadi Zakaria, 'Juvenile Delinquency: Its Relationship to the Family and Social Support,' in Cho Kah Sin & Ismail Mohd Salleh (eds), *Caring Society: Emerging Issues and Future Directions*, ISIS Malaysia 1992, pp 133-149 at 134.

²⁶ Rashid, Meme Zainal, *Juvenile Justice in Malaysia: The Role of the Department of Social Welfare*, presented at SUHAKAM seminar on Human Rights and the Administration of Juvenile Justice, September 2008.

Number of Beyond Control Children Newly Admitted to STBs (1998 - 2009)²⁷



Source: Department of Social Welfare, 1998 - 2009

Currently, parents who are having difficulty controlling their children can apply to the Court to have the child declared beyond control and sent to a Probation Hostel (Asrama) or Approved School (STB) for a period of three years. Prior to the Court making a determination, a probation officer must meet with the child and parents and prepare a report. In some cases, the child is sent to an Asrama for a one-month period while the report is being prepared. Some probation officers reportedly try to discourage parents from sending their children to an institution, referring them instead to a counsellor or someone they trust in the community, such as a religious leader, for advice. However, there is no standard practice of requiring parents and children to undergo counselling or some other form of supportive intervention as a pre-condition to an institutional placement.

As will be discussed in more detail below, STBs and Asramas are closed facilities that children are not permitted to leave at will and therefore fall within the international definition of deprivation of liberty. Many stakeholders raised the concern that children subject to

WHAT THE CHILDREN SAID

The punishment is not fair. Children who have run away from home for two or three days are sent to STB for three years.

For cases where a person is from divorced parents or problematic families, the courts should try to bring the family together. They shouldn't tear them apart further by sending the young person away for three years.

The courts should try to understand why the kid has run and what the situation is like at the home. Then they should advise both parents and the young person so that steps can be taken together to ensure that the young person does not run away again.

The fair punishment for people who have run away from home is through counselling and monitoring. This should not just be for the child, but for their parents as well. The courts should delve into the issue deeper and find out what the core issue is. Then they should monitor and counsel the parents so that they can guide their children better.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

²⁷ Data was not available for 2004 and 2005.

a beyond control order are not entitled to early release and must serve a full three-year term, regardless of the progress that they make while in institutional care. This has reportedly led to some children being denied the opportunity for further schooling or vocational training. In addition, children who run away from an Asrama or STB are subject to being transferred to a Henry Gurney School, which is a higher security facility run by the Prisons Department and intended for children who commit serious crimes. A significant number of girls in the Henry Gurney School are “beyond control” children who have run away from a JKM facility.

Several Asrama and STB staff members who participated in the study were of the view that it was generally not in the best interest of children to be institutionalised because of family problems. It was noted that while children who have committed a crime generally realise their mistakes and understand why they have been detained, children subject to a beyond control order have more difficulty accepting their situation. Many end up feeling rejected and unloved by their family and become even more rebellious, which can cause family reunification and reintegration to become even more difficult. It was also noted that beyond control children, who are often younger and more naive, end up learning worse behaviour from the other children in the institution. In some instances, children as young as 11 are detained together with 17 year olds who are on remand for very serious crimes. Some stakeholders suggested that parents and children should be required to undergo one or two months of counselling before considering sending the child to an institution, or that parents should be required to visit the facility first, to dispel misperceptions that it is like a boarding school.

KEY FINDINGS

In accordance with the CRC and international best practices, Malaysia has established special juvenile justice protections that apply to children who were under the age of 18 at the time the alleged offence was committed and in some cases may be extended to young people up to the age of 21. However, there are some exceptions to this rule, resulting in lesser protection for children who commit security offences, who are not formally charged until after they turn 18, or who commit offences together with adults. The UN Committee on the Rights of the Child has emphasised the importance of ensuring that juvenile justice protections apply equally to all children who were under the age of 18 at the time the offence was committed, regardless of the nature or seriousness of the offence. This is because the rationale behind special juvenile justice protections is children's lack of maturity and ability to fully understand the consequences of their actions. The determining factor for special treatment is the child's level of maturity and thinking process, not the seriousness of his/her outward actions. Children's intellectual and emotional maturity, and therefore their degree of culpability, remains the same regardless of the type of crime they commit.

Malaysia has also met the CRC requirement of setting a minimum age below which children are considered too young to be held criminally responsible for their actions. However, the current minimum age is low by international standards. As in many other countries, provisions that were intended to limit the criminal liability of children between the ages of 10 and 12 are not rigorously applied and there is no standard process by which the Court makes assessments of maturity based on the advice of a psychologist or other expert. In practice, the lower age of 10 is generally used.

In its Concluding Observations in response to Malaysia's first country report under the CRC, the UN Committee on the Rights of the Child noted with concern the low minimum age of criminal responsibility and recommended that Malaysia raise the age to at least 12. Since very few children under the age of 12 are currently involved in crime, the minimum age of criminal responsibility could be raised without compromising public security. In rare instances where children under the age of 12 do commit crimes, they could be more effectively dealt with through social welfare interventions, rather than being subject to criminal proceedings.

Some stakeholders were concerned that increasing the age of criminal responsibility would increase the number of children being exploited by adults to commit crimes. However, the appropriate deterrent measure to address this would be to more severely sanction adults who exploit children, rather than to punish children at a younger age. Other stakeholders expressed the view that Malaysian children are currently much more mature than in the past and therefore a lower age of criminal responsibility was justified. However, caution must be exercised in judging children's maturity based on their outward behaviour or demeanour. The ability to understand the consequences of one's actions and to make reasoned, moral decisions are skills that develop through the course of adolescence and early adulthood. A study undertaken in the Philippines demonstrated that adolescents who appear mature and act "street-smart", such as street children, were in fact more delayed in their moral and cognitive reasoning than school-going children of the same age.

The current provisions allowing children to be deprived of their liberty for status offences such as running away, being disobedient or otherwise beyond control are also cause for concern. This approach, inherited from outdated British legislation and once prevalent throughout the Commonwealth, has now been proven to be ineffective. Adolescence can be a trying time for families and parents struggling to cope with teenage misbehaviour should be able to access guidance and support. However, as the UN Committee on the Rights of the Child has emphasised, children should not be sanctioned for behaviour that would not be considered criminal if committed by an adult. Acting out and engaging in rebellious behaviour is a normal part of the process of growing up and most children will "age out" of this behaviour on their own. Overly intervening with punitive measures has proven to be counter-productive, as this disrupts the parent/child relationship and risks reinforcing the child's deviant identity.

KEY FINDINGS

While technically children who are “beyond control” are not considered “offenders”, they are nonetheless subject to the same conditions of detention as child offenders, which they themselves perceive as punishment. The current practice of detaining children for three years is arguably excessive, unduly costly to the State, and does little to heal the parent / child relationship or to build the child’s cognitive and social skills. In addition, detaining children with minor behaviour problems together with child offenders is contrary to international best practices regarding criminal contamination, and may actually be increasing the chances that the child will go on to a life of crime. International experience suggests that adolescent behaviour problems are best addressed through non-punitive, social welfare responses targeting both the child and his/her family, rather than costly and ineffective institution-based rehabilitation programmes.



ARREST AND INVESTIGATION

International Standards

The first encounter a child has with the juvenile justice system is usually when s/he is arrested by the police. This first contact can have a lasting impact on the child and can profoundly influence the child's attitude towards authority figures and the rule of law. The Beijing Rules therefore require that any contact between law enforcement agencies and a child must be managed in such a way as to respect the legal status of the child, to promote his or her well-being and to avoid harm to the child.²⁸

The CRC requires that the formal arrest and detention of a child be used only as a measure of last resort.²⁹ Where a child is arrested, States parties must guarantee the child's right to be informed promptly and directly of the charges and to have the assistance of their parents and a legal representative.³⁰ In order to ensure parental involvement at the earliest possible stages of the proceedings, the Beijing Rules state that, whenever a child is apprehended by the police, his/her parents must be notified immediately, or within the shortest possible period of time. The Rules also recommend that police officers who frequently or exclusively deal with child offenders or who are primarily engaged in the prevention of juvenile crime be specially instructed and trained. In large cities, special police units should be established for that purpose.³¹

Appropriate handling of children by the police is important not just from the perspective of children's rights and wellbeing, but also in terms of long-term public safety. International studies have produced consistent evidence that police can actually increase

the risk that a child will re-offend simply by acting disrespectfully or unfairly when interacting with them.³² Children who are treated with respect and fairness are more likely to accept responsibility for their actions, while those who experience abuse or unfair treatment tend to become resentful and distrustful of adults and other authority figures. There is also a growing body of research to show that a surprisingly high number of children falsely confess to crimes they did not commit, often because they are covering for a friend, or feel compelled to confess as a result of pressure applied by the investigating authority. This undermines the ultimate aims of law enforcement and the justice system, which is to discover the truth. For these reasons, the UN Committee on the Rights of the Child has stated that children being questioned by law enforcement officials must have access to a legal or other appropriate representative and must be able to request that their parent(s) be present during questioning. Police officers and other investigating authorities should be well trained to avoid interrogation techniques and practices that result in coerced or unreliable confessions or testimonies.³³

As a result, police forces around the world have begun to recognise the need for a specialised response to handling children in conflict with the law. This has included reforms such as: restricting the types of offences for which children can be arrested and held in police custody; requiring the use of alternatives to formal arrest such as a summons or written notices to appear in court; establishing specialised police units to handle children in As a result, police forces around the world have begun to recognise the need for a specialised response to handling children in

²⁸ Article 10.

²⁹ Article 37(b).

³⁰ Article 40.

³¹ Article 10.1 and 12.

³² McLaren, Kaye, "Tough is not Enough. Getting Smart about Youth Crime: A review of research on what works to reduce offending by young people," New Zealand Ministry of Youth Affairs, 2000, available at: <http://www.myd.govt.nz/uploads/docs/0.7.4.2%20tough%20fulldoc.pdf>.

³³ General Comment No. 10 (2007), CRC/C/GC/10.

conflict with the law. This has included reforms such as: restricting the types of offences for which children can be arrested and held in police custody; requiring the use of alternatives to formal arrest such as a summons or written notices to appear in court; establishing specialised police units to handle children in conflict with the law; developing police policies or standard operating procedures for handling children; and requiring that a parent, relative or lawyer be present whenever a child is questioned by the police, failing which any statement taken from the child is inadmissible as evidence.

Malaysian Laws and Policies

The Malaysian Constitution guarantees everyone the right to be protected from deprivation of liberty except in accordance with the law.³⁴ Under Malaysian law, a person may be arrested by the police with or without a warrant. The power to arrest without warrant is quite broad, including the arrest of “any person who has no ostensible means of subsistence or who cannot give a satisfactory account of himself”. Preventative detention is also authorised under the Internal Security Act 1969, the Emergency (Public Order and Prevention of Crime) Ordinance 1969, and the Dangerous Drugs (Special Preventative Measures) Act 1985. If a person forcibly resists arrests or tries to escape, the police may use all means necessary to affect the arrest.³⁵ These legal provisions apply equally to both children and adults and there are no special provisions in law restricting the use of formal arrest or force when handling children.

The Criminal Procedure Code states that, where a person is arrested, s/he must be informed of the grounds for the arrest and must be allowed to consult and be defended by a legal practitioner of his choice.³⁶ Any statement taken by the police is inadmissible if any inducements, threats or promises have been made.³⁷ The Child Act includes additional protections for children, stating that when arresting a child, the police must immediately inform a probation officer and the child’s parent or guardian of the arrest. A copy of the charge must be sent to the probation officer to facilitate the preparation of a probation report. However, there is no specific requirement to have a probation officer, parent, guardian, or other support person present while a child is being questioned by the police.

When a person is arrested, the police must without unnecessary delay either release the person on bail, or bring them before a magistrate within 24 hours.³⁸ If the person is arrested for a “bailable” offence, the police may either release the person on their own bond, or hold them in police detention while they conduct the investigation. Decisions about whether to release a person on “police bail” are made by an Inspector and release at this stage does not require the deposit of a cash bond.³⁹

As a general rule, investigations must be completed within 24 hours.⁴⁰ If the investigation is not completed within that time period, the police must bring the person before a magistrate for a decision as to whether to extend the period of police custody, or release the person on bail. Recent amendments to the

34 Article 5.

35 Police Act 1967 (Act344), s. 27.

36 Section 15(2).

37 CPC, s. 113(1).

38 CPC, s. 28.

39 CPC, s. 29.

40 CPC, s. 28, 29.

Criminal Procedure Code have reduced the amount of time the police may hold a person for investigation of a criminal offence. Previously, police custody could be extended for up to 14 days for all offences. At present, if the offence is punishable with imprisonment for less than 14 years, the maximum period is four days for the first detention and three days for the second detention. The Magistrate must review the case and decide whether the second period is warranted. For more serious offences, the maximum period is seven days for the first detention and seven days for the second detention. However, persons arrested under the Internal Securities Act and for drug offences may be detained in police lock-ups for up to 60 days at the discretion of the police, without Court oversight.⁴¹

The Child Act does not include specific provisions with respect to the length of time that children may be held in police custody for investigation, other than the requirement that they be brought before a Magistrate within 24 hours. As a result, the law has generally been interpreted to mean that the normal provisions under the CPC and other laws apply equally to children.⁴² However, the Child Act states that, where a child is detained at a police station, appropriate arrangements must be made to prevent the child from coming into contact with adult offenders, and to protect the child's privacy from the media.⁴³

In addition to procedural laws, the police are also guided by more detailed internal Inspector General Standing Orders, Directives, and Codes of Practice. For example, an Administrative Directive was issued in 2004 regarding the police obligation to inform and permit family members to visit suspects (adults and children) detained in police lock-ups, as well as

suspects' right to counsel and right to be informed on grounds for arrest.⁴⁴ There are also directives instructing police not to use handcuffs against children unless the child is violent or uncontrollable, to contact probation officers immediately when a child is arrested, and to expedite the release of children who are on remand.⁴⁵ There is currently no comprehensive, detailed directive addressing all aspects of handling cases involving child suspects, however, more detailed guidance is reportedly in the process of being developed.

Structures, Processes and Practices

In 2004-05, the Royal Malaysia Police underwent a comprehensive Royal Commission review. The Commission highlighted a number of challenges facing the police force, including lack of sufficient resources for managing child suspects and victims, insufficient training in the treatment of children and the Child Act, insensitivity to child suspects when affecting arrests, and under-resourcing of police stations and police lock-ups. In terms of general police practices, the Report noted a tendency to "arrest first, investigate later", resulting in unnecessary use of police custody and remand. The Commission also expressed concern that police investigations tended to be confession-based, rather than evidence-based. It noted that, while the majority of police officers perform their duties with integrity, there was evidence that physical and psychological abuse was sometimes used by police interrogation officers to extract confessions and that the sheer number of complaints regarding police

41 Internal Security Act, s. 73; Dangerous Drugs (Special Preventative Measures) Act 1985, s.3.

42 Public Prosecutor v. N(A Child), [2004] 2 MLJ 299.

43 Section 85.

44 Administrative Directive No. 12/2004 KPN (PR) 63/5; CID Directive No. 8/2004, as referenced in the Royal Commission Report. Copies were not available for review.

45 These directives were not available for review. The information provided is based on interviews with police personnel.

mistreatment warranted concern. The Commission made a number of general recommendations to modernise and strengthen the police force, including some recommendations specifically related to the handling of children. These included disseminating knowledge of the Child Act, improving arrest and investigation process in child cases, and establishing a separate Child Division by 2010.⁴⁶

WHAT THE CHILDREN SAID

The veteran officers may more than likely to help you out compared to the younger officers.

Younger police officers are rougher than the older ones. They are more egoistic and want to show off that they have the power just because they are in uniform.

The police don't usually tell children of their rights or even explain what crime they have supposedly committed. And they don't let them know that they can also call a lawyer.

The police should learn to respect young people. Only then will young people respect the police.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

Following the Royal Commission report, the Royal Malaysian Police Force has made significant progress in improving police practices and promoting specialised handling of children. A Sexual and Children Investigation Division (D11) was established at the national level, with specialised units in every district, staffed primarily by female police officers. However, to date the focus of the Child Protection Units has been mainly on children as victims, rather than children as offenders. Responsibility for investigating children alleged to have committed a crime depends on the type of offence involved (e.g. narcotics department, criminal investigation department, traffic branch).

Similarly, while progress has been made in providing in-service training on special skills and techniques for

interviewing children, the focus has primarily been on children as victims. There is no specific component on handling child suspects in the general induction training programme provided to all new police recruits, nor opportunities for in-service training or specialisation in this area through the Police College. The majority of the police officers who participated in the study were of the view that specialised training on techniques for handling children in conflict with the law would be beneficial. It was noted that, while they do receive some information regarding the Child Act and children's rights, there are no opportunities as yet for skills-based training relating to child development, child psychology, or special interview techniques to use with child suspects. The Training College advised that it is considering developing a specialised course on handling children, as well as integrating modules on children into its advance training programmes on issues such as investigation and interrogation.

Despite the lack of specialized units, the police reportedly do take a different approach when dealing with children in conflict with the law. Police advised that they generally do not handcuff children unless necessary and use softer, more encouraging interrogation techniques. Attempts are also made to contact the child's parents as soon as possible after the arrest, though this is sometimes challenging if children provide incomplete or deliberately false information, if the parents live far away, or if the child is non-Malaysian. Priority is also placed on releasing children, rather than holding them in police custody, unless detention is necessary to complete the investigation. Where children are held in police custody, they are kept separate from adult offenders. In many cities, specialised juvenile lock-ups have been established, however police acknowledged that facilities are still lacking in some areas. Where there is no separate juvenile lock-up, children are at minimum placed in a separate cell from adults.

⁴⁶ Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police, 2005.

Stakeholders advised that the police generally comply with the requirement to notify probation officers whenever a child is arrested and the relationship between police and probation officers is generally quite good. D11 has circulated an instruction and contact list of all probation officers to facilitate this process, however some police expressed concern that they have difficulty locating probation officers, particularly after hours. Probation officers stated that notification is sometimes delayed and does not happen immediately at the time of arrest and that there are sometimes difficulties with the timely transmission of charge sheets and investigation papers. In some areas, probation officers attend the police station to meet with children who have been arrested and are on call to respond to arrests on evenings and weekends. However, this is not common practice and due to shortage of staff, probation officers are generally not involved at the arrest stage. Some police and probation officers highlighted the need for improved coordination and cooperation, and in particular the importance of ensuring that probation officers were available 24 hours a day and involved from the point of arrest so as to facilitate the child's early release on bail.

Stakeholders also raised concerns that some police are not familiar with the special provisions under the Child Act and as a result children are not always afforded the special protections to which they are entitled. Respondents highlighted incidents where parents were not notified until several days after their child's arrest and where improper interrogation tactics were used. Many of the parents and children who participated in the group discussions raised concerns about the lack of timely notice to parents when a child is arrested and where confessions were obtained using inappropriate methods, sometimes in cases where no crime had been committed. Concerns were also raised that children are not always properly

informed of their rights. SUHAKAM has noted that among the complaints it has received, they include inappropriate treatment of children and abuse of remand procedures. SUHAKAM has therefore recommended the establishment of specialised police units to deal with children in conflict with law.⁴⁷

WHAT THE CHILDREN SAID

- There are cases where the police will help you out and lend you a phone to call parents.
- Lock-up sizes are small. Usually, the police will pack about 25 people in one lock-up.
- Sometimes you can't tell night from day.
- Food served is not very appetizing, tasteless.
- The lock-up is bare with cement floors. You don't get any blankets or pillows, so people use their shirt either as a pillow or to cover the floor.
- You are only given a pair of shorts and a t-shirt, which you will wear throughout the whole duration – which may be for a week or more.
- Toilets at the lock-up are filthy and there is no privacy.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

In addition, while significant progress has been made in improving lock-up facilities for children, there remain some concerns with conditions of detention. Many of the police officers who participated in the study highlighted the need for investment in improved facilities and for the establishment of more centralised lock-ups for children. While boys are now separated from adults in the lock-ups, girls continue to be detained together with adult women due to lack of facilities. Concerns have also been raised, both during the course of this study and in previous reports about the conditions in the lock-ups, the quality of food, privacy in toilets and showers, inadequate sleeping arrangements, lack of clothing and other necessities

for detainees.⁴⁸ While some lock-ups have secure outdoor facilities where children can get exercise and fresh air, in other locations children are confined in their cells at all times, with no access to reading materials, television or other forms of stimulation. While this may be adequate for very short periods of custody (i.e. 24 hours), it is not appropriate for longer periods of confinement. Although police reportedly do try to complete investigations and release children as quickly as possible, it is not uncommon for children to be held in lock-ups for a week and some are detained for up to 60 days.

⁴⁸ Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police, 2005; SUHAKAM Law Reform Report: Rights of Remand Prisoners, 2001.

KEY FINDINGS

Malaysia has introduced some important protections designed to safeguard children during arrest and investigation. However, it has yet to develop a comprehensive, specialised police response to children in conflict with the law. While the Child Act includes some provisions on the arrest of children, it provides limited guidance with respect to issues such as alternatives to arrest, restrictions on use of force or restraints, duration and conditions in police custody, and the presence of parents, probation officers, or lawyers during investigative procedures. While the police are generally cognizant of the need to handle children's cases more sensitively, they have not been provided the necessary skills, directives, facilities, and oversight to ensure that this happens in all cases. However, opportunities are available through existing Police Colleges to promote greater training and specialisation at the induction stage, and through in-service short-courses.

Under existing legislation, the key procedural protection afforded to children is the requirement that both their parents and the probation officer be informed of the arrest. However, for this protection to be meaningful, the parent and/or probation officer must be permitted to be present and to participate in the proceedings from the point of arrest. Having a lawyer or supportive adult present during police interrogations helps ensure that children's rights are respected and also protects police against allegations of abuse. However, the role of parents, probation officers and lawyers at this crucial arrest stage is currently quite limited. This is a cause for concern because police investigations which do not follow proper procedures and investigation techniques, can result in high rates of inaccurate confessions from children, as international studies have demonstrated.

While existing resources make it unlikely that every child could be guaranteed access to a lawyer free of charge at the investigation stage, there are opportunities to promote greater involvement of probation officers from the point of arrest. Early involvement of a probation officer (i.e. from the point a child is first taken to a police station) can help ensure that children are aware of their rights, that parents are located and notified, and that children have emotional support during interrogations. Assessments undertaken at this stage could be used to gather information necessary to make determinations about the appropriateness of diversion and to facilitate bail or some other appropriate alternative to remand. The existing contingent of probation officers would likely not be sufficient to fulfill this function, however other countries have overcome this challenge by utilising trained, gazetted volunteers.

Consideration could also be given to establishing alternative facilities for processing arrested children, at least in major cities. In Thailand, for example, all arrested children are taken to Observation Centres staffed by probation officers, rather than the police station, to be processed and assessed. In South Africa, One Stop Child Justice Centres have been established in major cities, with a police station, probation office, temporary lock-up, and Youth Court all in one building. This provides a more child-sensitive environment, promotes greater inter-agency collaboration, and reduces transport and other logistics costs.

The practice of requesting police remand and remand extensions for the purposes of facilitating the investigation is also cause for concern. In the majority of cases, child suspects could be questioned without detaining them and this practice should be used very sparingly and only for the most necessary cases. Police expediency alone should not be sufficient grounds for holding children in police custody. Children who are not a flight risk, who are willing to make themselves available for questioning, and who have a family member or some other fit person able to guarantee that they will appear before the Investigating Officer for questioning need not be remanded during the investigation. Criteria and time limits for holding children in police custody should be clearly stipulated in law, with timeframes shorter than those for adults.

As noted above, significant progress has been made since the release of the Royal Commission Report towards separating boys from adults in police lock-ups. This has significantly reduced children's exposure to abuse at the hands of adults. However, due to lack of facilities, girls continue to be held together with adult women. In addition, conditions in the lock-ups do not yet meet international standards and are particularly inappropriate for prolonged detention of children.

RECOMMENDATIONS

In order to ensure that all contact between law enforcement agencies and a child are managed in such a way as to respect the legal status of the child, to promote his or her well-being, and to avoid harm to the child, it is recommended that Malaysia:

- **Amend the Child Act to include more detailed provisions on arrest, investigation, custody, and police conduct, including:**
 - Restricting the types of offences for which children can be arrested and held in police custody;
 - Providing for alternatives to formal arrest, such as a summons or written notices to appear in court;
 - Placing restrictions on the use of physical force, handcuffs and other means of restraint;
 - Requiring that a parent, lawyer, probation officer, or some other support person be present whenever a child is questioned by the police;
 - Stating that any statement taken from a child is not admissible in evidence unless a parent or some other support person is present and the statement is recorded (video or audio);
 - Providing guidance on the exercise of police discretion in granting bail to children;
 - Restricting the length of time children can be held in police custody; and
 - Stipulating minimum conditions for police lock-ups.
- **Develop detailed police Standing Orders or a Code of Practice for handling children in conflict with the law.**
- **Promote greater police specialisation and sensitivity by:**
 - In major cities, establishing special police units with a mandate to investigate all cases of children in conflict with the law;
 - In other areas, designating specific officers with responsibility to handle all children's cases;
 - Designing an in-service short course for all investigators who are specialised in handling children in conflict with the law; and
 - Incorporating a basic session on the Child Act and special procedures for handling children in conflict with the law in the induction training programme provided to all new police recruits.
- **Establish a more expansive role for probation officers at the arrest stage**, requiring that they be present to provide support and advice to children during all investigative procedures, and that they conduct preliminary screening/assessments to provide advice on diversion and bail options. Staffing limitations could be overcome by appointing trained volunteer probation officers to take on this role.
- **Consider establishing alternative facilities for processing arrested children**, at least in major cities.
- **Ensure that all police stations have adequate staff and vehicles to transport child suspects to and from court separately from adults, without handcuffs and under conditions that respect their dignity.**



BAIL AND PRE-TRIAL DETENTION

International Standards

It is now widely recognised that detaining children during the investigation and pre-trial stage can have significant negative consequences, including disruption of education or employment, separation from family, as well as exposure to physical abuse and “criminal contamination” from other detainees. International studies have shown that children who have been subjected to remand are at a significantly higher risk of re-offending than those who are released pending their trial.⁴⁹ It is important to remember that a child who has been accused of a crime is presumed to be innocent and therefore remand should be used only in exceptional circumstances.

The CRC requires States parties to ensure that detention pending trial (i.e. remand) is used only as a measure of last resort and for the shortest possible period of time. Every child who is arrested and held in police custody must have the right to challenge the legality of their detention before a court and to have a prompt decision on any such action.⁵⁰ Remand must be used only in exceptional circumstances and all efforts should be made to impose alternative measures.⁵¹ In order to reduce reliance on remand, the Beijing Rules recommend that, whenever possible, alternatives such as close supervision, placement with a family, or in an educational or home setting should be used. The Beijing Rules also caution against using detention as a substitute for more appropriate child protection, mental health or other social measures aimed at addressing the needs of the child.⁵² In other words,

a child should never be subjected to remand because of the failings of his/her parents or because s/he is homeless and without proper parental care. In such cases, appropriate alternative care should be arranged.

The UN Rules for the Protection of Children Deprived of Liberty (JDLs) reinforce that children detained under arrest or awaiting trial are presumed innocent and must be treated as such. When detention is used, courts and investigators must give the highest priority to expediting the process to ensure the shortest possible period of detention.⁵³ The UN Committee on the Rights of the Child has urged States parties to ensure that cases are generally completed within 30 days, or within 6 months at the latest.⁵⁴

Children detained at the pre-trial stage must be separated from adults and from convicted juveniles, must have opportunities to continue their education or training, and must be provided with care, protection and all necessary assistance – social, educational, vocational, psychological, and medical – that they may need in view of their age, sex and personality.⁵⁵

Internationally, high rates of remand often results from over-reliance on cash bonds and the lack of viable alternatives, particularly for children who come from disadvantaged or dysfunctional families. Most children who are accused of non-violent crimes pose no great threat to the public, but often face prolonged periods under police custody or remand because authorities cannot identify a responsible adult to supervise them pending their trial, or because parents are unable

49 Holman, B. and Ziedenberg, J. (2006) “The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities” Washington: Justice Policy Institute; Maxwell, G. (2003), “Achieving Effective Outcomes in Youth Justice: Implications of New Research For Principles, Policy and Practice, Wellington: Crime and Justice Research Centre; Margo, J and Stevens, A. (2008) “Make me a Criminal: Preventing Youth Crime,” London: Institute for Public Policy Research

50 Article 37.

51 JDLs, Article 17.

52 Article 13.

53 Article 18.

54 General Comment No. 10 (2007): Children’s Rights in Juvenile Justice, CRC/C/GC/10, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

55 JDLs, Article 17, 18; Beijing Rules, Article 13.

or unwilling to post a cash bond. Over-reliance on remand is not only harmful to the child, but also costly to the State and contrary to long-term public safety since it increases rates of recidivism. For this reason, many countries have taken steps to reduce the use of remand by: introducing statutory limitations on the use and duration of remand; reducing or eliminating cash bail in children's cases; strengthening the Court's case management systems to ensure that children's cases are dealt with expeditiously; and introducing innovative new models for supervising children in community settings. This includes:

- Releasing children on their own recognisance, subject to a "behavioural contract" with conditions such as a curfew and reporting requirements;
- Release under supervision of a parent or other responsible adult, both with/without conditions;
- Release under the supervision of a mentor/community supervisor. A volunteer from the child's community acts as additional supervisor, spending time with the child and making regular home visits and telephone calls to check on the child's adherence to curfew, etc.;
- Intensive Home Supervision: children are subject to a strict curfew, limited movement outside the home, and frequent unannounced visits/telephone calls from probation officers (staff or volunteers);
- Day or evening reporting centers: non-residential programs that provide between six and twelve hours of daily supervision and structured activities for children who require more intensive oversight;
- Specialised foster care: particularly for younger, low-risk children. Foster parents receive specialized training and have access to appropriate support;
- Group Homes: small, home-like centers located in residential areas that care for 10-15 children. Children continue to attend school, training or work in the community. Security is minimal and the homes rely primarily on close staff supervision, trust-building and a structured, daily routine to monitor the child's behaviour.

Malaysian Laws and Policies

The Child Act outlines special procedures that must be followed with respect to bail and remand of children. Section 84 of the Act states that a child who is arrested must be brought before a Court for Children (or if this is not possible, before a magistrate) within 24 hours, and that the Court must release the child on a bond executed by his/her parents (with or without requiring a cash deposit) in an amount that the Court feels is sufficient to ensure that the child returns to court for his/her hearing, unless: a) the child is charged with one of the listed grave crimes;⁵⁶ b) it is necessary in the best interests of the child to remove him/her from association with any undesirable person; or c) the Court has reason to believe that the release of the child would defeat the ends of justice. In other words, there is a presumption in favour of immediate bail of children for all but the most serious crimes, and as a general rule children should be released on their first appearance in Court unless there is evidence to suggest that to do so would "defeat the ends of justice".

⁵⁶ Murder, culpable homicide, attempted murder, an offence under the Firearms (Increased Penalties) Act, 1971, and offences under the Internal Security Act 1960 punishable with imprisonment for life or with death; an offence under the Dangerous Drugs Act 1952 punishable with imprisonment for more than five years or with death, and an offence under the Kidnapping Act 1961.

Under the Criminal Procedure Code (CPC), bail is generally prohibited for grave crimes that are punishable by death or life imprisonment, but there is an exception giving magistrates the discretion to release children under 16 years even in grave cases.⁵⁷ However, the CPC protection does not apply to children between the ages of 16 and 18 and the Child Act is silent on this point.

Children who are not released on bail are remanded pending their trial to a “place of detention” appointed and gazetted by the Ministry. The Child Act states that places of detention are to be governed by separate regulations and inspections.⁵⁸ However, while regulations have been issued with respect to “places of safety”, as yet there are none specific to “places of detention” for children. The Prison Act states that remandees shall not ordinarily be associated with prisoners serving their sentences of imprisonment or be required to labour, and that young prisoners (defined as those under 21 years of age) shall, so far as local conditions permit, be kept apart from adult detainees.⁵⁹

There are no statutory limits under either the CPC or the Child Act regarding the length of time a child can be held on remand while waiting for their trial.

Structures, Processes and Practices

Stakeholders advised that, as a general rule, preference is given to releasing children on bail rather than subjecting them to remand pending trial.

In general, decisions regarding bail are made in the regular Magistrate Court, rather than the specialised Court for Children, with each magistrate in a particular district taking turns to hear bail matters on a rotational basis. There are no detailed guidelines or directives guiding Magistrates in exercising their discretion to grant bail to children and it is unclear the extent to which magistrates apply the special provisions of the Child Act, rather than the regular bail provisions of the CPC. Both the Royal Commission Report and SUHAKAM have highlighted shortcomings in bail proceedings, including police requesting remand in cases where not necessary; bail hearings being heard in chambers without the accused present; the tendency of Magistrates to grant remand orders as a matter of course; and the lack of legal representation during remand procedures.⁶⁰

To be released on bail, children require a parent or relative to sign a bond and deposit a cash amount with the Court as security. The amount of the bond and deposit varies depending on the seriousness of the crime and the parents’ ability to pay. Practices seem to vary across the country, with respondents quoting the “standard” bail amounts as anywhere from RM1000 to RM3000, though some Magistrates require a more minimal amount of RM300-500. While magistrates advised that they generally take into account the parent’s ability to pay when setting the bond amount, concerns were raised about children being subject to remand for very minor offences solely because their parents were unwilling or unable to pay for bail. For example, the research team observed one case before the Court for Children where a child had been held on remand for over nine months on a charge of stealing RM20 from an “auntie” because his mother was

57 Section 388.

58 Child Act, s. 58, 86.

59 Section 49.

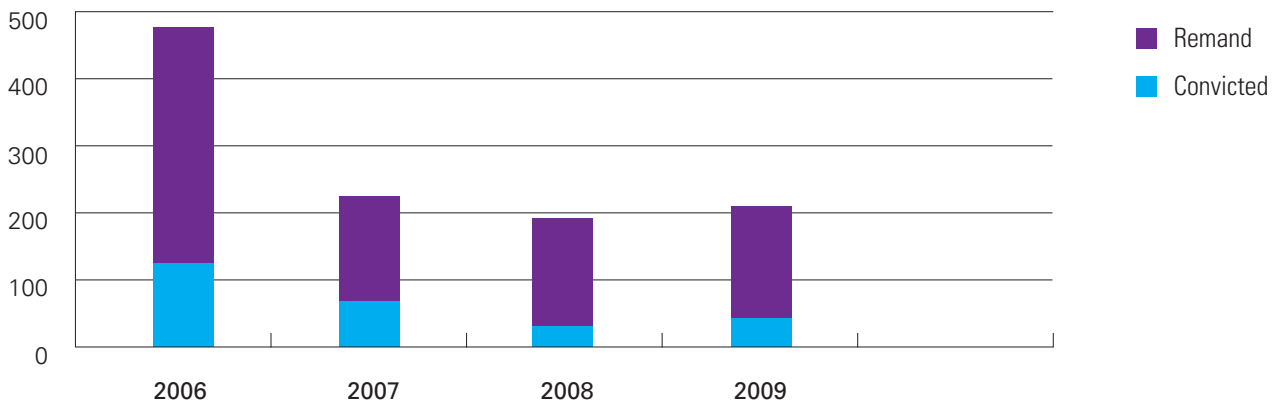
60 Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police, 2005; SUHAKAM Reports on the Right to a Fair and Expeditious Trial, 2005 and 2006.

unwilling to pay for bail. Non-Malaysian children and children without valid identity documents also face difficulties in being released on bail and are generally held in detention pending their trial.

Statistics from the Court show that approximately 10% of children with cases pending before the Court

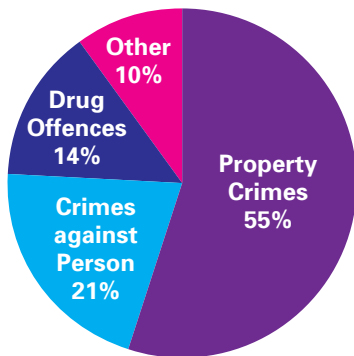
in 2009 are held on remand.⁶¹ This represents a pre-trial detention rate of approximately 4.85 per 100,000 of children between the ages of 10 and 18.⁶² While this rate is generally within the acceptable range, of concern is the fact that 80% of children currently in prison are on pre-trial detention (see table below).

Number of Children in Juvenile Correction Centres (2006 - July 2009), by Status



Source: Prisons Department, 2006 - July 2009

Percentage of Children on Remand in 2009, by Type of Offence



Source: Court of Children, 2009

The majority (52.7%) of children on remand at the time of the study have been accused of minor property-related offences (theft, theft of motor vehicle, possession of stolen property, housebreaking). Only 20% are charged with serious offences involving violence (causing injury, robbery, rape and other sexual offences, murder). Theft of a motor vehicle is the most common crime allegedly committed by children on remand, accounting for over 26% of all children on remand.⁶³ In addition, while the majority of children on remand are between the ages of 16 and 18, there was at the time of the study one 10 year old on remand for mischief by fire, as well as 4 thirteen year olds and 13 fourteen year olds.

⁶¹ Calculation excludes Kuala Lumpur and Kedah, where data was not provided.

⁶² Using 2008 data from the Statistics Office indicating a total population of children between the ages of 10 under 18 as 4,843,800. This age range was selected since only children between the ages of 10 and 18 are subject to criminal liability under Malaysian law.

⁶³ Calculation excludes Kuala Lumpur and Kedah, where data was not provided.

If a child is not released on bail, the Magistrate then determines whether the child will be remanded to a facility operated by JKM (where available) or the Prison Department. There is no written guidance with respect to how this discretion is exercised and statistics show no consistency in decision-making based on the nature or gravity of the offence. According to statistics from the Court, less than half (46%) of children on remand are in specialised children's facilities operated by the Department of Social Welfare. The remainder have been remanded to jails. There was at the time of the study twelve 14-year-olds being held in jails, four of them for simple theft.

Children remanded to the JKM may be sent to a Probation Hostel (Asrama) or an Approved School ("STB"), depending on the facilities available. Due to concerns about security and the need to keep remandees separated from children who have been found guilty by the Court, remandees have much less freedom of movement within the institution and fewer opportunities for education, training and recreation, than children subject to a final court disposition. In most institutions, children on remand participate in religious classes with the other children, but are not permitted to take part in education, vocational training or external outings. As a general rule, they must be kept behind bars in a secure dorm room for all but two hours of the day. Stakeholders advised that this practice was instituted as a result of a Directive issued by the Department (not available for review) in response to concerns about escapees. Some institution staff noted that this has created problems, since children held on remand for lengthy periods of time become bored, restless and sometimes violent due to lack of exercise and constructive activities. As a result, some institutions are not strictly complying with

the restrictions on remandees' freedom of movement within the institution grounds, particularly in probation hostels where remandees tend to greatly outnumber children subject to a final court disposition.

Children remanded to the Prison Department may be sent to either a Henry Gurney School or a Prison. Children on remand in these institutions enjoy the same facilities and programmes as children who have been adjudicated by the Courts and there is no separation between convicted children and children on remand. Children and young persons (defined as a person under the age of 21) are now separated from adults in all Prison Department facilities. However, there is no standardised process for separating younger children from older young people, resulting in children as young as 14 being mixed with 21 year olds.

While there is no statutory limit on the length of time a child may be held in pre-trial detention, stakeholders were generally conscious of the importance of completing procedures quickly when a child was on remand. A Practice Directive issued by the Chief Justice (not available for review) relating to prioritisation of cases reportedly instructs all magistrates to ensure that children's cases are completed within three to six months.⁶⁴ Magistrates advised that steps are generally taken to expedite proceedings if a child is on remand, for example by setting mention dates at two week intervals, rather than the standard one month, or prioritising the completion of probation reports. Many probation officers and heads of institutions also gave examples of cases where they had personally intervened with the DPP or Magistrate to inquire about the status of a case of a child who had been on remand for a long time.

64 Chief Registrar Circular No 2, Year 2002 dated 26 July 2002 – Child on remand.

Statistics from the Court show that the majority of children (51%) on remand as of May 2009 had been in custody for less than 6 months. However, there continue to be cases of children falling through the cracks and remaining on remand for lengthy periods of time, sometimes in excess of a year. Several stakeholders raised the example of a young boy who was detained for more than nine months because he was not carrying his ID card.⁶⁵ Court statistics showed that 11% (24 children) of children on remand at the time of the study had been there for between 6 and 12 months, 7% (14 children) for between 12 and 24 months, and 4 children for between 24 and 36 months. Three children (all in Selangor) had been detained pending trial for more than three years. The number of children on remand for more than six months is highest in Selangor and Johor. Several stakeholders raised concerns that children often plead guilty to crimes they did not commit simply to have the matter dealt with and be released from remand.

In Johor, for example, the warden of the Probation Hostel noted that since the Court for Children increased the frequency of sittings from once a week to three times per week, the number of children on remand has reduced dramatically.

WHAT THE CHILDREN SAID

Sometimes for small crimes, they deny bail, and too much is dependent on the mood of the judge.

The amount of bail (RM2,000) set is too big for parents to pay. The amount should be reduced. This will help and encourage more parents to bail their children.

The courts take a long time to clear your case. As long as the case is postponed or still in investigation, they will be in remand, and this can sometimes be for two years.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

The infrequent sittings of the Court for Children reportedly contributes to delays and measures have been taken in some jurisdictions to address this problem by setting aside more court days for children.

⁶⁵ Dusuki, Fara Nini, (2009) "The UN Convention on the Rights of the Child and the Administration of Juvenile Justice: An Examination of the Legal Framework in Malaysia, Asia Law Quarterly, v.1. No.1: Asia Legal Information Network, pp.141-157.

KEY FINDINGS

Malaysia currently has a relatively moderate rate of remand. However, the significant number of children who are held on remand for very minor offences is cause for concern, as is the consistently high percentage of children in prisons who have not yet been convicted of a crime. This is not only harmful to the child, but also costly to the State and contrary to long-term public safety due to increased rates of recidivism. Most children who are accused of non-violent crimes pose no great threat to the public and could readily be supervised in the community pending their trial without sacrificing public safety or the interests of justice. All stakeholders, including heads of institutions, were of the view that remand was not in the best interest of children and should be used more sparingly.

The high rates of remand for minor offences may be attributed to the over-reliance on cash bail, a lack of viable alternatives for supervising children whose parents are unwilling to do so, and the absence of clear legislative restrictions on the use of remand for minor crimes. While the Child Act creates a presumption in favour of bail for children, it also allows magistrates to deny bail on the broad grounds that it would “defeat the ends of justice”. Release on bail is also prohibited for certain serious offences, regardless of the child’s age or personal circumstances. There are no legislative alternatives to remand other than the execution of a bond by the child’s parent or guardian, which effectively provides less protection to children than adults, who may be released on their own recognisance. It also means that, in effect, whether a child is released or not is dependent largely on his/her parents, rather than what is in the best interest of the child, or the requirements of the justice system.

Available statistics suggest that in most cases, children on remand have their cases dealt with within the maximum six-month time frame recommended by the UN Committee on the Rights of the Child. However, due to the lack of legislated standards and systemic monitoring practices, there are cases of children being held on remand for lengthy periods of time, sometimes in excess of the term of imprisonment they would be subjected to if sentenced as an adult (for example, the case of the boy on remand for 9 months for stealing RM20). In some cases, measures that are intended to protect the child, such as the special sittings of the Court for Children, the preparation of a probation report, and the presence of a parent during the trial, are in fact contributing to lengthy periods of detention. In its Concluding Observations to Malaysia’s Country Report under the CRC, the UN Committee on the Rights of the Child expressed its concern at long pre-trial detention periods and delays in dealing with cases involving children.

Although the Child Act includes provisions designed to ensure that children are sentenced to prison only in relation to very serious crimes, there are no similar protections with respect to the use of prisons as a place of remand. As a result, many children charged with very minor offences are being exposed to prison life and held together with young offenders up to 21 years of age who have been convicted of very serious offences.

The restrictive conditions imposed on children under remand in JKM facilities are of cause for concern and are reportedly contributing to behaviour problems and escape attempts. Children on remand are presumed innocent and must be treated as such. Regardless of the duration of their detention, they must be afforded opportunities for education, training and recreation and should not have their movements unduly restricted.

RECOMMENDATIONS

In order to reduce the number of children subject to remand, it is recommended that Malaysia:

- **Amend the Child Act to include more detailed provisions regarding bail and remand, including:**
 - More detailed criteria for making decisions about pre-trial release, with explicit reference to the principle of institutionalisation as a last resort;
 - Permit pre-trial release for all types of offences, with decisions based on the circumstances of the individual case;
 - Prohibit the use of remand for specified minor offences and restrict the circumstances under which a child can be remanded to a prison rather than a place of detention operated by JKM;
 - Introduce a wider variety of community-based alternatives to remand, including releasing children on their own recognisance; behavioural contracts; release under the supervision of a mentor/community supervisor; intensive home supervision; day or evening reporting centers; specialised foster care; and group homes;
 - Stipulate minimum conditions for the care and treatment of children held on remand;
 - Set a maximum period of six months for the completion of proceedings against a child who is on remand, after which time charges must be dismissed; and
 - Require / authorise the Court for Children to review and modify any decision with respect to bail or remand where an initial decision was made by a court other than the Court for Children.
- **Issue detailed regulations for all places of detention caring for children,** including police lock-ups and remand facilities operated by JKM and the Prison's Department.
- **Ensure involvement of probation officers (or volunteers) from the point of arrest to facilitate bail or an appropriate pre-trial release alternative.**
- **Introduce programmes to supervise children on pre-trial release,** including volunteer community mentors/supervisors and reporting centres. Explore options for establishing smaller, open group homes that children without parental support can be referred to as an alternative to remand.
- **End the practice of mixing children on remand with convicted children in JKM homes.** Consider converting all probation hostels to remand facilities, as the number of convicted children sent to probation hostels is very small.



DIVERSION

International Standards

Internationally, one of the main trends in juvenile justice reform has been the introduction of diversion, or the use of alternative processes for dealing with minor offences in an informal way, outside of the formal justice system. “Diversion” refers literally to diverting or sending a child away from the formal justice system to an alternative, community-based process for resolving the crime. Children who admit to a crime may have the offence dealt with immediately through police cautioning, mediation, or referral to a diversion or counselling programme, rather than being subjected to formal arrest and trial.

The CRC requires States parties to promote the establishment of measures for dealing with children in conflict with the law without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected.⁶⁶ To accomplish this, the Beijing Rules state that police, prosecutors or other agencies dealing with children’s cases must be empowered to dispose of cases at their discretion without initiating formal proceedings, in accordance with the criteria laid down for that purpose. The Rules emphasize that any diversion involving referral to appropriate community or other services must require the consent of the child and must be subject to review by a competent authority. In order to facilitate the discretionary disposition of children’s cases, efforts must be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.⁶⁷

The UN Committee on the Rights of the Child has interpreted article 40(1) of the CRC to mean that States

parties should promote diversionary measures for, at minimum, children who commit minor offences such as shoplifting or other property offences with limited damage, as well as for first-time child offenders. The Committee has noted that, in addition to avoiding stigmatisation, this approach has good outcomes for both children and the interests of public safety, and has proven to be more cost-effective.⁶⁸

Diversion is commonly practiced in many legal systems because it has been demonstrated to be a more effective and efficient way to resolve children’s offending behaviour. Studies have shown that engaging in rebellious or low-level criminal behaviour is a normal part of the process of growing up and most young people will “age out” of this behaviour on their own without intervention. For the majority of children, getting caught and receiving a warning or some other informal intervention is generally sufficient to deter future offending and formal processing is both unnecessary and potentially counter-productive. Studies have shown that taking a child through the formal process of arrest and trial is generally not necessary for first-time, low-risk offenders, and can actually increase the likelihood that the child will re-offend through the process of labelling and stigmatisation. The more deeply a child advances through the criminal justice process, the more likely he/she is to self-identify with criminality, and therefore re-offend.⁶⁹

In many countries, diversion was first introduced using the existing charging discretion that police, prosecutors and judges already have, and was then incorporated formally into juvenile justice legislation. Diversion can take many forms, starting from a simple

⁶⁶ Article 40(3)(b).

⁶⁷ Article 11.

⁶⁸ General Comment No 10.

⁶⁹ Muntingh, LM (2000), “The Effectiveness of Diversion Programmes: A longitudinal evaluation of cases”, London: NICRO; Bell, A., Hodgson, M. and Pragnell, S. (1999) ‘Diverting Children and Young People from Crime and the Criminal Justice System’, in B. Goldson (ed.) *Youth Justice: Contemporary Policy and Practice*. Aldershot: Ashgate; Maxwell, G., “Achieving Effective Outcomes in Youth Justice: Implications of New Research for Principles, Policy and Practice (2003), Wellington: Crime and Justice Research Centre.

police caution and extending to include more intensive interventions aimed at repairing relations between the child and victim, or addressing family problems and other factors contributing to the child's offending behaviour:

- **Police warning:** police are given clear discretion (in law or guidelines) to give children a caution, rather than arresting them, for specified minor crimes. Some countries provide for two levels of cautioning, depending on the nature and seriousness of the offence: 1) an informal caution given to the child on the spot; and 2) a formal caution given to the child at the police station or his/her home, in the presence of his/her parents.
- **Restorative Justice Process:** many countries give the police, prosecutors and/or the Court the discretion to refer certain cases to a restorative justice process, rather than initiate or proceed with formal charges. This generally involves some form of mediated settlement between the child, his/her family members and the victim. Various models are used, including traditional or village-based dispute resolution, victim-offender mediation, and family group conferences.
- **Referral to a Diversion Programme:** many countries also allow police, prosecutors and/or courts to refer children to a specific diversion programme, often based on the advice or assessment of a probation officer. Formal charges are put on hold for a specified period of time (generally 6 months) while the child participates in an agreed diversion programme. If the programme is completed successfully, then charges are

permanently withdrawn. Diversion programmes are generally under the management and supervision of social welfare authorities, but may be provided by NGOs or community youth justice boards. Programmes can include performance of a specified number of hours of community service work, or participation in a structured life skills / competency development programme(s), such as decision-making, conflict resolution, anger management, peer influence resistance, or drug/alcohol awareness. Some diversion programmes, such as Singapore's Guidance Programme, require both the child and parents to participate in a combination of counselling sessions and group programmes.

Globally, diversion has been at the heart of juvenile justice reforms in many countries because it has been demonstrated to hold many benefits for both the child and society in general:

Diversion is more effective than the formal system: various forms of diversion have been used extensively in other countries for many years and have been subjected to rigorous analysis and evaluation. Studies conducted in the North America, Europe, South Africa and New Zealand have all found that diversion is an effective strategy for juvenile crime prevention. Rates of recidivism (i.e. incidents of re-offending) have been found to be consistently lower for children who were subject to diversion, as compared to those processed through the formal court system.⁷⁰

70 Muntingh, LM (2000), "The Effectiveness of Diversion Programmes: A longitudinal evaluation of cases", London: NICRO; Bell, A., Hodgson, M. and Pragnell, S. (1999) 'Diverting Children and Young People from Crime and the Criminal Justice System', in B. Goldson (ed.) Youth Justice: Contemporary Policy and Practice. Aldershot: Ashgate; Maxwell, G., "Achieving Effective Outcomes in Youth Justice: Implications of New Research for Principles, Policy and Practice (2003), Wellington: Crime and Justice Research Centre.

Diversion prevents children from being labelled and having a formal Record:

International research on adolescent behaviour has found that children who are labelled or made to feel like a criminal are more likely to adopt a criminal identity and can find it very hard to subsequently escape from this identity. This “labelling theory” is now well-documented globally and has shown that subjecting a child to the formal process of arrest and trial tends to confirm the child’s deviant identity, both in their own eyes and those of others, thereby extending rather than curbing their delinquent behaviour. Being labelled a criminal reinforces the distance between the child and his peers and society, rather than helping to reunite the child with a productive role in the community.⁷¹ Diversion gives children a chance to reassess their behaviour and take responsibility for their actions, without the negative consequences of a Court appearance and formal criminal record.

Diversion is less costly: diversion reduces the number of less serious crimes clogging up the formal justice system, thereby allowing authorities to focus their time and resources on high-risk child offenders. Formally processing a child through arrest, investigation and trial can be quite costly since it requires significant time and resources of police, prosecutors, probation officers, and magistrates, as well as the cost of transport and other logistics. Economic costing exercises carried out in other countries have shown that greater use of diversion can significantly reduce the overall costs of the juvenile justice system, as it ensures that more expensive formal justice processes are used only in necessary cases.⁷²

Malaysian Laws and Policies

The Child Act currently does not include any specific provisions with respect to pre-trial diversion of children. However, pursuant to the Federal Constitution, the public prosecutor has the power, exercisable at his/her discretion, to institute or discontinue criminal proceedings,⁷³ which could be used as the basis for diversion.

Structures, Processes and Practices

Malaysia does not currently have any formal diversion programmes or processes for resolving minor offences through mediation or some other restorative approaches. However, the police reportedly do exercise some charging discretion in very minor cases. For example, in cases of traffic violations, minor shoplifting or fighting between two children, the police will sometimes try to mediate an amicable resolution between the parties, rather than formally charging the child. However, this practice is reportedly not widely used or actively encouraged and no records are kept of these types of resolutions. Police generally seemed wary of exercising charging discretion, since it would potentially expose them to complaints from dissatisfied victims or the general public.

Therefore, in the majority of cases, regardless of how minor, the police conduct a full investigation and submit investigation papers to DPP for a determination of whether charges are appropriate. The DPP reportedly

71 Margo, J and Stevens, A. (2008) “Make me a Criminal: Preventing Youth Crime,” London: Institute for Public Policy Research; Allen, R., (2006) “From punishment to problem solving: A new approach to children in trouble,” London: Centre for Crime and Justice Studies.

72 See, for example, Justice Bill Budget and Implementation Plan, South Africa Inter-Sectoral Committee for Child Justice, 2002.

73 Article 145(3).

use their prosecutorial discretion to dismiss charges in petty cases such as shoplifting or fighting that causes no injuries and can review and dismiss a case at any point up until the Court has made its ruling. The DPP assigned to the Court for Children advised that if a charge is brought to them and they feel is not necessary to prosecute, they can then send the investigation papers to the head of the department for review. However, there are no guidelines or standard procedures to encourage the use of prosecutorial discretion in children's cases and no formal process for screening all cases for possible diversion. Decisions with respect to initiating or continuing a prosecution are based largely on whether there is sufficient evidence to prove the charge. The discretion to withdraw a charge is reportedly used quite sparingly, and generally only in cases where there is insufficient evidence to prove the offence.

Support for the introduction of diversion or restorative justice programmes has been growing amongst policy makers, academics and legal practitioners. The University of Malaya recently sponsored a seminar on restorative justice, with both national and international guest speakers. Diversion and restorative justice were also discussed during a national forum on human rights and the administration of juvenile justice, organised by SUHAKAM to commemorate Human Rights Day in 2008. Local experts and academics who participated in the study expressed some concern about whether restorative approaches would be appropriate for Malaysia, since these are generally dependent on a sense of community cohesion and a tradition of community dispute resolution, neither of which

are particularly strong in Malaysia. However, many stakeholders expressed an interest in introducing family conferencing proceedings and structured diversion programmes such as the Guidance Programme in Singapore.

KEY FINDINGS

While Malaysia does not have a formal diversion process, both the police and prosecutors currently use their discretion to dispose of minor child offences without initiating formal criminal proceedings. However, this discretion is understandably being used quite sparingly, since there is no legislative or policy directive to encourage diversion of children.

There are currently a significant number of children's cases being processed through the formal court system that could be handled more effectively and cost-efficiently through diversion. Although detailed statistics were not available, stakeholders advised that the majority of children coming before the Court have committed minor, property-related offences such as theft, that most cases (reportedly 80%) are resolved by guilty plea, and that the most common order is a discharge or bond of good behaviour. Arguably, most of these cases could have been handled more efficiently by referring the child directly to a diversion programme at the outset, rather than going through the expense and stigmatising process of numerous Court appearances.

Diverting these less serious cases from the Court system would reduce Court backlogs and result in significant savings in terms of transport, logistics and remand costs. This would also protect children from the damaging and stigmatising effects of being held in police lock-ups and making numerous court appearances, both of which have been shown to reinforce a child's deviant identity through the process of labelling.

The introduction of diversion would not necessarily require the development of costly new administrative structures or programmes. There are currently probation officers in all districts who could provide guidance and supervision to children referred to a diversion programme. Caseloads would not necessarily be increased, since most children who would benefit from diversion would have otherwise ended up under the supervision of a probation officer as part of their bond of good behaviour. Diversion programmes, at least in the initial stages, could be introduced by making use of existing community service work programmes, combined with the counselling services and interactive workshop programmes already operated by the JKM. Child Welfare Committees and other volunteers could be mobilised to provide supervision, community service work opportunities and potentially more structured, interactive programmes for children who have been diverted.

RECOMMENDATIONS

It is recommended that Malaysia introduce diversion programmes as an alternative to formal processing for children who commit non-violent offences. Diversion could be introduced informally using the DPP's existing prosecutorial discretion, however stakeholders were generally of the view that it would be more effective to have the practice formalised through amendments to the Child Act. To protect the police and DPP from public dissatisfaction and complaints of corruption or favouritism, the process and criteria for making decisions about diversion would need to be clearly articulated and transparent. This would require:

- **Amendments to the Child Act to:**
 - Give police authority to issue informal and formal cautions for specified minor offences;
 - Introduce and define the concept of diversion as an alternative to formal arrest and trial, with a statement of the general principles and objectives of diversion;
 - Provide detailed guidance on the types of offences for which diversion may be used, the authority of the DPP and/or Court to divert children's cases, the factors or criteria to be considered when making decision about diversion, and the types of diversionary measures that may be used. Diversion should be used only in cases where children admit to the offence and agree to the diversion programme.
- **Development of guidelines and training for police and DPP on the exercise of the new cautioning and diversion powers.**
- **Development of a screening process and screening / assessment tools to guide decisions about diversion,** ensuring that decisions are made as soon as possible, preferably immediately after arrest or at the first Court appearance. Decisions should be based on an assessment of both the nature and circumstances of the offence, as well as the child's background, family circumstances, and willingness to accept responsibility for the alleged offence. Probation Officers could support this process by conducting initial assessments and providing advice and recommendations to the DPP or Court.
- **Designation of an agency (likely JKM) to manage diversion programmes** and to monitor and report back on a child's compliance with a diversion agreement.
- **Development of diversion programmes,** building on existing interactive workshop activities and community service programmes, potentially in partnership with Child Welfare Committees, NGOs, and community groups. This should include the identification of suitable community service work opportunities for children, as well as the gradual development of inter-active, adolescent-specific, competency development programmes addressing skills such as decision-making, anger management, peer influence resistance, and the parent / child relationship.
- **Community awareness and sensitisation to build broad-based support for diversion.**



DEFENCE COUNSEL

International Standards

Children in conflict with the law, because of their young age, are generally not able to protect their legal rights or participate meaningfully in the criminal justice process on their own. For this reason, it is important that children have independent legal assistance at all stages of the criminal proceedings.

The CRC requires States parties to ensure that children in conflict with the law have the right to appropriate legal or other assistance throughout the proceedings. The UN Committee on the Rights of the Child recommends that States Parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. It notes that other appropriate assistance is possible (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.⁷⁵

The Beijing Rules emphasize that, throughout the proceedings, the child must have the right to be represented by a legal adviser and to apply for free legal aid where there is provision for such aid in the country. The Commentary to the Rules notes that the role of legal counsel is separate and distinct from that of parents; while participation of parents is important to provide general psychological and emotional assistance to the child, support from a lawyer is needed to ensure that the child receives proper legal advice.⁷⁶

Many countries have recognised children's special need for legal assistance by including provisions in

their juvenile justice legislation requiring a lawyer to be present whenever a child is questioned by the police and obligating the Court to appoint a lawyer, or lay advocate, for any child who is unrepresented.

Malaysian Laws and Policies

Article 5 of Malaysia's Constitution guarantees everyone arrested for an offence the right to obtain legal advice and be defended by a lawyer. In 2007, amendments were introduced to the Criminal Procedure Code to reinforce the right of an accused individual to legal representation from the earliest possible stages of the arrest and investigation. Under the CPC, an arrested person who wishes to contact a relative or lawyer must be permitted to do so. If the accused has requested a lawyer, the police must defer any questioning for a reasonable time to allow the lawyer to be present and to consult with the accused. However, the police may deny an accused the opportunity to consult with a lawyer where the police reasonably believe that the consultation will allow an accomplice to avoid being caught; where consultation will result in the concealment, fabrication or destruction of evidence or the intimidation of a witness; or having regard to the safety of others, the questioning of the person arrested is so urgent that it cannot be delayed.⁷⁷

The Child Act states in general terms that children have the right to be legally represented for the purposes of preparing and presenting their defence, and that, where a child is not legally represented, his/her parents, guardian, relative, or responsible person may assist him or her in the case.⁷⁸ However, it does not

⁷⁵ General Comment No. 10 (2007): Children's Rights in Juvenile Justice, CRC/C/GC/10, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

⁷⁶ Article 15.1.

⁷⁷ CPC, s.114

⁷⁸ Section 90.

include any special guarantees with respect to legal representation for children, for example by making it mandatory to have a lawyer or relative present to assist the child during any police questioning, or by requiring the Court to appoint a lawyer for all children who come before the court unrepresented.

Under the Legal Aid Act 1971 (Act 26), the national Legal Aid Bureau has been mandated to provide legal assistance free of charge for those who meet specified criteria. The Legal Aid Bureau's mandate in criminal matters is generally limited to representing people who plead guilty and require assistance in making a plea of mitigation. However, their capacity to act in criminal proceedings under the Child Act has no such restriction and therefore arguably extends to representing children at trial.⁷⁹

Structures, Processes and Practices

No statistics were available with respect to the percentage of children in conflict with the law who are represented by a lawyer. Stakeholders were all in agreement that it was rare for a child to have legal representation at the arrest, investigation and bail stage, and that when a child did have the assistance of a lawyer, it was mainly only for the purposes of plea and trial. There is no standard practice requiring the police and/or probation officers to inform children and their parents of the availability of free legal assistance and of how they can access legal aid.

Both justice sector officials and parents were of the view that lawyers' fees were generally affordable, though sometimes parents with low incomes were unable or

unwilling to hire a lawyer for their child. Children in conflict with the law who are unable to afford a lawyer are able to access free legal services through either the government Legal Aid Bureau, or through the Bar Council Legal Aid Centre. Both use a means test to determine eligibility. Eligibility is based on the parent's income (less than RM25,000 per annum in the case of the Legal Aid Bureau), rather than that of the child, but both organisations advised that they would accept an application from a child whose parents' income was above the threshold, but were unwilling to provide the child a lawyer. In addition, some legal advocacy is available through NGOs such as Shelter Home, which has a Juvenile Justice Advocacy Department.

The Legal Aid Bureau is under the Legal Affairs Division of the Prime Minister's Department. It has a total of 171 legal and paralegal officers and 22 branches nationwide, including a service centre located at the court complex in Kuala Lumpur. While the bulk of the Bureau's work relates to family law matters, it also assists both adult and child defendants in criminal matters. Its criminal services are generally limited to assisting defendants who are pleading guilty, with its main role being to make submission to the Court to mitigate the sentence. However, with child offenders, the Bureau is able to assist with both guilty pleas and trial. Its lawyers currently attend the Court for Children only when they have a client, not on a regular basis. The Legal Aid Bureau is keen to extend its services to children, but cited low public awareness of their services for the low percentage of children in conflict with the law who apply for legal aid. The Bureau recommended that the police and/or probation officers alert them whenever a child was arrested, or provide children and parents with information about their services, so that children can be provided legal advice at the earliest possible stages of the investigation.

⁷⁹ Legal Aid Act, Second Schedule.

WHAT THE CHILDREN SAID

Police don't let people know that they can call a lawyer

To have a lawyer you need to pay, and the case will be prolonged.

Young people don't have a lawyer when they go to court. It is up to parents to hire a lawyer. The Courts will not offer the option of a free lawyer.

The welfare lawyer (lawyer kebajikan) will almost always ask that the young person confesses to the crime, and they can only help in lessening the sentencing.

We have heard of welfare or pro-bono lawyers (peguam sukarela), but are unsure of how to engage their services.

If someone's parents are poor, they will not get any legal representation.

Lawyers can only be engaged if you can afford to pay for them.

In some cases, the judge will tell you that you don't have to hire a lawyer for a straightforward case. This is because the judges feel that a lawyer will prolong the case and the judges don't want to spend too much time for them.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

In addition to this Government funded service, the Bar Council also offers free legal services on a pro bono basis through its Legal Aid Centre. People in need of legal assistance can access these services through the Centre, which has offices at the courthouse. The Bar Council also proactively seeks out individuals in need of legal aid by visiting police lock-ups, prisons and STBs on a fortnightly basis to interview remandees, particularly children. Due to shortage of lawyers, it is often unable to provide legal assistance to all applicants who qualify. However, cases involving children are

reportedly always taken up by one of their members, particularly if the case involves a serious offence.

The Bar Council also operates a programme whereby law graduates undergoing their pupillage (chambering) regularly attend criminal court sessions and provide assistance to defendants who are pleading guilty. However, chambering students reportedly do not attend sittings of the Court for Children because it is closed to the public.

There are currently no special ethical guidelines with respect to representing children and no guidance on how lawyers balance the potentially competing interests of the primary client (the child) with the wishes of the parent who is paying the fees. The Bar Council offers regular continuing legal education seminars on various topics, however it has yet to offer any specialised learning opportunities on the issue of children in conflict with the law.

In general, both children and parents were satisfied with the legal advice they received. However, Magistrates, probation officers and prosecutors noted that most lawyers are understandably more accustomed to dealing with adult matters under the CPC and PC and tend to be less conversant with the special provisions of the Child Act. There was also a general perception amongst Magistrates, Court Advisors and probation officers that the involvement of the probation officer was sufficient to protect the child's interest and lawyers were unnecessary, particularly for guilty pleas. Respondents also raised concerns that sometimes children have not been properly advised by lawyers, probation officers and police on their plea and this has led children to sometimes plead guilty (despite initial claims of innocence) for the purpose of expediency or to gain the benefit of a lesser sentence.

KEY FINDINGS

Malaysia currently has both government-funded and private, pro-bono legal aid services available, both of which give attention and priority to providing legal assistance to children in conflict with the law. However, many of the children who participated in group discussions were unaware that they could have accessed free legal services through the Legal Aid Bureau or the Bar Council and there does not appear to be a standard practice of informing children or their parents about these services. In addition, the overall capacity and coverage of legal aid services is currently limited due to shortage of resources and lack of specialised training. There is no duty counsel system to ensure that the Court for Children is consistently staffed with a legal aid lawyer able to assist children who are unrepresented and chambering students who provide this service in other criminal courts are unfortunately not permitted to appear in the Court for Children.

While there are no concrete statistics available, input from stakeholders suggests that the majority of children in conflict with the law do not have the support of a lawyer, particularly if they are pleading guilty. This is cause for concern, particularly since pleading guilty is sometimes encouraged for expediency without due consideration to whether the child has a valid legal defence to the charge.

Also of concern is the general perception amongst probation officers and other stakeholders that lawyers are unnecessary when a child is pleading guilty and that input from a probation officer is an adequate substitute. While probation reports provide valuable information about the child's background and circumstances from a social welfare perspective, probation officers are not mandated to make independent representations on behalf of the child and are not trained to provide legal advice. The assistance of a trained lawyer (or para-professional) is important to ensure that a child fully understands the consequences of a plea of guilty, that the interests of the child are put to the Court effectively, and that the child does not plead guilty when s/he has a valid legal defence or where there is insufficient evidence to warrant a conviction.

RECOMMENDATIONS

In order to improve children's access to and the quality of legal representation, it is recommended that Malaysia:

- **Amend the Child Act giving the Court authority to appoint a lawyer in all cases where a child appears before the Court unrepresented and the Court is of the view that legal representation is necessary in the child's interests.**
- **Introduce a "duty counsel" system at all Court for Children sittings,** with a lawyer / para-legal from the Legal Aid Bureau or chambering student stationed in the courtroom to provide basic legal advice and assistance to unrepresented children, and referral to further legal assistance as necessary.
- **Develop posters and pamphlets providing children and parents with information about how to access free legal aid services through the Legal Aid Bureau and Bar Council.** Posters should be on display in all police stations and courthouses and pamphlets distributed to children at the time of arrest, as well as by probation officers.
- **Sensitise probation officers on the importance of children's right to legal representation** and encourage them to give children advice about how to access free legal assistance through the Legal Aid Bureau and Bar Council.
- **Develop a handbook for lawyers on representing children in conflict with the law.** The handbook should include ethical guidelines for representing children, as well as an overview of the Child Act and key judicial precedents relating to children in conflict with the law. Encourage the development of Bar Council CLE seminars and other learning opportunities to promote greater specialisation in representing children.
- **Promote broader participation of lawyers in pro bono work** by, for example, making it a legal or ethical requirement that all lawyers perform a set number of hours of pro bono work per year.



JUVENILE COURT AND TRIAL PROCEDURES

International Standards

Having to appear in court can be a frightening experience for anyone, especially a child, and the formality of the proceedings can sometimes inhibit a child's full and effective participation. Special measures are therefore needed to reduce intimidation and ensure that children are able to participate fully in the proceedings.

The CRC requires States parties to ensure that every child charged with an offence has the right to have the matter determined without delay by an independent and impartial authority in a fair hearing, in the presence of legal or other appropriate assistance and, unless considered not to be in the best interest of the child, his or her parents or legal guardians. Children also have the right to be presumed innocent until proven guilty, not to be compelled to give testimony or to confess guilt, to examine adverse witnesses, and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality. Children must also be guaranteed the right to have the free assistance of an interpreter if they cannot understand or speak the language used and must be provided the opportunity to express their views and to be heard in any judicial or administrative proceedings affecting them.⁸⁰

The Beijing Rules state that, where a child has not been diverted, s/he must be dealt with according to the principles of a fair and just trial and each case should be conducted expeditiously from the outset. Court proceedings must be conducive to the best interests of the child, conducted in an atmosphere of understanding and must allow the child to participate fully and to express him/herself freely. The child's parents or guardian are entitled to participate in the proceedings and may be required by the Court to attend if in the interest of the child.⁸¹

In order to promote a more specialised approach to court proceedings for children, many countries have established special children's courts, at least in major urban centres, and have developed separate procedures designed to reduce formality and facilitate the participation of children and their parents. Specially designated and trained magistrates and judges help ensure a consistent, child-sensitive approach to handling children's cases.

Malaysian Laws and Policies

The Child Act calls for the creation of a special Court for Children to hear all cases of children in conflict with the law, except those accused of crimes that are punishable by death, where the child is co-accused with an adult, or where the child has turned 18 before being formally charged. The Court for Children has the same general powers as a Magistrate Court and is presided over by a Magistrate and two Court Advisors, one of whom must be a woman. The role of the Court Advisors is to give the magistrate advice about what order to make in relation to a child who has been found guilty and, if necessary, to provide advice to the parent or guardian of the child.

Children charged with more serious crimes, including murder, certain terrorism offences, hostage-taking, waging war, mutiny, kidnapping, gang robbery with murder, and drug trafficking, are tried by the High Court. When hearing the case, the High Court may, but is not required, to exercise the powers given to the Court for Children under the Child Act.⁸² This has been interpreted to mean that there is no requirement for the High Court to have Court Advisors present when deliberating on a children's case.⁸³

⁸⁰ Articles 12 and 40.

⁸¹ Article 14, 15, 51.

⁸² Sections 11, 117.

⁸³ *Buri Hemna v. PP*, 19998) 5 MLJ 813.

Under the Child Act, the Court for Children must, if practicable, sit either in a different building / room or on different days than the normal Magistrate's Court. If a Court for Children sits in the same building as other Courts, the Court for Children must have its own entrance and exit to allow children to be brought to and from the Court with privacy. Arrangements must also be made to prevent children from coming into contact with adult offenders when they are being transported to and from the court or while waiting at the courthouse, as well as to prevent the child being filmed or photographed.⁸⁴ Proceedings of the Court for Children are closed to everyone except members and officers of the Court, children and their parents, guardians, advocates, witnesses, and other persons directly concerned with the case.⁸⁵ The Court must require the child's parents or guardian to attend all the stages of the proceedings, unless it is unreasonable to do so or not in the best interest of the child. Any parent or guardian who fails to attend when required to do so by the Court is subject to a fine of up to RM5,000 and / or imprisonment for up to two years.⁸⁶

Section 90 of the Child Act 2001 outlines the procedures to be followed when a child is brought before the Court. Under this section, the child has the right to be informed promptly of the charge and it is the duty of the Court to explain the allegations in simple language suitable to the child's age, maturity and understanding. The Court must then ask the child whether s/he admits the offence. If the child does, the Court must ascertain whether the child understands the nature and consequences of the admission and record a finding of guilt. If the child does not admit to committing the offence, the Court must hear the evidence of witnesses. If the child is not legally represented, the Court must allow the child's parents, guardian, any relative, or other responsible person to

assist the child in conducting his/her defence. If the child has no assistance, the Court may then ask the child whatever questions may be necessary to bring out or explain the child's defence and must question witnesses as deemed necessary on behalf of the child.

Structures, Processes and Practices

Malaysia at the time of the study has one full-time Court for Children in Kuala Lumpur. In other districts, children's cases are heard separately by a Magistrate sitting as the Court for Children on specific day(s) of the week. The Magistrates Court has a computerised system for registering and tracking all cases filed with the Court and there is a separate "code" for children's cases that allows them to be tracked and scheduled appropriately. The number of special Court for Children sittings varies from location to location; in some districts, such as Johor Bahru, three days per week have been set aside for children's cases, while in others, such as Kota Kinabalu, children's cases are heard only once per week. In smaller districts, Court for Children sittings can be as infrequent as once per month. Court statistics suggest that the number of days set aside to hear children's cases does not appear to be regularly reviewed and adjusted to take into account the number of pending cases.

In general, Court for Children proceedings are conducted in a regular courtroom, in the same building as court hearings involving adult offenders. In all cases, the Court is closed to the public, and only interested parties are permitted inside the courtroom. Due to infrastructure limitations, the Courts for Children generally do not have separate entrances, but in

⁸⁴ Section 85.

⁸⁵ Article 12.

⁸⁶ Sections 88, 89.

some jurisdictions efforts have been made to select a courtroom that is in an isolated part of the building so as to minimise children's contact with adult offenders. However, due to limited police vehicles and personnel, children on remand are often transported to and from Court together with adults. This was highlighted as an area of concern in the Royal Commission Report. Furthermore, while children do not appear in Court in handcuffs, they are generally handcuffed by the police while in transit.

WHAT THE CHILDREN SAID

The courts listen to young people and are fair to them.

The courts don't explain the procedures to you. They merely read the case files, offense, file number, etc.

Magistrates will not allow you to negotiate or discuss anything about your case. But it depends on which magistrate and whether s/he is kind to allow you an opportunity. It's not the same across the board.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

The courtrooms used to hear children's cases, including the full-time Court in Kuala Lumpur, are physically the same as the regular Magistrates Court. In some jurisdictions, Magistrates try to reduce the formality and intimidation of the courtroom setting by sitting down on the same level as the child, rather than up high in his/her usual chair. Other Magistrates conduct guilty pleas more informally in their Chambers, rather than in the formal courtroom. However, these practices are at the discretion of the Magistrate and there does not appear to be any standardised practice or directive in this regard. Some Court Advisors favoured having proceedings in the open courtroom

because they believed the formality and intimidation of the surroundings had an educative effect on children. However, the majority of Magistrates, Court Advisors and probation officers were of the view that conducting proceedings in Chambers was preferable, since both the child and his/her parents felt more relaxed and were able to express themselves more freely.

In Kuala Lumpur, a specialised Magistrate and Deputy Public Prosecutor have been designated full-time to the Court for Children. In other locations, the Magistrates and DPPs also deal with adult offenders on days when there are no Court for Children hearings. In some districts, all children's cases are assigned to one specific Magistrate, however in other jurisdictions, children's cases are apportioned equally to all of the Magistrates in the district. Rotation is reportedly quite frequent, so even those Magistrates and DPP who are specially designated to handle children's cases do not have the opportunity to build up significant experience and expertise before being transferred elsewhere. There is currently no requirement that Magistrates and DPP appointed to the Court for Children undergo any specialised training on juvenile justice as a prerequisite to their appointment, and opportunities for specialised training on this topic are limited. All legal officers, including Magistrates and DPP, receive both induction and in-service training on a wide variety of topics through the Judicial and Legal Training Institute (ILKAP), however there is currently no specialised course with respect to children in conflict with the law.⁸⁷ The majority of stakeholders were of the view that greater opportunities for training and specialisation would be beneficial.

In all districts, the Magistrate sitting as the Court for Children is assisted by a court clerk, who also acts as interpreter, and two Court Advisors. The Court

⁸⁷ ILKAP recently introduced a special short-course on children, but the focus is mainly on child victims and witnesses and the new procedures under the Evidence of Child Witnesses Act, rather than children as offenders.

Advisors are drawn from a local roster of individuals who have been appointed by the Prime Minister's Office, generally on the advice of the Department of Social Welfare. The majority are retired public servants, generally former social workers, probation officers, or teachers. With the support of UNICEF, the Department of Social Welfare recently designed a manual and training programme for Court Advisors and most have now participated in a five-day training programme. Their main function is to advise the Magistrate with respect to sentencing (discussed in more detail in Section 7 below) and to give advice to parents. Stakeholders were generally of the view that Court Advisors played a beneficial role, particularly since Magistrates tend to be quite young and have limited experience with children. However, it was also noted that, as retirees, they tend to have a conservative perspective and may not be attuned to the realities and challenges that Malaysian parents and youth currently face. The Court Advisors who participated in the group discussions demonstrated varying degrees of familiarity with basic child justice principles and sometimes expressed views that were not in accordance with the principles of the CRC.

As noted above, stakeholders advised that most children do not have legal representation when they appear in court, particularly if they are pleading guilty. However, in the majority of cases, the child's parent or some other relative is present. Magistrates reportedly take the requirement to have a parent present very seriously and will generally adjourn proceedings if the child comes to Court without a guardian. However, this sometimes works to the disadvantage of children by causing unnecessary delays. In one case in Johor, for example, a child remained on remand for several months because his parents were in Sabah and could not be contacted.

WHAT THE CHILDREN SAID

The courts are fair to young people because they will listen to your side of the story and will consider your family background.

The courts only know how to pass a sentence and judge young people. The courts are not interested in finding out the truth or the whole story.

Magistrates are always only taking notes and will listen more to the police.

In most cases, the courts will not allow the opportunity for young people to tell their side of the story.

The courts are fair because even in cases where you have been forced to admit to the crimes, the courts will also ensure that there is solid proof before they pass down the sentence. The courts don't just take the confession at face value and ensure that the police have done their work in gathering the proof.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

Procedurally, hearings in the Court for Children are substantially the same as those for adults, with some minor adjustments. Magistrates reportedly take extra care to ensure that the child understands the nature of the allegations and is given the opportunity to speak. However, during all Court proceedings observed by the research team, children and their parents spoke very little and appeared intimidated by the process.⁸⁸ When dealing with guilty pleas, the charges are read out officiously by the Court clerk, often very quickly and in language that may not be readily understood by a child or his/her parents. Some, but not all, Magistrates also provided a simplified explanation of the charges. While Magistrates usually asked both the child and parent if they had anything to say prior to sentencing, this generally elicited no response from the child and limited input from the parent. There does not appear to be a practice of asking the child more specific

⁸⁸ There were no full trials involving children on any of the days when the research team observed court proceedings. These findings are therefore based on observations of children appearing for "mention", and proceeding for sentencing children who had plead guilty.

questions designed to elicit more detailed input or that would encourage the child to explain his/her side of the story (at least when dealing with children who have plead guilty). Of concern is the fact that Section 90 of the Child Act has been interpreted to mean that, unlike adults, children do not have a right to silence during the trial process and must give evidence in the proceedings.

Parents and children who participated in the study generally stated that their experience with the Court process was officious and impersonal and the majority felt that they were not given a real chance to tell their side of the story. Many expressed the view that the Court was primarily concerned with processing cases quickly, rather than hearing the child's point of view. However, several children highlighted the fact that the Court took time to explain the proceedings to them and made sure they understood what would happen if they plead guilty. One parent whose child had experienced both the formal courtroom and Chambers said that holding proceedings in Chambers was a much better approach, since they felt more relaxed and able to talk.

WHAT THE CHILDREN SAID

If you do not plead guilty, the case would be postponed and prolonged – and that could mean years. Hiring a lawyer would mean spending money. So you pleaded guilty. It was easier to plead guilty – you could not say anything anyway.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

Stakeholders reported that the vast majority of children in conflict with the law plead guilty. While no statistics were available on this point, stakeholders consistently advised that approximately 80% of cases were resolved through guilty pleas. Concerns were

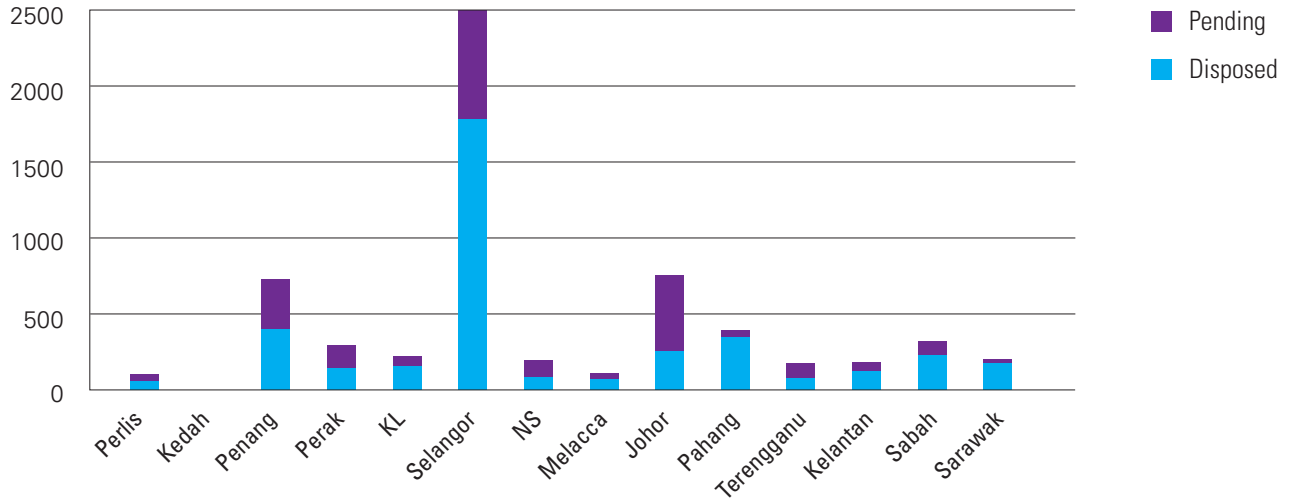
raised that some children who are not guilty, or who have a valid defence, plead guilty simply to have the matter dealt with quickly. Some children have not been thoroughly advised on the consequences of their plea by the police or probation officer and have thus pleaded guilty due to the perception that the sanction will not be heavy.

Statistics from the Court suggest that proceedings involving children, at least those on remand, are generally completed with six months and backlogs and delays in the Court for Children are significantly less than in the regular criminal courts. According to stakeholders, a directive has been issued by the Chief Justice advising all Magistrates to give priority to children's cases and measures are generally taken to ensure that cases are completed as quickly as possible, particularly where the child is being held in detention pending trial.

However, there remain a significant number of cases where proceedings stretch on for up to or in excess of 12 months. Stakeholders advised that the most common factors contributing to adjournments and delays were: parents not attending; difficulties in locating parents to complete probation reports; and witnesses not attending on the date set for trial.

In some locations, the infrequency of Court for Children sittings contributes to delays and thus a measure intended to protect children is in fact acting to their disadvantage.

Volume of Cases before the Court for Children in 2009 (until May)



Source: Court Registrar, 2009

KEY FINDINGS

Malaysia has made significant progress in promoting separated court proceedings for children in conflict with the law. While many stakeholders expressed concern about the lack of fully separate court facilities for children, international experience suggests that ensuring child-sensitive handling of children's cases does not necessarily require full-time dedicated children's courts or specialised court facilities. In most districts, the current volume of cases would not justify a fully separate Court for Children and with a functioning diversion system (as recommending above) the number of children coming before the Court would be even further reduced. Under the circumstances, the current system of dedicating special days for children's cases is an acceptable compromise.

However, the number of days per week that the Court for Children sits should be closely monitored and adjusted to meet the volume of cases being registered. For example, Court statistics show that Selangor has by far the highest number of children's cases registered (1571), as well as the highest number of cases pending and the highest number of children on remand for in excess of six months. However, in the capital of Shah Alam, the Court for Children sits only once per week. By contrast, in neighbouring Kuala Lumpur, where only 117 new cases were registered in 2009, the Court for Children sits every day.

In addition, greater measures could be taken, using existing infrastructure, to make the court experience more child-friendly and less intimidating, thereby encouraging more substantive participation of children and their parents. Many Magistrates have Chambers space attached to the courtroom that could provide a more informal venue, particularly for guilty pleas and sentencing proceedings. Alternatively, counsel tables and other furniture inside the courtroom could be rearranged so that all parties are sitting on the same level, rather than requiring the child and parents to stand before an elevated court panel. These measures are being practiced in some jurisdictions, but not consistently.

More important than the physical environment is how the proceedings are actually conducted. Simply allocating children's cases to a special courtroom or separate day is not enough; Magistrates, court clerks, prosecutors, and lawyers must make fundamental changes in how they conduct themselves during the proceedings and how they interact with the child. The UN Committee on the Rights of the Child has emphasised that the effectiveness of any juvenile justice system fundamentally depends on the quality of the persons involved in the administration of juvenile justice. Of concern in this regard is the lack of detailed guidance and training for Magistrates, court clerks and DPPs. As a result, practices vary considerably from one jurisdiction to another, depending on the knowledge, skill and motivation of individual Magistrates. Even in locations where there is a dedicated Magistrate for the Court for Children, the frequency of rotations limits the extent to which any substantive expertise or specialisation is developed.

As a result, despite real efforts on the part of most Magistrates to encourage children to express their opinion, they and their parents generally experience the Court as impersonal, and tend to say little during the process. This is of particular concern given the very high percentage of children who plead guilty. More informal and detailed questioning designed to encourage the child to tell his / her "side of the story", rather than simply asking if the child has anything to say in relation to the charges, might elicit more detailed responses from the child, thus drawing out mitigating factors or identifying cases where the child has a valid defence to the charge.

While children's cases are generally being completed expeditiously, the number of cases with inordinate delays remains a cause for concern, particularly in cases where the child is subject to pre-trial detention. In its Concluding Observations to Malaysia's Country Report under the CRC, the UN Committee on the Rights of the Child expressed its concern at long pre-trial detention periods and delays in dealing with cases involving children. In some cases, delays are being exacerbated by the very measures intended to protect children, such as the need to schedule children's cases on a separate day, the preparation of pre-sentence reports and parental participation. While these safeguards are important, Magistrates must exercise discretion to ensure that they do not lead to injustice, for example by subjecting children to excessive pre-trial detention periods for minor offences because their parents repeatedly fail to attend Court.

RECOMMENDATIONS

In order to improve the juvenile court and trial procedures, it is recommended that Malaysia:

- **Issue a directive providing Magistrates with detailed guidance on conducting Court for Children proceedings and exercising their discretion under the Child Act.** This should promote informality and the use of Chambers wherever feasible; emphasise the importance of being proactive in managing individual cases so as to reduce unnecessary delays; encourage direct and informal engagement between the Magistrate, the child and his/her parents; and provide guidance to Magistrates in exercising their discretion on matters such as ensuring best interest of child and reducing delays.
- **Ensure that all districts conduct regular, periodic reviews of case flow and backlogs within the Court for Children and adjust the frequency of sittings accordingly;**
- **Promote greater specialisation in Magistrates and DPP by:**
 - Designating a specific Magistrate and DPP in each district to hear all children's cases;
 - Developing a specialised in-service short-course through ILKAP, as well as a handbook or e-learning course for self-directed training. Consider requiring all Magistrates to complete an online certificate-based e-learning course prior to sitting as the Court for Children.
- **Consider eliminating the role of the Court Advisors and investing resources instead in enhancing the capacity of probation officers, as well as providing independent legal representation to children before the Court;**
- **Amend the Child Act to:**
 - Expand the jurisdiction of the Court for Children to include children who are co-accused with adults;
 - Stipulate more clearly that, regardless of whether proceedings are before the Court for Children or the High Court, children must be afforded all of the procedural protections provided for under the Child Act;
 - Establish specific time limits for the completion of children's cases.



SENTENCING PRINCIPLES AND PRACTICES

International Standards

Sentencing is one of the key areas where the approach to children should be fundamentally different from that of adults. The CRC emphasises that while children should be held accountable for their actions, any order imposed must take into account the child's age and the need to promote his/her recovery and reintegration. In other words, the objective when imposing an order on a child should not be purely punitive; any response to a child must be aimed primarily at helping the child to correct his/her behaviour and to become a productive, law-abiding member of society.

There are two main justifications for taking this different approach to sentencing children in conflict with the law. First, because children lack the maturity and judgment of adults, they have diminished guilt or responsibility for their actions. Secondly, because they are still young and developing their personalities, children tend to have greater rehabilitative potential than adults and can be more easily influenced to change their behaviour. Children must be held accountable and made to take responsibility for their actions in order for them to learn that there are consequences to bad behaviour. However, this should be done in a way that teaches them why their behaviour was wrong, what affect it had on others and how they can make better decisions in the future.

The CRC and international standards therefore require that any consequences imposed on a child offender should be guided by the following general principles:

Proportionality

The CRC requires States parties to ensure that all children in conflict with the law are dealt with in a

manner that is appropriate to their well-being and proportionate both to their circumstances and to the offence.⁸⁹ This means that strictly punitive approaches are not appropriate when handling children. The response to child offenders must be based on a full consideration of not just of the gravity of the crime, but also of the child's individual background and personal circumstances.

At the same time, the proportionality principle also means that measures imposed on children should not be more severe than the offence warrants. Measures aimed at promoting the child's welfare (for example, placement in a rehabilitation school or under some form of social control) must not go beyond what is necessary and proportionate to the type of crime the child committed.⁹⁰ In other words, children should not be subject to institutionalisation, even if intended for their own good, for a length of time that is not in proportion to the seriousness of the crime and that is in excess of the sentence an adult would receive for a similar offence.

Individualised Approach

The CRC promotes an individualised approach to children in conflict with the law and emphasises that the child's well-being must be a guiding factor in deciding what measure to impose. In order to support a more individualised approach to sentencing, the Beijing Rules recommend that authorities be given broad flexibility and discretion in choosing the most appropriate sentence in each case. The Rules also require that a "social inquiry" report be prepared in all cases except those involving minor offences, so that the Court has a full picture of the child's background, circumstances and the conditions under which the offence was committed.⁹¹

⁸⁹ Article 40.2.

⁹⁰ Beijing Rules, Article 17 and Commentary.

⁹¹ Articles 6, 16, 18.

Deprivation of Liberty as Last Resort

One of the fundamental principles of sentencing under the CRC is that any form of deprivation of liberty must be used as a measure of last resort and for the shortest possible period of time. The Beijing Rules emphasise that deprivation of liberty shall be imposed only after careful consideration of all other options, and must be used only in cases where the child has committed a serious act involving violence against another person, or if the child persists in committing other serious offences and there is no other appropriate response.

A frequent misconception is that the “last resort” principle applies only to the placement of children in prisons. However, “deprivation of liberty” has a broad definition under international standards and includes all orders placing a child in any facility that s/he may not leave at will.⁹² As such, the placement of children in approved schools, hostels and other educational or rehabilitative institutions, while preferable to imprisonment, also constitutes deprivation of liberty and should be used only as a measure of last resort for children who commit violent crimes, or persist in committing other serious offences.

The underlying reason for the international community’s emphasis on reducing the use of deprivation of liberty lies in the fact that, despite the best intentions of authorities, removing children from their community and confining them in rehabilitation establishments has proven to be singularly ineffective in reducing re-offending, and in fact may increase the chances that the child will go on to commit further crimes. Rigorous evaluations undertaken in the US, UK, Canada, and New Zealand have shown that institution-based reform

models are less effective than community-based programmes and that the percentage of children who go on to commit further violations after their release from reform schools is consistently higher.⁹³ For example, one US study found that 70% of children had re-offended within one year of their release and prior placement in a custodial institution was one of the main predictors of recidivism.⁹⁴ In the U.K., 82% of boys released from juvenile correctional centres were found to have re-offended within two years of their release.⁹⁵ A meta-analysis of programmes in North America found that there were greater reductions in re-offending for children subject to community-based reform measures, rather than deprivation of liberty.⁹⁶

There are a number of reasons why reform schools generally fail:

- **Promotes criminal contamination**

congregating groups of troubled adolescents together facilitates affiliation with anti-social peers and reinforces delinquent attitudes and identification with deviancy. Adolescence is a time when children are in the process of developing their identity and social skills and when the influence of peers is at its highest. For this reason, behavioural scientists generally recommend against placing children in situations where they may form close bonds with others involved in offending. Correctional schools both congregate groups of troubled adolescents together and deprive children of normal social interactions with positive peer influences. As a result, children who spend time in these institutions have a

⁹² UN JDLs, Article 11.

⁹³ Margo, J and Stevens, A. (2008) “Make me a Criminal: Preventing Youth Crime,” London: Institute for Public Policy; Holman, B. and Ziedenberg, J. (2006) “The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities” Washington: Justice Policy Institute; McLaren, K., (2000) “Tough is not Enough: Getting Smart about Youth Crime. A review of research on what works to reduce offending by young people,” New Zealand Ministry of Youth; Maxwell, G., “Achieving Effective Outcomes in Youth Justice: Implications of New Research For Principles, Policy and Practice (2003), Wellington: Crime and Justice Research Institute.

⁹⁴ Holman (2006).

⁹⁵ Bateman, T, (2006), Youth Crime and Justice: Statistical Evidence, Recent Trends and Responses.

⁹⁶ Sherman et al (1998).

higher tendency to be socialised with deviant attitudes. In effect, correctional schools become “schools of crime”, where younger and more inexperienced children learn from fellow students how to be better criminals.

- **Does not address underlying risk factors**

There is now increasing recognition that rehabilitative interventions that target the child alone and attempt to address behavioural problems in isolation from family and community are less effective because they do not address the factors that influence the child’s behaviour. Children who are serious or persistent offenders tend to be those experiencing a range of risk factors in their family, school, community, and peers. Since children’s behaviour is heavily shaped and influenced by their environment, the most effective rehabilitation programs are those that work with the whole environment, building on strengths and addressing the weaknesses. Removing children from their family and community and placing them in correctional schools does nothing to fix the underlying problems in the child’s life. Once released, the child returns to the same environment that contributed to his/her offending behaviour, without having learned how to cope in the real world.

- **Causes stigma and makes it difficult for children to reintegrate**

Children released from correctional schools often have difficulties reintegrating into the community due to

stigma, discrimination and low self-esteem. They face rejection by schools due to their criminal past, or do not qualify for re-entry due to lower educational standards in correctional schools. Economists in the US have shown that being subject to deprivation of liberty as an adolescent will reduce a person’s future earnings and their ability to remain in the workforce.⁹⁷

- **Diverts resources from more effective community-based programmes**

In addition to being ineffective and counter-productive, correctional schools are also not a cost-effective means of dealing with child offenders. Community-based programs that teach children necessary life-skills and provide support services to both the children and their families have been proven to be much cheaper and more effective at promoting long-term law-abiding conduct.⁹⁸ In the U.S., costing analysis showed that multi-systemic therapy, one of the most professionalised and intensive community-based programmes for child offenders, was more than five times cheaper than an institutional placement. A Washington State Institute for Public Policy analysis found that for every dollar spent on county juvenile detention facilities, \$1.98 of “benefits” in terms of reduced crime and costs of crime to taxpayers was achieved. By sharp contrast, mentoring programs produced \$3.36 of benefits for every dollar spent, anger management training produced \$10 of benefits for every dollar spent, and multi-

⁹⁷ Ibid.

⁹⁸ Ibid, Note 7.

systemic therapy produced \$13 of benefits for every dollar spent.⁹⁹ Investing juvenile justice resources on correctional schools and prisons drains available funds away from interventions that could be more effective at reducing recidivism and promoting public safety. This is not to say that children should never be placed in Approved Schools or prisons. In every country, there will always be some children who must be isolated from the community because they pose a threat to others. However, given that institutional placements are not as effective as community measures, are more costly and may actually increase the likelihood of re-offending, these types of measures should be used sparingly and with great caution.

Variety of Sentencing Options

In order to ensure that deprivation of liberty is used only as a measure of last resort, the CRC states that a variety of sentencing options should be available, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes, as well as other alternatives to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and to the offence.¹⁰⁰ Children must not be subject to capital punishment, life imprisonment without the possibility of release,¹⁰¹ or corporal punishment.¹⁰² The UN Committee on the Rights of the Child strongly recommends the States Parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.¹⁰³

Having a clear continuum of sentencing options allows for a more graduated response to children in conflict with the law. In other words, it allows for a gradual increase in the intensity or duration of the measure if the child fails to respond to less intrusive measures. This promotes the most cost-effective use of resources, since it ensures that the more intensive (and therefore more expensive) measures are only used when necessary. A graduated response ensures that children who are at low risk of re-offending are dealt with through less intensive means (e.g. diversion, warning, fine), reserving more intensive and more costly interventions for those who require more support. Too often, children who commit minor, non-violent crimes are placed in reform schools or other custodial settings because there are no other viable and effective options for providing them with education and supervision in the community.

Malaysian Laws and Policies

In Malaysia, the sentencing of children is governed mainly by Section 90 of the Child Act. The Act makes it mandatory for the Court for Children to consider a probation report before making an order against the child and to consider the opinion of the Court Advisers. The Act states that probation reports must be prepared by a probation officer and must contain information with respect to the child's general conduct, home surroundings, school record, and medical history. The Court may also request a report from a social welfare officer, registered medical practitioner, or any other person whom the Court for Children thinks fit.¹⁰⁴

99 McLaren (2000); Aos, S. (2002), *The Juvenile Justice System in Washington State: Recommendations to Improve Cost-Effectiveness*. Washington: Washington State Institute for Public Policy.

100 Article 40.

101 Articles 37 and 40.

102 Beijing Rules, Article 17.3.

103 General Comment No. 10 (2007): *Children's Rights in Juvenile Justice*, CRC/C/GC/10, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

104 Section 90(12) and (13).

The Act does not include any general principles or criteria for making decisions about sentencing. However, section 91 includes a list of the following sentencing options:

- **Admonish and discharge;**
- **Good Behaviour Bond:** discharge the child with a bond to be of good behaviour and to comply with conditions specified by the Court;
- **Custody of Fit Person:** Order the child to be placed in the care of a relative or other fit and proper person for a specified period and with conditions specified by the Court;
- **Fine:** order the child to pay a fine, compensation or costs. The Court may order that the child's parents pay the fine, rather than the child personally;¹⁰⁵
- **Probation order:** order the child to be placed under the supervision of a probation officer for a period of between 12 months and three years. Probation is not available for children who have committed specified grave crimes¹⁰⁶ voluntarily causing grievous hurt, rape, incest, outraging modesty, and other "unnatural offences" under the Penal Code. The probation order places the child under the supervision of a probation officer, and requires him/her to refrain from committing any further offences, in the event of which the child can be sentenced for the original crime as well as the new one. As part of the order, the Court can also impose any other restrictions it thinks necessary, including requiring the child to reside in a certain place, to attend an educational institution recommended by the probation officer, or to follow a set curfew. In addition, children aged 10 years or older may be sent to a probation hostel for up to 12 months;¹⁰⁷
- **Approved School Order:** children 10 years of age or older (i.e. all those over the age of criminal responsibility) may be sent to an Approved School if the offence is "not serious in nature" and if the probation report indicates that the parents or guardian of the child can no longer exercise or is incapable of exercising any proper control over him and that the child is in need of institutional rehabilitation. All orders sending a child to an Approved School are for a fixed period of three years, though the child may be released early by the Board of Visitors after serving at least one year. The person in charge of the approved school may also extend the child's detention by an additional six months, with the approval of the Board of Visitors, if they are of the view that the child needs additional care and training, without which s/ he will not be able to find a suitable job.¹⁰⁸
- **Henry Gurney School:** children 14 years or older may be sent to a Henry Gurney School if they a) are found guilty of any offence punishable with imprisonment; b) if the probation report shows that their parents or guardian can no longer exercise or is incapable of exercising any proper control over them; the child is habitually in the company of persons of bad character; and the child is not suitable to be rehabilitated in an approved school; and c) the Court is of the view that the offence committed is serious in nature and by reason of the nature of the child's criminal habits and tendencies it is expedient that the child be subject to detention.

¹⁰⁵ Section 94.

¹⁰⁶ Murder, offences under the Firearms (Increased Penalties) Act, the Kidnapping Act, and certain offences under the ISA and the Dangerous Drugs Act.

¹⁰⁷ Sections 62, 98.

¹⁰⁸ Sections 66, 67, 69.

All orders sending a child to a Henry Gurney School are for a period of three years, or until the child reaches the age of 21 (whichever is first), though the child may be released early by the Director General of Prisons after serving at least 12 months.

- **Whipping:** boys, but not girls, may be whipped with not more than ten strokes of a light cane. Whipping must be carried out within the Court premises and in the presence of the child's parent or guardian;
- **Imprisonment:** if the child is 14 years or older and has committed an offence punishable with imprisonment, the Court may order any term of imprisonment which could be awarded by a Sessions Court.¹⁰⁹
- **Indefinite Imprisonment:** If a child commits an offence for which the death penalty applies,¹¹⁰ the child must be detained in prison indefinitely at the "pleasure of the sultans". The previous version of the Act stated only that the child must be "detained", allowing for placement in Henry Gurney School, but the Child Act 2001 mandates a prison placement. The Board of Visiting Justices for the prison where the child is being held must review the case at least once per year and make recommendations regarding his/her release or continued detention.¹¹¹
- **Bond from Parents:** In addition to any order above, the Court may require the child's parent or guardian to execute a bond for the child's good behaviour with or without security. Parents may be required to report regularly

to the welfare department or to the nearest police station with the child and to attend an "interactive workshop". If the child is sent to an approved school or Henry Gurney School, the Court may also require the parent to visit the child as stipulated intervals.

Malaysia has recently enacted legislation to introduce community service work programmes as an alternative to imprisonment. However, the programme is currently only applicable to offenders who are over the age of 18.

The Child Act does not include an explicit statement that deprivation of liberty be used only as a measure of last resort, or any limitations on the types of offences for which a custodial order may be used. However, the Act does include some limits on orders of imprisonment, stating that a child under the age of 14 cannot be ordered to be imprisoned for any offence, or committed to prison for failing to pay a fine, compensation or costs. In addition, children over the age of 14 must not be ordered to be imprisoned "if he can be suitably dealt with in any other way whether by probation, or fine, or being sent to a place of detention or an approved school, or a Henry Gurney School, or otherwise."¹¹² There is no limit on the maximum term of imprisonment that may be imposed on a child and children are liable to both life imprisonment and indefinite imprisonment at the discretion of the Ruler. Section 97 of the Child Act states that a person who was under the age of 18 at the time the offence was committed cannot be subject to the death penalty. However, pursuant to the Essential (Security Cases) Regulations 1975 (ESCAR), children charged with offences under the Internal Security Act 1960 and the Firearms (Increased Penalties) Act 1971 (FIPA) are not afforded the special protections under the Child Act

¹⁰⁹ Section 75.

¹¹⁰ Murder, certain terrorism offences, hostage taking, waging war, mutiny, kidnapping in order to murder, gang robbery with murder, drug trafficking.

¹¹¹ Section 97.

¹¹² Section 96.

and may be subject to capital punishment.¹¹³ ESCAR explicitly states that “Where a person is accused of or charged with a security offence, he shall regardless of his age, be dealt with and tried in accordance with the provisions of these Regulations and the Juvenile Courts Act (1948) shall not apply to such person”. Unfortunately, the ESCAR was not amended with the Child Act 2001.

The Child Act also outlines circumstances where children are not necessarily entitled to the benefit of these special sentencing provisions. Where a child turns 18 before s/he is formally charged, or where turns 18 while the Court proceedings are ongoing, it is then up to the discretion of the Court whether to apply the special sentencing provisions available for children under the Child Act or impose an adult term of imprisonment.¹¹⁴

Structures, Processes and Practices

All stakeholders were in agreement that the approach taken when dealing with children is different from adults. Generally, public safety is the primary factor taken into account when sentencing an offender, however with children, the interests of the public must be balanced against the best interest of the child. When deciding what order to impose, a broader range of factors are taken into account, including the nature and seriousness of the offence, the child’s prior record of offences (if any), as well as his/her background, family circumstances, educational status, and level of maturity.

Stakeholders advised that probation reports are an indispensable tool in this process, as they provide the Court with a more detailed picture of the child’s background and circumstances. Given that most children are unrepresented and contribute limited information during the proceedings, the report is the Court’s main source of information about the child and his/her family situation. Reports are prepared for all cases that are heard before the Court for Children, though in some jurisdictions they are waived for minor offences such as traffic violations. Other magistrates courts and the High Court reportedly also request probation reports in most cases when it is imposing an order on a child (for example, when the child is co-accused with an adult), though sometimes judges are not aware of this requirement. In order to allow time for the probation report to be prepared, the proceedings are generally adjourned for one month, though some Magistrates allow for a shorter time period if the child is on remand.

In preparing the report, probation officers generally visit the child’s home and speak to both the child and his/her parents and family members. Time permitting, they may also consult with the child’s teacher or neighbours. A report is then prepared detailing the child’s family background (parent’s age, occupation, number of siblings); home environment (physical size and condition of the home); family’s financial situation; and situation of the child (health, educational status and performance; employment; skills; behaviour and personal traits; relationship with family members; peers and activities; interests and hobbies; and criminal record). Probation officers also provide their personal comments and views regarding the appropriate disposition. There is a standard format for all probation reports and probation officers reportedly

113 Regulation 3(3) of ESCAR. The primacy of ESCAR was challenged and upheld by the Federal Court in *Lim Hang Seoh v. PP*, [1978] 1 MLJ 68.

114 Child Act 2001, s. 83(2), (3).

receive training on report writing as part of the standard three-month induction programme provided to newly appointed JKM staff.

WHAT THE CHILDREN SAID

Courts are fair to young people and will listen to their appeals.

The courts take the trouble to explain the whole court process to young people, letting them know of the maximum sentence for the crime. They allow a chance for young people to really think of the consequences before you enter your plea.

One of the court's good practices is that you can plea bargain.

The magistrates listen to all sides of the story (parents, welfare officer and the young person) before passing down a sentence.

When the courts pass the sentence parents usually don't say anything. For many parents, it is their first time in court too, and they don't know what they can say or do.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

Based on discussions with stakeholders, it appears that probation reports have significant influence on the opinion of the Magistrate, the Court Advisors and the DPP, and most found the contribution of probation officers to be very valuable. The majority of stakeholders were of the view that the content and quality of the reports was generally quite good, though both the depth of the information and timeliness tended to vary depending on the probation officer's level of experience, the time and resources available and the degree of cooperation by the child's family. Probation officers themselves advised that they sometimes do not have enough time to prepare reports to the standard they would like. In districts

with high juvenile caseloads, such as Johor Bahru, probation officers can have up to 50 probation reports to complete per week. Probation officers highlighted many challenges in trying to complete reports in a timely manner, including staff shortages and high volume of cases, difficulties in contacting parents and delays caused when parents miss appointments or are not at home during the designated time for a home visit. A stakeholder gave an example of a case where a child was held on remand for almost a year on relatively minor charges because his parents could not be located to complete the probation report. This type of delay most often occurs when a child is arrested in a different city or province from where his/her parents live. In these cases, the probation officer in the district where the parents live is asked to complete the report, however this can sometimes cause delays.

In general, the reports that were tendered during the Court proceedings observed by the research team tended to be somewhat superficial, with a focus on basic biographical information about the family and a description of the physical environment of the home, rather than a more in-depth assessment of potential risk factors and resiliencies, parenting capacity, and the parent-child relationship. More detailed assessments of the child and his/her family, including a standard risk assessment tool, are undertaken by district counsellors, but only after the child is sentenced by the Court and placed under the supervision of a probation officer. The majority of probation officers advised that they based their views and recommendations primarily on the best interest of the child and tended to recommend a lighter sentence, such as a bond of good behaviour, in most cases. However, in some cases, parents raised concerns that probation officers were advising parents to agree to send their children to institutions, on the basis that it would benefit their children.

WHAT THE CHILDREN SAID

Punishments are fair because for stealing cases that are not so serious, the offenders are sent to hostels.

And for those who are sent to prison for a crime like rape, murder, drugs and robberies, the punishment is fair.

Sometimes, different punishments are handed out for the same type of crime.

The punishment is not standardized. It is all dependent on the mood of the judge.

Community service would be a more suitable punishment for light crimes committed such as stealing, hanging out at night, etc.

For big cases, young people should be sent to Henry Gurney. But for small crimes like out of control kids or stealing a pair of shoes, they should be made to go for counselling sessions, motivational programs or just let them go.

Kids who are sent to STB or Henry Gurney Schools will mix with the other kids who have committed more serious crimes and they will learn how to be more violent and naughty.

Sending a young person to STB or any other institution can backfire because the person is then exposed to many different people who have committed other crimes.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

The role that Court Advisors play in the sentencing process tends to vary in different locations. In some proceedings observed by the research team, Court Advisors were given an opportunity to interact directly with the child and his/her parents and voiced their opinion as to sentence out loud. In other jurisdictions, the Magistrate conducted a brief whispered conversation with each of the Court Advisors before pronouncing his/her order. Court Advisors and Magistrates were generally of the view that the advice the advisors provided was valuable and was given due weight by the Magistrate. However, their opportunity

for input is quite cursory and limited by their lack of background information about the case. Most advised that they generally just followed the opinion in the probation report. It was noted that Court Advisors do not receive information about the case in advance and some complained that they are often unable to hear the charges because they are read out too quickly by the Court clerk. Some expressed concern that they did not receive copies of the probation reports in advance and therefore had very limited time to read and digest the content before being called upon to give their opinion about sentencing. In general, there is very limited opportunity for consultation between the Court Advisors and Magistrate prior to a decision about sentencing, apart from a brief exchange while they are sitting on the bench.

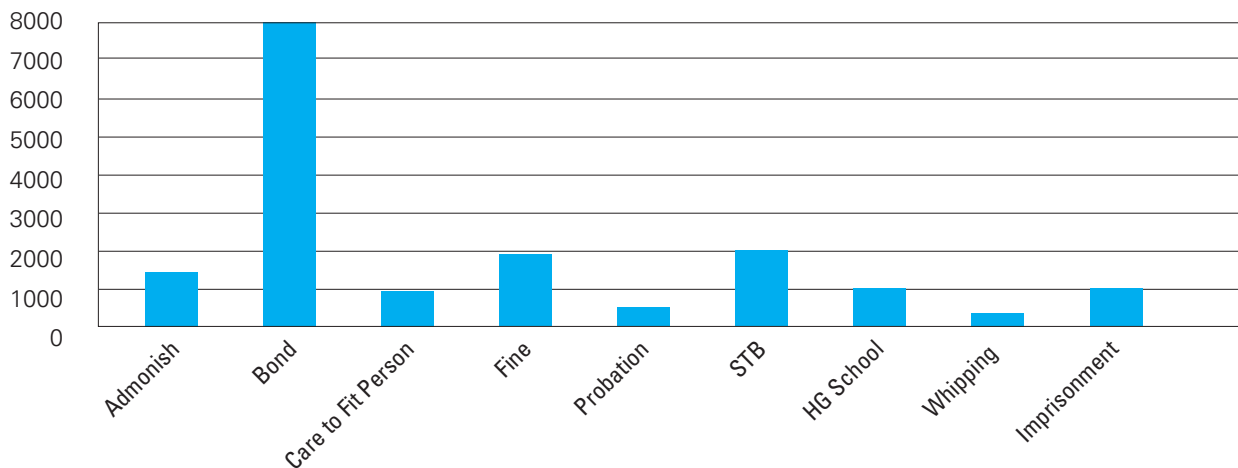
Stakeholders advised that, in general, the orders imposed on children are quite light, particularly for first-time offenders. Even in cases where children appear before a Court other than the Court for Children (for example, when co-accused with an adult), the Courts reportedly maintain a different approach and take into account the child's lack of maturity. However, how the balance between the best interest of the child and the public interest was addressed tended to vary. Some Magistrates, Court Advisors and DPP stated that primacy must be given to public safety, while others emphasised the need to give children a second chance.

Legal academics have also highlighted a similar tension in High Court rulings between the importance of safeguarding children and ensuring their best interest on the one hand and protection of the public on the other. Commentators have noted that, while there has been some movement towards a more welfare oriented approach in cases involving children, the tendency is to be more punitive rather

than reformatory. While the best interest of the child is acknowledged, primacy remains on the perceived need to protect the public with tougher sentences.¹¹⁵ For example, in sentencing a 17 year old boy to 10 years imprisonment, one High Court judge stated: "Persons indulging in this type of offence are a scourge to society and unless the courts treat deterrence and public interest as vital factors in sentencing... Thus, in this type of offence, the public interest should never be relegated to the background and must of necessity assume the foremost importance. Hence, the offender must be punished accordingly."¹¹⁶ In another case, however, the High Court seemed to lean more heavily in favour of the best interest of the child. In quashing a Magistrate's order sending a child

to a Henry Gurney School for theft of a motor vehicle, the Judge said: "The learned magistrate should weigh the alternatives, that is of sending the juvenile to the Henry Gurney School or of letting the parents take care of the juvenile, to see which is better. The seriousness of the offence does not weigh much nor the rampancy of such offence. It is the interest of the public that the juvenile realizes his mistake, which he does, and that he be properly educated so that he will not be a bother in the future, which letting his parents take care of him will provide. What the learned magistrate failed to appreciate is that this is not a juvenile hell bent on life of crime, but who was placed in a dilemma where, not unexpectedly given his age and fear for damaging the car, a wrong decision was made...."¹¹⁷

Types of Court Orders Imposed on Children (2003 - 2009)



Source: Court for Children, 2003 - 2009

Statistics from the Court show that the most common order imposed by the Court for Children is a bond of good behaviour, used in 55% of all cases. Overall the Courts seem to favour non-custodial options, with

77% of children being subject to alternatives such as admonishment, bond of good behaviour, care to a parent or fit person, and fines. Whipping has also been imposed on 21 children between 2003 and 2009.

115 Dusuki (2009); Nazeri, Norbani Mohamed, (2008) "Welfare: The Key to Juvenile Justice in Malaysia, Nazeri, Norbani (2008b), "Child Offenders: Policies and the Emergency Rule, The Law Review, pp. 577-586.

116 Sarithan Pachimuthu v Public Prosecutor, [2000]5 CLJ 15.

117 A Juvenile v. PP, [2003] 1 CLJ 171.

When a bond is used, parents are required to guarantee their child's good behaviour, and to pay a cash deposit of a certain percentage of the bond. The amount of the bond and the deposit vary at the discretion of the Magistrate and can reportedly range from RM5,000 to RM15,000. As a condition of the bond, the child must not commit any further offences for a specific period (generally 3 years), failing which the parent will be required to forfeit the bond and possibly pay a fine of RM5,000. Some Magistrates also impose additional conditions on the child, such as abiding by a curfew, attending an Interactive Workshop or reporting regularly to the police station, a probation officer or the National Anti Narcotics Agency. However, there does not appear to be any standardisation in this practice.

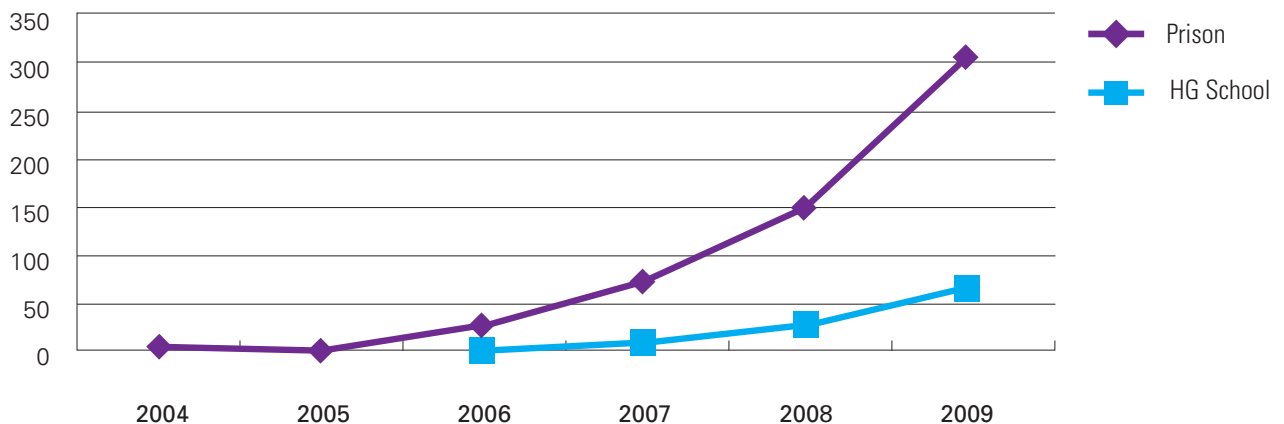
The monetary bond was generally perceived by Magistrates, Court Advisors and probation officers as a way to ensure parent's commitment to properly supervise their child. However, some parents who participated in the study found the bond to be unfair and highly stressful, advising that they were fearful for

the full period that their child would get into trouble.

Many highlighted the difficulties they faced controlling their child's behaviour at all times over a three-year period, particularly as the child got older. One parent noted the impossibility of making her teenage son comply with an 8 p.m. curfew for three years.

Based on the information available, it appears that prison sentences are used quite sparingly against children. Between 2003 and 2009, 646 children (5%) were sentenced to imprisonment. On average, there are generally less than 60 convicted children being held in prison facilities per year. However, statistics from the Prisons Department show a dramatic increase in the number of children who received a prison sentence between 2004 and 2009, with an increase from 6 children in 2004 to 307 in 2009. By comparison, Henry Gurney Schools are used much less frequently, despite the fact that they provide more specialised rehabilitative programmes for children.

Number of Convicted Children Newly Admitted to Prisons and HG Schools (2004 — 2009)¹¹⁸



Source: Prison Department, 2004 - 2009

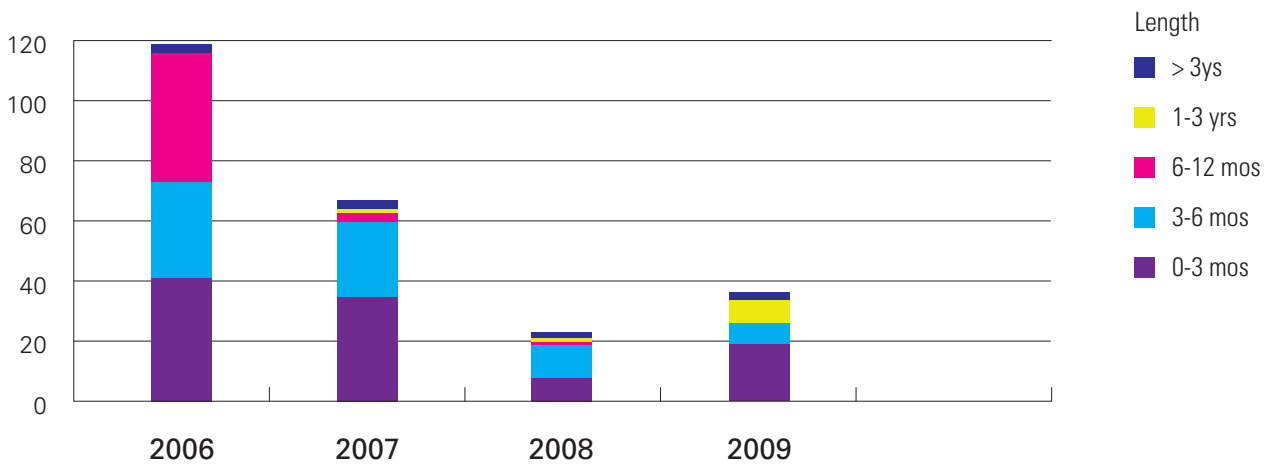
118 Henry Gurney School data was not available for 2004 and 2005.

Most children sentenced to prison have reportedly committed relatively serious offences, or are repeat offenders, although no data was available to confirm this. However, there are occasional anomalies, for example a case cited by many stakeholders of a child sentenced to imprisonment for stealing a chicken. In addition, non-Malaysians and children without proper identification documents tend to receive imprisonment

sentences regardless of the crime committed, after which they are transferred to the immigration department.

The duration of imprisonment sentences imposed on children tend to be relatively short, with most terms being under 6 months.

Duration of Prison Sentences for Children (2006 - 2009)

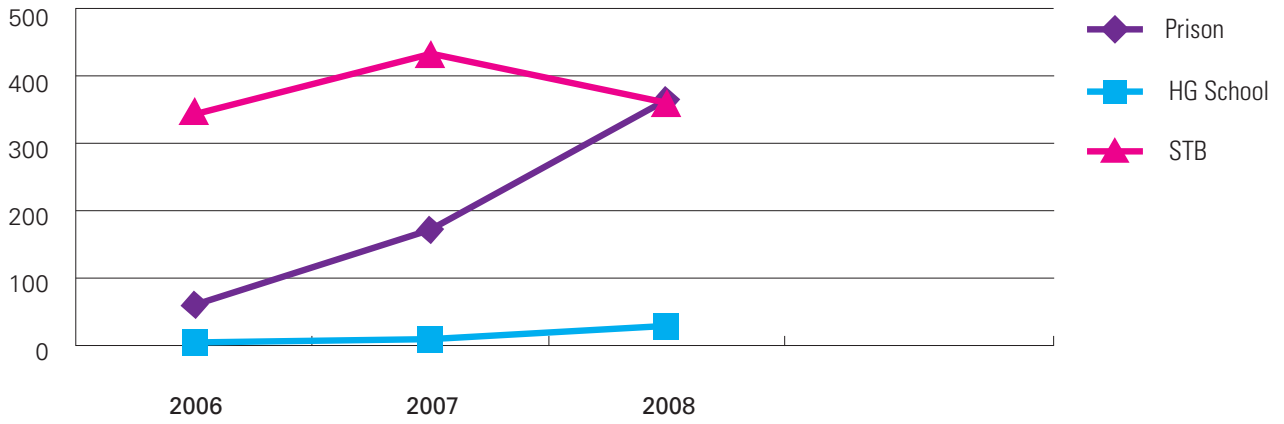


Source: Prisons Department, 2006 - 2009

Although imprisonment seems to be used relatively sparingly, other custodial dispositions, including Probation Hostels and STBs are used much more liberally. According to Court statistics, 18% of all children sentenced by the courts between 2003 and 2009 received one of these custodial dispositions.

Available statistics also show that there are a significant number of children in STBs for very minor crimes, such as theft. In 2007, for example, 78% of child offenders newly admitted to STBs had committed a property-related offence, the most common being theft.

Number of Convicted Children Newly Admitted to Prison, HG Schools and STBs (2006 - 2008)

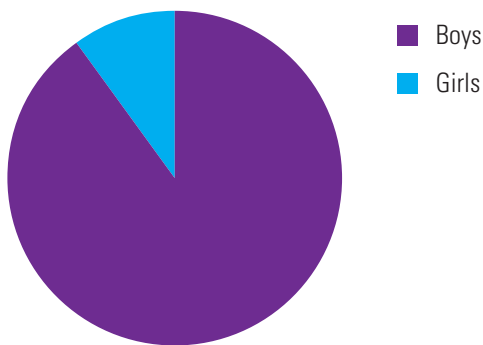


Source: Court for Children, 2006 - 2008

While the majority of children who receive custodial sentences tend to be between the ages of 16 and 18, there are a significant number of younger children being subject to detention, particularly in STBs. The number of boys significantly outnumbers girls sentenced to

custody in both Henry Gurney Schools and STBs, with the percentage of female residents being higher in STBs. It is unclear, however, whether there is any difference in the proportion of male and female child offenders who receive custodial dispositions.

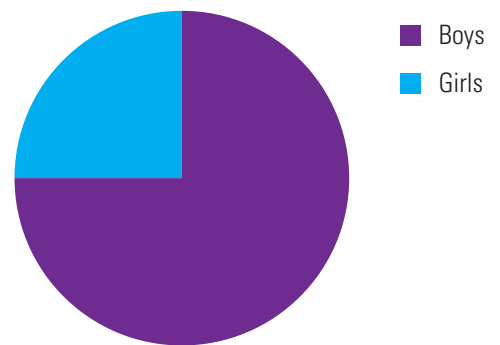
Children in HG Schools 2007, by Gender



Source: Department of Social Welfare, 2007

While most stakeholders advised that they were guided by the principle of institutionalisation as a last resort, their understanding and application of that principle was often not in accordance with international standards. "Last resort" was generally understood as

Children in STB Residents 2007, by Gender



Source: Department of Social Welfare, 2007

permitting custodial dispositions whenever a parent was unwilling or unable to care for a child, or where the child could benefit from education or vocational training. Indeed, whether a child was sent to a custodial institution or released on a bond was often presented

as the parent's choice, or at least dependent on the parent's willingness to accept responsibility for the child and commit to a bond.

A significant proportion of stakeholders were of the view that placement of a child in a Henry Gurney School, Probation Hostel or STB was actually good for the child, since it would provide them access to education and training. Those from poorer families, who are not in school, or who are from environments that are perceived to be negative or inadequate are at higher risk of being institutionalised, regardless of the nature and seriousness of the crime committed. In some instances, Magistrates and probation officers have actively encouraged parents to agree to have their child sent away to a Henry Gurney School or STB, often by likening them to boarding schools. However, some heads of institutions expressed concern about the children they were being sent, noting that institutionalisation was generally not the best option for children. Many staff members were quite frank in acknowledging that, while they do their best they can for children, the institutional setting was not the best environment for children.

Most of the children subject to custodial orders remain for the full fixed term of 12 months in the case of a Probation Hostel order and three years for STBs and Henry Gurney School orders. In the case of STBs, early release is possible on the recommendation of the Board of Visitors, however the review system is not currently functioning fully or independently. Some institutions had gone up to a year without a functioning Board of Visitors due to delays in official appointments. There is also no requirement that each child be subject to a regular, periodic review at set intervals; children are only considered for release if their names are put forward to the Board of Visitors by the head of the institution (warden/principal). Some institutions seem

to take a relatively structured approach, regularly reviewing children's progress every three months and promoting early release for those who demonstrate progress and good behaviour. However, in other locations, early release was seen as an extraordinary measure used only where necessary because a child had been accepted to a specific education or vocational training programme outside of the institution.

If a child is being considered for release, the warden/principal will prepare a report and request the district probation officer to visit the family and report back on their willingness and ability to accept the child. The child is then called before the Board of Visitors to answer any questions they may have. The warden/principal is present during the Board of Visitors meeting, but does not have a vote. However, the Boards reportedly follow the advice of the principal in most cases; some Board members expressed the view that it would be inappropriate for them to go against the views of the principal, since s/he knew the child better than they do. Members of the Board do not receive any training or guidance on how to perform this essential function.

For children in Henry Gurney Schools, release on licence is at the discretion of the Director General of Prisons. Children are considered for early release after they have completed 12 months of detention, but only if they have had excellent conduct, have received a job offer and have the support of their house master, rehabilitation officer, School discharge board, and family.

The review process for children who are detained at the pleasure of the Ruler is also not functioning regularly and there are no guidelines with respect to how these reviews are to be carried out or what factors should be taken into consideration.¹¹⁹ There are at the time of the study 11 boys being held indefinitely at the

pleasure of the Ruler, all of whom were convicted of murder. One boy, now 22, was 11.5 years old when the crime was committed and has reportedly only had his detention reviewed by the Board of Visiting Justices twice in the last six years. The High Court has ruled that children detained under this provision must be sent to prison, since the Act does not grant discretion for detention in any other facility.¹²⁰ The use of indeterminate sentences against children was recently challenged as being unconstitutional, however the Federal Court has upheld the practice.¹²¹

Although capital punishment is technically available under the Essential (Security Cases) Regulations 1975, there has reportedly been only one case where the death sentence was pronounced on a child. In 1978, a 14 year old boy was sentenced to death for possession of a pistol and ammunition. The sentence was affirmed by the Federal Court, however the King exercised his prerogative power of pardon and commuted the death sentence to detention in the Henry Gurney School until the child reached the age of 21. Since then, there have been no other cases.¹²²

120 KWK (A Child) v. PP, (2003) 5 AMR 681.

121 KWK (A Child) v. PP., November 2009

122 Lim Hang Seah v PP [1978] 1 MLJ 68.

KEY FINDINGS

In both law and practice, Malaysia currently employs a different approach when sentencing children. When deciding on the appropriate order to impose, consideration is given not just to the seriousness of the offence, but also the background and circumstances of the child. Orders are not purely punitive, but instead take into consideration the welfare and rehabilitation of the child. In general, the orders imposed on children are quite lenient, with most cases reportedly being resolved by way of a bond of good behaviour or some other community supervision order.

However, the principles and criteria to be considered when imposing an order on children are not clearly articulated in either law or judicial precedent, resulting in differing interpretations and application. While most Magistrates and Court Advisors were cognizant of the need to take into consideration the best interest of the child, their understanding of how the child's interest should be balanced against public safety varied.

As a result, the principle of proportionality is not being consistently adhered to, resulting in children being subjected to lengthy custodial orders. For children over 14 who commit serious offences, this is exemplified by the application of adult terms of imprisonment to children, including life imprisonment and indefinite detention, without sufficient regard to the child's age, background and personal circumstances. In its Concluding Observations to Malaysia's Country Report, the UN Committee on the Rights of the Child expressed concern at the deprivation of liberty at the pleasure of the Ruler, which causes problems in terms of the development of the child, including her/his recovery and social reintegration. More generally, the Committee has been critical of countries that allow children to either be tried or sentenced as adults for serious offences, highlighting that special juvenile justice principles should apply equally to all children in conflict with the law regardless of the seriousness of their actions. This is in recognition both of the child's limited culpability for his/her actions, and greater rehabilitative potential. In recognition of these considerations, most countries now set a much lower maximum term of imprisonment for children, including those who commit the most heinous crimes such as murder.

The practice of sentencing children who commit minor offences to fixed three-year terms in an STB or Henry Gurney School is also not in accordance with the proportionality principle. This approach, inherited from outdated British legislation and once practiced throughout the commonwealth, has generally been abandoned in favour of more proportionate sentencing. Although Magistrates, Court Advisors and probation officers are generally well intentioned and concerned about helping the child, these 3-year custodial rehabilitation orders often result in periods of detention that are well in excess of what is warranted by the crime. For example, children are being detained for 3 years for committing petty theft, which is more intrusive than the sanction an adult would have received for the same crime. While the CRC requires that any order imposed on a child offender should promote the rehabilitation of the child, the measures directed at rehabilitation must not violate the proportionality principle. This means that the rehabilitative measures must not result in a sentence that exceeds a response that is proportionate to the seriousness of the offence and the degree of responsibility of the child.

Thus, a child should not receive a longer or more intrusive sentence than is warranted by the crime simply because his/her background and circumstances suggest that more intensive rehabilitative measures may be required. This would amount to punishing children because of their needs, or due to the failings of their parents. If a child has care and supervision needs that go beyond the appropriate scope of a criminal justice response, then interventions should be sought outside the child justice system, i.e. through supportive social welfare interventions. In particular, children should not be subject to a custodial order simply as a means of providing them with access to education or vocational training, or to overcome problems with parental supervision. Training and guidance can be provided more effectively, with less stigma and in a more cost effective way through community-based programmes. While STBs, probation hostels and Henry Gurney Schools are clearly preferable to prison facilities, it is rarely, if ever, in a child's best interest to be confined to a rehabilitative institution.

KEY FINDINGS

The last resort principle means that any form of deprivation of liberty, including placement in an STB, probation hostel, Henry Gurney School, or juvenile rehabilitation centre should be used only in cases where the child has committed a serious crime involving violence or persists in committing other serious offences and there is no other appropriate alternative. While most stakeholders advised that they were guided by the principle of institutionalisation as a last resort, their understanding and application of that principle was often not in accordance with international standards. “Last resort” was generally understood as permitting custodial sentences whenever a parent was unwilling or perceived as unable to provide an appropriate level of supervision over the child. Sentencing decisions seem to centre mainly on the capacity of parents, the child’s physical living environment and the willingness of parents to sign a bond or take the child back, rather than the nature and seriousness of the offence or character of the child. As a result, a significant number of children are being subjected to deprivation of liberty for minor, non-violent crimes. Statistics from JKM show that the majority of children in its custodial facilities have committed very minor crimes, the most common being theft.

Reducing reliance on custodial orders and institution-based rehabilitation requires a wide range of sentencing options, with maximum flexibility for Magistrates to tailor an order to the individual child. By international standards, Malaysia currently has limited sentencing options available. In practice, the tendency seems to be to rely mainly on monetary bonds of good behaviour with conditions relating to reporting, participation in an inter-active workshop, and sometimes curfews. However, Magistrates do not appear to be exercising sufficient creativity in crafting these orders to suit the individual child. In addition, the period of supervision is often out of proportion to the nature of the crime and the circumstances of the child, resulting in an inefficient use of resources.

For many children, an order directing them to a specific counselling, rehabilitation or vocational training programme would be sufficient, without the need for a lengthy three-year period of reporting regularly to the police or a probation officer. International studies also suggest that requiring children to report to the police is both ineffective and counter-productive; where some form of supervision is required, it is preferable for children to be subject to the guidance and support of a probation officer. For those who require more intensive interventions, a range of alternative, non-residential sentencing options should be made available, such as guidance and supervision orders (generally undertaken by a community volunteer), non-residential attendance centre orders (requiring the child to attend an activity centre for a specified number of hours each day), or intensive supervision and support order (requiring more direct contact and support from a probation officer). Malaysia has the basic infrastructure and potential to support these types of alternatives without significant additional investment (discussed in more detail under Section 8).

To adopt a more individualised approach to sentencing, Magistrates and Judges will require clear guidance and training, as well as comprehensive assessments of the child’s background and circumstances. This type of information is currently available through probation reports, however the content of reports is sometimes quite superficial. A more detailed assessment of the child and family, as is done by counsellors post-sentencing, would provide more insight. Probation officers could be trained, as in other countries, to use basic assessment tools (e.g. standardised risk assessment forms), thus providing the Court with a more objective and detailed picture of the child and family.

Consideration could also be given to providing Magistrates the discretion to refer a child to a Family Group Conference for sentencing recommendations. FGCs are used in a number of countries, including New Zealand, Canada, Australia, and Singapore not just as a diversion option, but also to provide non-binding recommendations to the Court regarding the most appropriate sentence to impose on a child who has been found guilty by the Court. FGCs allow children, parents and victims to play a greater role in the sentencing process, thus adding a restorative element and providing more insight into how best to address the child’s offending behaviour. This would likely be more meaningful than the current practices of having Court Advisors give input on sentencing, since the Advisors currently play a fairly limited role in the process and by their own account generally simply follow the advice contained in the probation report.

RECOMMENDATIONS

It is recommended that the following measures be taken in order to improve consistency in sentencing practices, to promote greater use of non-custodial sentencing options and to ensure that deprivation of liberty is used only as a measure of last resort and for the shortest possible period:

- **Amend the Child Act** to:
 - Include a statement of sentencing principles, with explicit reference to the best interest principle, the proportionality principle, and the principle of institutionalisation as a last resort;
 - Allow for probation reports to be waived in minor cases, or where they would cause undue delay;
 - Eliminate placement in a probation hostel as a sentencing option;
 - Expand the sentencing options to include a wider range of non-custodial alternatives, including guidance and supervision orders; reparation to the victim; community service work; orders to attend counselling or life-skills programmes; non-residential education or vocational training orders; intensive support and supervision orders; and attendance or day centre orders. These options should be available as stand-alone orders, not necessarily attached to a probation order or bond of good behaviour.
 - Shorten the period for probation orders and bonds of good behaviour.
 - Include restrictions on the types of offences for which children may be subject to a custodial sentence, and in particular prohibit the use of imprisonment for all minor and non-violent offences;
 - Eliminate the mandatory three-year term for Approved School and Henry Gurney School placements and require that the duration of any institutional placement be proportionate both to the circumstances of the child, as well as to the seriousness of the offence;
 - Eliminate whipping as a sentencing option;
 - Eliminate life imprisonment and indefinite imprisonment at the pleasure of the Ruler;
 - Establish a maximum period for imprisonment of a child, regardless of the crime.
- **Issue detailed instructions for Magistrates and judges on the exercise of their discretion in sentencing children.** This should encourage a more individualised approach to orders, promote more creative approaches to tailoring conditions and requirements to the child, encourage less reliance on monetary bonds, and address the appropriate use of custodial sentences.
- **Issue detailed regulations and guidelines regarding the regular, periodic and independent review of all children in detention by the Board of Visitors.** Provide all Board members with training on this important task.
- **Provide more training and resources to improve the quality of probation reports.**
- **Consider eliminating the function of Court Advisors and introducing instead Family Group Conferencing as part of the sentencing process.**



COMMUNITY- BASED REHABILITATION PROGRAMMES AND SERVICES

International Standards

As noted above, the CRC emphasises the importance of promoting community-based sentencing alternatives to provide care, guidance and supervision to children in conflict with the law. The UN Committee on the Rights of the Child has interpreted this to mean that States parties should have in place a well trained probation service to allow for the maximum and effective use of dispositions such as guidance and supervision orders, probation, community monitoring, and day report centres.¹²³ The Beijing Rules highlight the important role that communities and volunteers can play in supporting these initiatives, stating that volunteers, voluntary organizations, local institutions, and other community resources should be called upon to contribute effectively to the rehabilitation of the child in a community setting and, as far as possible, within the family unit.¹²⁴

Internationally, there has been growing recognition of the need to shift away from reliance on custodial measures and to invest instead in strengthening programmes and services to provide supervision and support to child offenders in the community. In particular, strengthening probation services and other community-based rehabilitation programmes has been one of the main strategies used to reduce rates of child detention and child recidivism. In general, studies have found that the most effective models for providing support services to children in conflict with the law are those that include the following elements:¹²⁵

- **Individualised approach:** Each child is unique, and the circumstances of how each child has

ended up in conflict with the law are different. Interventions must therefore be targeted and specific to the individual child's circumstances. This means conducting a comprehensive assessment of the child and his/her family and designing a plan tailored specifically to them. Studies have also highlighted the importance of ensuring that the level of intervention is appropriate to the individual child. Overly intervening in the lives of children who are at low risk of re-offending is not only an inefficient use of resources, but may also increase the risk of re-offending through the process of labelling. On the other hand, children who are identified as being at high risk of re-offending generally require more structured, intensive support, with a higher number of contact hours.

- **Multi-dimensional approach:** a child's behaviour and development may be affected by a complex interaction of multiple factors. Therefore, the most effective interventions are those that target the multiple factors contributing to the child's offending and address problems in each aspect of his/her life, including family, school, community, and individual development. In particular, approaches that involve parents and other family members have been found to be more successful than those that focus solely on the child. This means not just eliminating problems in the child's environment, but also building up the child's strengths or "protective" factors that can help them cope better with the difficulties in their lives. In the US and UK in

123 General Comment No. 10 (2007): Children's Rights in Juvenile Justice, CRC/C/GC/10, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

124 Article 25.1.

125 Burnett, R. And Roberts, C. (Eds), *What Works in probation and Youth Justice: Developing Evidence-based Practice*, London: Willan Publishing, 2004; For a full review of current international research into what models are most effective for dealing with juvenile offending behaviour see Kay McLaren "Tough is not Enough: A review of what works to reduce offending by young people," New Zealand Ministry of Youth Affairs, June 2000, available at www.youthaffairs.govt.nz.

particular, a plethora of programme evaluations have shown that the programs most proven to reduce recidivism in a cost-effective manner are those where a wide range of services are delivered to both the child and his/her family.¹²⁶ For example, one research study in the U.S. showed that children placed on probation were 14 percent less likely to commit future crimes than those who had been subject to a custodial sentence.¹²⁷ In the UK, the introduction of a parenting support programme resulted in a 56 percent reduction in offending.¹²⁸

- **Teach New Skills through Experiential/ Active Approach:** Many children in conflict with the law need to be taught new attitudes/ values and new thinking skills, such as anger management, conflict resolution, problem solving, and practical alternative ways for coping with peer pressure and dealing with difficulties in their lives. The most effective way to teach these skills is using cognitive-behavioural techniques to actively promote new skills and attitudes. Adolescents learn by watching, doing and practicing, and simply counselling or lecturing children about what is right or wrong is not very effective. Children need to be given opportunities to learn and practice new behaviours and cognitive skills, for example through role-plays and interactive, experiential learning programmes.
- **Modelling and mentoring:** Often, persistent child offenders are those who have not been exposed to significant positive role models in their lives and have therefore not learned how to behave in a positive, pro-social manner.

Effective interventions should therefore aim at making sure children spend most of their time with people (adults and peers) who are law abiding and productive citizens. This may be done by involving them in regular, ongoing sports, youth groups, or cultural activities in the school or community where they will come into contact with adults and peers who are involved in more socially desirable lifestyles, or by assigning the child a volunteer adult mentor. This allows children to learn positive behaviours through regular association with a positive adult role model.

Research has also debunked some common myths about how best to promote children's rehabilitation and have demonstrated that many "common sense" approaches are in fact counterproductive. The following approaches have been shown to be ineffective in preventing re-offending:

- **Harsh Treatment or Scare Tactics:** it is commonly believed that children could be "scared" out of committing crime through shock or scare tactics such as harsh or demeaning lectures from the police, spending the night in a police cell, prison visits, lectures by prisoners, or military-style "boot camps". However, studies have shown that in fact these tactics are not effective and almost always fail. This is because children who are persistent offenders are often lacking the skills and values necessary to behave in a pro-social manner and cannot simply be "scared" into good behaviour. Instead, they need to be taught the necessary skills or competencies that they are lacking, such as getting along

126 Holman, B. and Ziedenberg, J. (2006) "The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities" Washington: Justice Policy Institute; Gbate, D., Ramella, M. (2002), Positive Parenting. The National Evaluation of the Youth Justice Board's Parenting Programme, London: Youth Justice Board; McNeill, F. (2006) 'Community Supervision: Context and Relationships Matter', in B. Goldson and J. Muncie (eds) Youth Crime and Justice: Critical Issues. London: Sage.

127 Holman et al, (2006).

128 Gbate (2002).

with other people, problem solving, anger management, etc.

- **Community Restraints or Supervision without Support Services:** home detention, electronic monitoring and requiring children to simply report regularly to a probation officer or the police without providing support services to address the underlying factors that contributed to the child's offending behaviour has proven ineffective. Supervision orders are much more effective when they include services to help the child and his/her family address risk factors. In particular, intensive Probation Supervision based on electronic monitoring and intensive reporting requirements has proven to be ineffective unless combined with appropriate rehabilitative services.
- **Generalised Family and Individual Counselling:** vague, non-directive, unstructured counselling has been shown to be ineffective at addressing offending behaviour. Family or individual counselling that does not focus on risk factors for re-offending or that uses ineffective techniques for changing them, is unlikely to have an impact.

Malaysian Laws and Policies

Under the Child Act, primary responsibility for supervising children who are subject to a community-based order (bond of good behaviour, probation order) lies with probation officers. Probation officers are social welfare officers or assistant social welfare officers who have been appointed and gazetted by the Minister.¹²⁹ The Act also makes provision for the establishment of Child Welfare Committees at the district level to assist

probation officers and oversee the welfare of children in conflict with the law. General guidance with respect to their composition and functions is provided under the Juvenile Welfare Committee (Constitution and Responsibilities) 1976.

The Child Act includes limited detail with respect to the supervision or support that should be provided to children who are under the guidance of a probation officer. Children may be required to "submit to the supervision of the probation officer", to report to the probation officer at regular intervals, to reside at the home of a parent, relative or some other fit person, to attend an educational institution recommended by the probation officer, and to follow a curfew. In addition, both the child and his/her parent can be required to attend an "interactive workshop".

Structures, Processes and Practices

The Children's Division of the Department of Social Welfare currently has approximately 700 gazetted probation officers responsible for supervising child offenders under community-based orders, as well as child offenders who have been released from institutional care. However, not all staff members who are gazetted as probation officers are actively performing probation officer duties. In addition, many probation officers are also co-appointed as Protectors and also perform other general social welfare duties as and when required.

A significant amount of their time is spent appearing at Court for Children sittings and preparing probation reports. In some districts, probation officers have been provided office space within the courthouse.

129 Child Act, Article 10.

However, in other districts their offices are located within the local social welfare office.

Some probation officers have formal training in social work, however in general they come from a variety of backgrounds such as teaching, banking, economics, IT, business administration, etc. All undergo a three-month specialised induction training programme provided by the Social Welfare Institute. The Institute also offers regular short-courses and all staff members are required to attend a minimum of seven days of training per year. In 2001 and 2002 the service reportedly underwent a significant expansion, with many new officers recruited and appointed without induction training. Training is now ongoing, but the delay has reportedly impacted on the quality of services provided. In addition, rapid promotion has been used in recent years to fill gaps in middle-management, resulting in some managerial-level staff having limited front-line experience and therefore difficulty in guiding and supporting field-level staff. Concerns were raised by some stakeholders that probation officers sometimes lacked the skills, confidence and personality to work effectively with children. Many probation officers themselves were of the view that they could benefit from more specialised training and skill-development in handling children in conflict with the law, in particular regarding exposure to international models for addressing offending behaviours.

Children who are placed under the supervision of a probation officer are generally required to attend the probation office once per month, accompanied by a parent. These meetings last approximately 15 minutes and are used as an opportunity to provide the child and parent with guidance and advice. Parents and children generally described the process as attending the office to “sign”. Some parents found meeting with probation officer to be helpful and noted that although

their child may not listen to them, the child does listen when the probation officer tells them what to do. However, others advised that neither they nor their child had received any advice or support during their reporting visits. None of the parents who participated in the study had received a home visit from their probation officer, other than the initial visit to prepare the probation report. Most advised that they would like to have more programmes and activities for their children, particularly vocational training, exposure visits to vocational schools so children can see what options are available to them, and motivational programmes. In two of the group discussions with parents, participants highlighted the fact that there is no support for parents who are having difficulty with their teenagers and it is only after the child has committed a crime that they are able to get any help.

Due to limited staff and resources, probation officers reportedly have limited ability to provide individual guidance and support to children and there does not appear to be a comprehensive assessment, case management and referral process used. Probation officers advised that they sometimes provide families with help accessing financial support and assist children with school enrolment or vocational training if can. However, there is no standardised written care planning. Caseloads can be quite high, with each probation officer reportedly having between 60 (Kuala Lumpur) to 200 (Johor Bahru) children under their supervision. Probation officers advised that this caseload, combined with their Court obligations, did not allow sufficient time for rapport building or provision of individualised support to children under their supervision. Many were of the view that they would be more effective if they were able to focus on and build up specialisation in probation services, rather than being pulled into other departmental activities.

WHAT THE CHILDREN SAID:

All children have to do is “sign” and then leave. With the Probation Officers, there was no talk.

There are not many programmes organized by the social workers assigned to your case.

Social workers say at the beginning that they will visit you at home, but they never show up.

Two or three years of probation is too long a time. Programmes are organized rarely.

We participated in one interactive workshop with our parents in the past year. It had games and activities which were childish. We would rather that the games are designed to make us think.

Some motivational camps are helpful. But some camps are very boring, with just motivational talks that bore you (straight aje, lentok jadinya). If the camps have more activities, games with messages, then it will be more effective.

The workshops will not really prevent young people from committing any crimes or being naughty. They are too short and conducted sporadically to make any impact. It takes time for young people to change.

Counselling is a good thing for young people because it gets them to release their tension and get them talking about what is bothering them.

Counselling is a waste of time and energy.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

Most districts have a Child Welfare Committee in place tasked with assisting probation officers and providing support to child offenders and their families. There are approximately 110 district-level Child Welfare Committees nationwide,¹³⁰ each comprised of approximately 14 volunteers appointed by the MWFC. Most are retired social workers, teachers, police officers, and other former public servants. Each

Child Welfare Committee is given a grant of RM5,000 per year to plan and implement programmes and activities, such as awareness programmes, seminars, parenting courses, youth camps, and motivational programmes. Committee members receive no specific guidance or training on their role and function, though most are reportedly experienced in social welfare and / or children's issues.

In all locations visited, Committee members advised that they prepare an annual plan and budget and meet on a monthly basis. However, the degree to which the Committees are active and effective seems to vary. Some, such as the CWC in Kuala Lumpur and Johor Bahru, have had their term end with no re-appointments for over a year. All Committees advised that they generally organise only one or two events per year due to limited time and financial resources. In particular, the requirement that they submit a proposal and budget for each activity reportedly causes significant delays and impedes implementation of planned activities. Some Committees have organised neighbourhood or school-based crime awareness activities, seminars and motivational programmes for problem children and parents. However, most Committees focus on organising holiday events, sports days, family days, and motivational talks for children in local STBs and probation hostels.

The primary role of the Committees is to assist probation officers with child offenders under supervision and to support the reintegration of children released from institutions. However, most of the Committee members who participated in the study were focused primarily on organising events for children in institutions, rather than children under community-based supervision. At least with respect to the STBs, this tends to duplicate the function of

the Board of Visitors. Committee members who participated in the group discussions advised that they are rarely asked by probation officers to assist in supervising a child offender who is under supervision. Different probation officers reportedly have different ways of involving the Committees, however very few of them use members to provide mentoring or support to children under their supervision. While some members have had experience providing individual mentoring to children, this is not common.

Currently, the only community-based rehabilitation programme available for child offenders is the “interactive workshop”. The interactive workshop programme, operated by JKM district counsellors, involves individual and family counselling, parenting workshops and a family camp. The main objective of the programmes is to strengthen parenting skills and improve the parent-child relationship. All child offenders and their parents who have been ordered by the Court to participate in the programme first undergo an assessment process. A detailed series of psychological inventories has been used for this purpose, covering a range of issues, including risk assessment, self-esteem, family cohesiveness, personality, and career aptitude. It appears that in some locations, the assessment is done verbally with the parents and child, while in others they are given a written questionnaire to complete. The whole process is done under the complete guidance of the respective counsellors. Parents who completed the written questionnaire reported that it was very long and that they got bored, stating they would prefer a more interactive approach involving talking, rather than a written form.

Counsellors advised that they discuss the findings of the assessment with the child and parent and use the results to guide their interventions. Standardised case

management forms have been developed to record the intake interview, assessment, interventions, and family progress.¹³¹ Follow-up generally involves a series of family counselling sessions, referral of the parents to a parenting session and participation of the parent and child in a family retreat. In some districts, workshops and motivational sessions on topics such as stress management, civics and anger management are organised for the children and parents, however, due to limited funding this generally happens quite infrequently (once per quarter, or once per year). In general, most support is provided on an individual basis by giving guidance and advice during monthly office visits. However, as with probation officers, the lack of staff and resources means that counsellors have very limited time to spend with each individual family. Parents who participated in the study advised that they were generally asked to visit the counsellor’s office two or three times and to participate in the family retreat. Some parents were of the view that the counselling was very helpful, as it brought out problems between the parent and child and helped motivate parents to improve their communication with their child. However, the views of the children with regard toward the effectiveness of the counselling provided were more mixed.

District counsellors also organise an annual Family Retreat or Family Camp for between 25 to 50 families who are participating in the interactive workshop programme. Families are taken to a resort for three days and two nights, where they participate in a series of games, seminars and group counselling sessions designed to build cohesiveness between children and parents. Parents who participated in the interactive workshops were generally very appreciative of the retreat, highlighting that it gave them an opportunity to bond with their child, to improve their parenting and communication skills, as well as motivated

131 Standard Operational Procedure of Interactive Workshop Child Act 2001.

them to be better parents. Many also appreciated the opportunity to meet other parents and realise they were not the only ones experiencing problems. However, some parents were of the view that, while the retreat was good, additional sessions or follow-up support afterwards was needed. Others advised that it would have been better to have some sessions with parents alone, while the children participated in other activities designed specifically for them. Some of the children expressed the view that the retreat was held too infrequently to have any genuine impact and that the motivational talks and games were boring. While some parents thought that the retreat had a positive impact on their child's behaviour, most did not notice any positive results or noted only temporary improvements.

KEY FINDINGS

Globally, one of the key trends in juvenile justice reform has been the introduction of community-based rehabilitation programmes to supplant or reduce reliance on institution-based approaches. International experience suggests that the success of any rehabilitation programme lies in an individualised approach, as well as the skill and commitment of the individuals who are delivering it. Probation and other community-based rehabilitation programmes are most effective when they are managed by skilled social workers and other professionals who are able to undertake comprehensive assessments of the child and family and devise an appropriate intervention plan. The duration of supervision and the nature and extent of the support provided should be tailored to the individual child, so as to avoid overly-intervening with children who are at low risk of re-offending and to provide appropriate multi-dimensional support to children with more complex circumstances.

Malaysia currently has a cadre of highly dedicated district-level probation officers and professional counsellors tasked with supporting children in conflict with the law and their families. However, due to a shortage of staff, training and resources, most have limited ability to provide individual guidance and support to children. Probation officers are of necessity largely occupied with their duties to the Court for Children, leaving limited time for supervising children or devising appropriate community-based rehabilitation programmes. Many have only basic training in social work and limited exposure to specialised skills, tools and techniques for dealing with children in conflict with the law.

Children under a community supervision order meet regularly with a probation officer and / or counsellor and receive some guidance and advice. However, these meetings are quite cursory and sometimes amount to simply signing a register. Although relatively comprehensive assessment tools are being used by counsellors to better understand the child and his/her family, the assessment results are not being used to generate individual written care plans, or to tailor a package of interventions designed to meet the child's specific needs. Follow-up largely takes the form of ad hoc and undirected family counselling which, as noted above, has been proven internationally to have relatively limited success. Lengthy standardised three-year supervision periods also mean that resources are being spread thinly across large case-loads of children, many of whom would likely require very limited intervention.

The introduction of the interactive workshop programme has been a positive step towards more community-based approaches to rehabilitation, and also signals an important recognition that children's offending behaviour is generally best addressed by looking holistically at his/her family environment. However, the programme focuses almost exclusively on the parent-child relationship, to the exclusion of other factors that might be contributing to the child's offending behaviour. While parenting effectiveness training and family cohesion are important factors in addressing a child's offending behaviour, they are generally only part of a broader, multi-dimensional approach. Focusing only on holding parents accountable for their children's behaviour and sanctioning them financially if they fail to do so does not take due account of adolescents' growing independence and the influences outside their family. For many children, promoting responsible behaviour requires more than just curfews and improved family communication; programmes and services should also be directed at strengthening the child's cognitive or social skills (decision-making, anger management, conflict resolution), peer influences, and other key protective factors such as education, skills training and employment. While there have been some programmes designed to address some of these adolescent social skills, this has often been through seminar-based motivational programmes, rather than structured, inter-active modules.

The interactive workshop model has been in operation for several years, but has yet to undergo a full evaluation of its impact and effectiveness. Feedback from parents and children who participated in the study suggests that the model could be strengthened through some minor modifications. For example, it was noted that periodic family camps, without structured follow-up, may not be effective, and that greater attention should be paid to designing modules and activities specifically for adolescents.

KEY FINDINGS

Results from the study also suggest that the Child Welfare Committees are not currently functioning as intended and have not proven to be a successful mechanism for engaging the community in support of children in conflict with the law. Rather than mentoring and supporting children under community supervision, the Committees are focused largely on organising periodic celebrations, sporting events and motivational programmes for children in institutions. While probation officers were generally of the view that the Committees play a helpful, supportive role, few were using them to help support children under their supervision. Most Committees lacked a sufficient number and diversity of members to take on a mentoring or volunteer probation officer role, as in Japan or Singapore. They also do not have the structures, resources or capacity to perform the function of community youth justice boards, such as those operating in the UK and Canada.

RECOMMENDATIONS

In order to improve the range and effectiveness of community-based supervision and rehabilitation programmes for children in conflict with the law, it is recommended that Malaysia:

- **Appoint more probation officers and / or amend the Child Act to allow trained volunteer probation officers to provide assistance.** Consider appointing more support staff to relieve probation officers and counsellors of administrative tasks so that they can focus more of their time on direct support to children and families.
- **Build the skills and capacity of probation officers to develop structured, written intervention plans for children subject to community orders,** based on a comprehensive assessment of both the child and family.
- **Promote an individualised and multidimensional approach to intervention planning,** with support aimed at addressing not just the parent/child relationship, but also the child's cognitive and social skills, peer network, as well as education, training or employment needs.
- **Consider introducing a more intensive support and supervision programme for high-risk children who need more guidance and support.** Emphasis should be placed on additional, structured support services, not simply increased reporting and surveillance.
- **Design more structured, interactive experiential learning programmes to replace existing ad hoc motivational programmes.** These programmes should use interactive methods to build children's cognitive skills and address offending behaviours through, for example, group sessions on decision-making, anger management, conflict resolution, peer influence resistance, alcohol/drug treatment, etc. Programmes could be developed in partnership with the Child Welfare Committees or NGOs.
- **Introduce a mentoring programme,** using CWC members and community volunteers to help mentor child offenders. Consideration should be given to extending volunteer recruitment beyond the current focus on retirees to include youth mentors.
- **Establish parent support groups** for parents of children in conflict with the law or who are experiencing difficulties with their teenagers.
- **Develop an "attendance centre" model using existing Child Activity Centres.** This will likely require some additional guidance and skills training for Centre staff.
- **Reconsider the role and functions of the Child Welfare Committees,** which are currently not functioning effectively. Consider either building their capacity so that they can manage local planning and delivery of community-based rehabilitation programmes, or phasing them out in favour of a cadre of individual volunteer probation officers under the supervision of JKM.



CORRECTIONAL SCHOOLS, REHABILITATION CENTRES AND PRISONS

International Standards

The CRC requires that every child deprived of liberty must be treated with humanity and respect for their inherent dignity and in a manner that takes into account the needs of persons of his or her age. Children must also be separated from adults in all places of detention.

In addition to these basic safeguards, both the Beijing Rules and UN Rules for Children Deprived of the Liberty (JDLs) provide detailed guidance with respect to the care and treatment of children in all forms of institutional care. The JDLs in particular set out a complete code for the care of children deprived of their liberty, regardless of the type of institution. Both sets of rules emphasise that all facilities for children must meet the requirements of health and human dignity and should ensure to the extent possible that children subject to detention continue to enjoy their basic rights under the CRC.

The JDLs promote the establishment of small, “open” facilities for children that are integrated into the community and have no or minimal security. Where closed or secure facilities are used, they should be small enough to enable individualised treatment. Sleeping accommodations should consist of small group dormitories or individual bedrooms, rather than prison cells. In addition, all institutions for children should be decentralised so as to facilitate contact between the child and his/her family.¹³²

Both the Beijing Rules and JDLs highlight that the objective of any training and treatment of children placed in institutions is to provide care, protection, education, and vocational skills, with a view to assisting

them to assume a constructive and productive role in society. Where the length of a child’s stay in the facility permits, trained personnel should prepare a written, individualized treatment plan specifying treatment objectives, time-frames and the means by which the objectives should be achieved.¹³³ Children in detention must be afforded the same right to basic education as other children, to the extent possible by providing access to community schools outside the institution. Special attention should be given to meeting the learning needs of foreign children and children with learning difficulties. In addition, every child should have the right to receive vocational training and to participate in other meaningful activities.¹³⁴

The JDLs also emphasise the importance of ensuring that children subject to detention continue to have regular contact with their family and community. Children should be permitted to leave the institution to visit their home, as well as for educational, vocational or other important reasons. In addition, every child should have the right to receive regular and frequent visits, in principle once per week, in circumstances that respect the child’s need for privacy and unrestricted communication with their family.¹³⁵ The UN Committee on the Rights of the Child has stated that in order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family. Exceptional circumstances that may limit this contact should be clearly described in the law and not left to the discretion of the competent authorities.¹³⁶

The JDLs also require that every institution caring for children have an appropriate disciplinary system in place, with clearly articulated rules and a fair system for

132 Articles 30 – 33.

133 Article 27.

134 Articles 38-47.

135 Articles 59, 60.

136 General Comment No. 10 (2007): Children’s Rights in Juvenile Justice, CRC/C/GC/10, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

imposing punishments. Measures should be in place to ensure that children are protected from maltreatment and are not subject to cruel and inhumane punishments or unnecessary use of force and restraints. Corporal punishment, solitary confinement, placement in a dark cell, restrictions on family visits, and reduction of diet are all strictly prohibited.¹³⁷

The Beijing Rules also highlight the importance of ensuring due regard for girls who are detained in institutions. The Rules state that young female offenders placed in an institution deserve special attention as to their personal needs and problems and must not receive less care, protection, assistance, treatment, and training than young male offenders.¹³⁸ This is intended to address the fact that female offenders often receive less attention than their male counterparts, are more likely to be detained together with adults and often end up in institutions distant from their homes due to the shortage of facilities for girls.

Malaysian Laws and Policies

The Child Act provides for four different types of institutions for child offenders, with varying degrees of security:

Probation Hostels: Probation Hostels are designated and gazetted by the Minister of Women, Family and Community Development, and are subject to the regulation, management and inspection of the JKM. They are guided by the Probation Hostels Regulation 1982.¹³⁹

Approved Schools, or Sekolah Tunas Bakti (STBs):

The Child Act states that STB shall be established for the education, training and detention of children. The STBs are also designated and gazetted by the Minister of Social Welfare and subject to the regulation, management and inspection of the JKM.¹⁴⁰ They are guided by the Approved School Regulations 1981.

The Child Act requires the appointment of a Board of Visitors for each STB, though not for probation hostels.¹⁴¹ Each Board of Visitors must be comprised of not less than seven members. The responsibilities of the Board of Visitors are mainly to supervise and assist the management in the administration of the Schools, especially with regard to children's welfare.

Henry Gurney Schools: Henry Gurney Schools are operated by the Prisons Department and follow a higher security regime than STBs. They are governed by the Henry Gurney School Rules 1949.

Prisons: Children subject to an order of imprisonment are placed in a Youth Rehabilitation Centre operated by the Prisons Department. The Child Act states that a child ordered to be imprisoned shall not be allowed to associate with adult prisoners.¹⁴² Apart from this general protection, the care and treatment of children is guided by the Prison Act 1995, which defines a "young offender" to be a prisoner who is under the age of 21 years. Section 49 (3) of the Act states that a young prisoner shall, so far as local conditions permit, be kept apart from adults under detention. Apart from this protection, there are no special provisions regarding the care or treatment for children in prisons.

The Education Amendment Act 2002¹⁴³ makes primary

137 Articles 64, 67.

138 Article 26.4.

139 Child Act, s. 61(1).

140 Child Act, s. 65(1).

141 Section 82.

142 S. 96(3).

143 Act 1152.

education compulsory for all children who have reached the age of six. However, there is no explicit mention of education for children in detention.

and meet with inmates. However, SUHAKAM does not currently have the authority to make unannounced visits or to meet with inmates in private. Any concerns they note are reported to the relevant ministry and included in their annual report to Parliament.

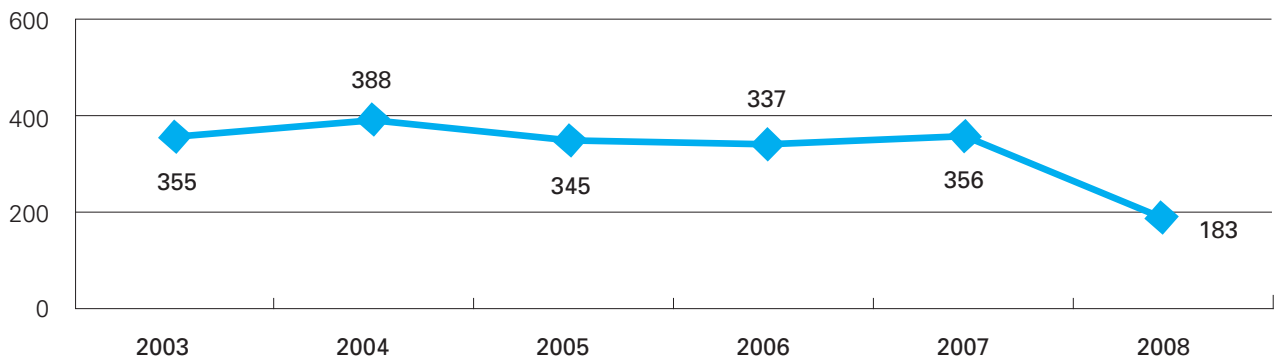
Structures, Processes and Practices

Malaysia currently has 11 probation hostels (three for girls and eight for boys) and 9 STBs (six for boys and three for girls) operated by the Department of Social Welfare, as well as 2 Henry Gurney Schools and 6 Juvenile Rehabilitation Centres operated by the Prisons Department. Monitoring of these facilities is undertaken through routine inspections by JKM / Prisons Department officials and periodic visits by the Board of Visitors / Board of Visiting Justices. In addition, SUHAKAM conducts regular visits to all places of detention throughout the country, including police lock-ups, prisons and sometimes STBs and Probation Hostels. They visit either in response to a complaint, or as part of their regular schedule of visits. While there, they are able to visit and inspect the premises

i) Department of Social Welfare Facilities

Probation Hostels cater to children under remand, children in transit to an STB and children under a Court order of detention for 12 months because they have committed a crime or are “beyond control”. They are generally smaller in size than STB’s, with a capacity of between 50 and 80 children. Stakeholders advised that probation hostels generally operate below capacity and that the majority of children are generally on remand, rather than a probation order. For example, in Kuala Lumpur, only 3 out of 15 children were on probation orders, and in Johor Bahru, only 7 out of 20. Johor Bahru has recently completed construction of a new probation hostel with a capacity for 200, though at the time of the study the current facility had only 20 children.

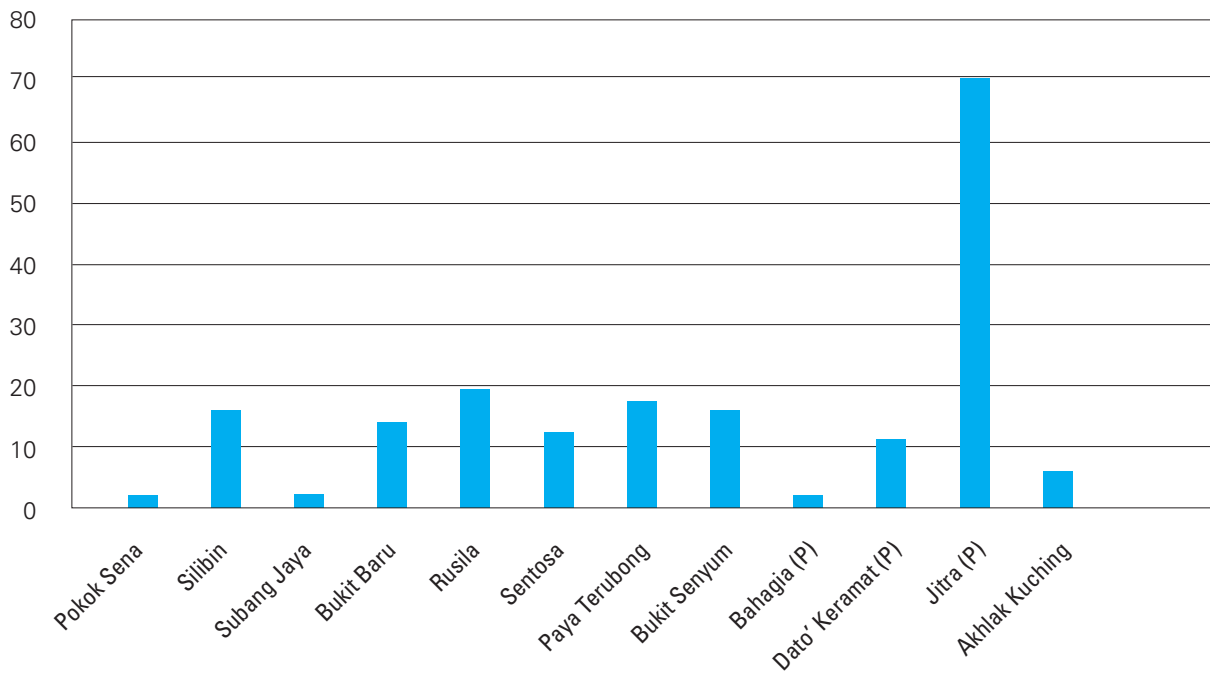
Number of Children in Probation Hostels (2003 - 2008)¹⁴⁴



Source: Department of Social Welfare, 2003 - 2008

¹⁴⁴ Refers to number of children in the institution at the end of the year, rather than newly admitted children.

Number of Children in each Probation Hostel at year end, 2008¹⁴⁵



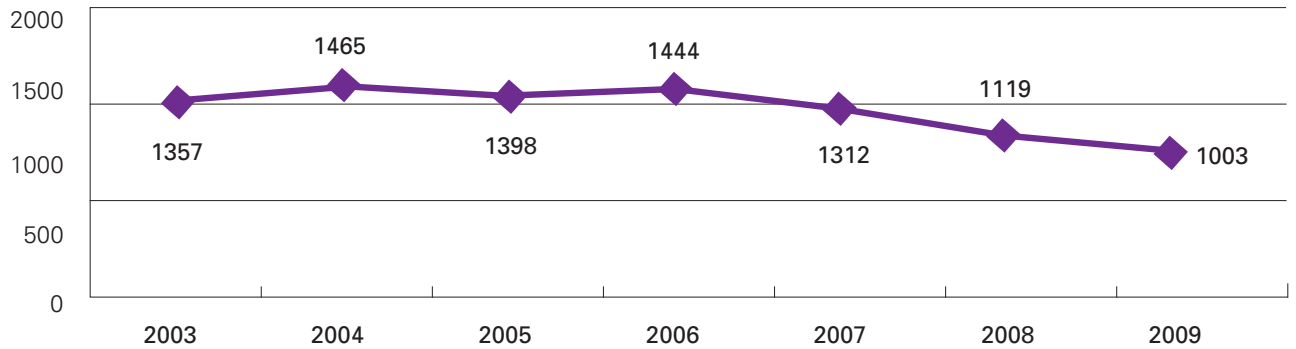
Source: Department of Social Welfare, 2008

All Probation Hostels have a daily schedule of activities for children, which generally includes periodic roll call, marching drills, time for education or training, religious instruction, sports and recreation, and free leisure time. Institution staff placed significant emphasis on organising activities and programmes to keep the children occupied. Children who were in school prior to being placed in the probation hostel may be permitted to continue their education in regular schools outside of the institution. However, the number of children who benefit from this is generally quite small (one or two per institution).

Those who are not enrolled in formal schooling are provided basic instruction in reading and writing (Kelas Intervensi Awal Membaca dan Menulis - KIA 2M) and some vocational training. Training facilities at the Probation Hostels are more limited than STBs, primarily focusing on basic, practical skills such as haircutting, gardening / landscaping, fish rearing, cooking, and music classes. The institutions also organise regular community outings to movies, sports centres, sporting competitions, etc.

145 Those labelled (P) are hostels for girls.

Number of Children in STBs (2003 - 2009)



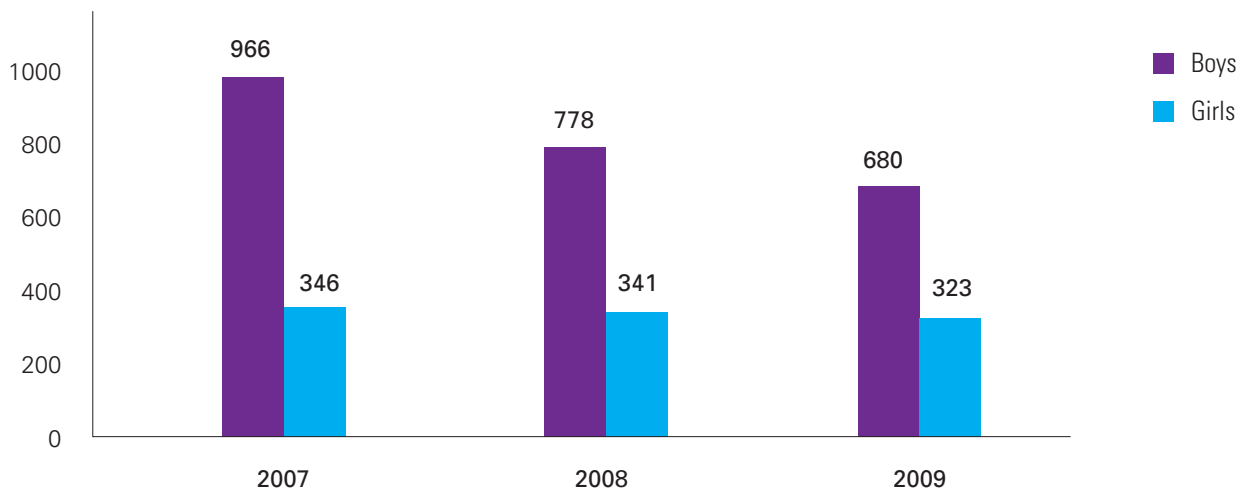
Source: Department of Social Welfare, 2003 - 2009

Sekolah Tunas Bakti, or STBs cater to child offenders, children who are beyond control, and sometimes children on remand. They are generally large-scale facilities with a capacity of between 100 to 200 children.

There are currently nine STBs nationwide, with a total capacity for 1,200 children. Since 2003, the STBs have consistently housed over 1,000 children.

Of these eight STBs, six are for boys and three for girls.

Number of Children in STBs By Gender (2007 - 2009)

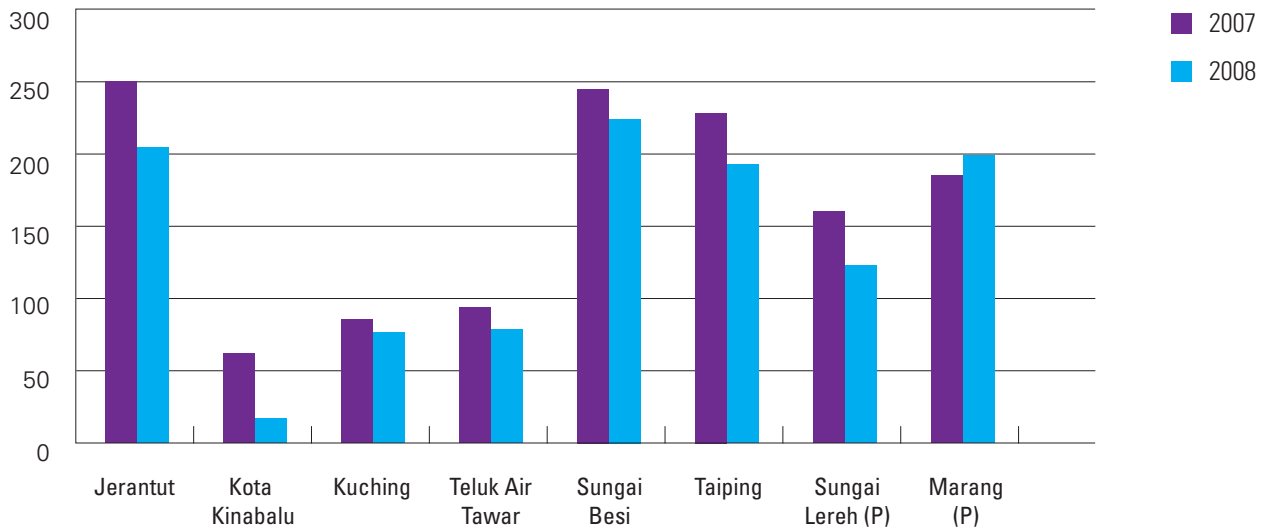


Source: Department of Social Welfare, 2007 - 2009

As with the probation hostels, STBs generally operate under capacity. At the time of the study, for example, the STB in Kuala Lumpur had only 67 boys (with

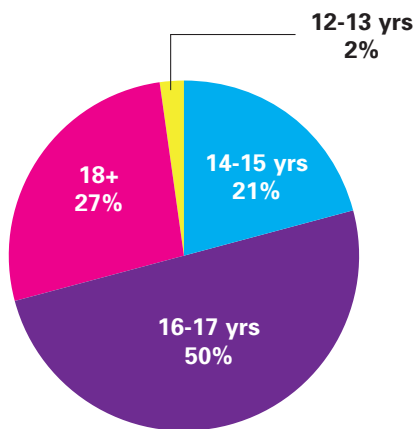
capacity for 200) and Kota Kinabalu had 51 (with capacity for 200).

Number of Children in STB by Location (2007 - 2008)



Source: Royal Malaysia Police, 2003 - 2008

Children Newly Admitted to the STBs 2009, by Age



Source: Department of Social Welfare, 2009

The majority of children in STBs are reportedly between the ages of 15-18, though sometimes children as young as 10 or 12 are admitted.

As with probation hostels, children in STBs follow a structured daily programme that includes morning assembly, regular roll calls and marching drills throughout the day, education and vocational training, religious instruction, and recreation or leisure time. Some STBs, including Sg Lereh in Melaka and STB Marang in Terengganu, offer formalised schooling in-house, providing PMR and SPM level classes, as well as basic “2Ms” for children who are illiterate. The formal education programme is taught by qualified teachers seconded from the Ministry of Education and follows the same curriculum as State schools. Children sit the public exams as independent candidates so there is no

record of them having been in an institution. However, stakeholders raised the concern that the teachers designated to the STBs are often only qualified as primary school teachers. It was also noted that, since many STB students have been out of school for some time prior to their entry, it can be difficult to motivate them to study again. In addition, because only a limited number of grade levels are taught, many children have to condense several years of schooling into one in order to catch up. For example, a child in Form 3 sitting for the PMR may have only one year to cover Forms 1 to 3. In the STB in Melaka, staff members have developed their own software programme for children to do catch-up learning. Children beyond the level of schooling available in the institution may be permitted to attend local community schools, though the number of children who do so is generally quite small (4 in Kuala Lumpur and 3 in Melaka).

For children not participating in formal education, most STBs offer a range of vocational training programmes, including skills such as gardening, fish rearing, motor mechanics, furniture making, welding, plumbing, construction, and electrical wiring for boys, and sewing, cooking, and batik for girls. The training programmes are relatively informal and not certificate-based. Institution staff raised the concern that the training they provide is not recognised by the Central Industrial Development Board (CIDB) and therefore children do not have any recognised qualifications when they are released.

Both Probation Hostels and STBs are headed by a warden or principal, who is assisted by a contingent of welfare assistants, religious instructors, temporary teachers, security guards, and other support staff. Most STBs have a full-time counsellor on staff, while Probation Hostels rely on visits from the district counsellor. As with probation officers,

Welfare Assistants come from a variety of different backgrounds and receive some basic induction training on social work through the Institute Social Malaysia (ISM). Welfare Assistants advised that the number of welfare assistants per shift was generally insufficient and it was therefore sometimes difficult for them to have one-to-one interaction with the children. Most were of the view that the social work training course was too basic and did not adequately equip them for their job. They also emphasised the importance of selecting and recruiting people carefully for this type of work, as it takes a certain type of personality or character to work effectively with children.

Both the Probation Hostels and STBs follow the same general admissions process. When a child enters the institution, a Welfare Assistant interviews the child and notes down his/her particulars, including family background, health condition and educational status. An individual file is opened to track the child's progress and note any progress or disciplinary problems. However, there is no individualised assessment or written care plan for children, apart from some decision-making regarding education and vocational training. Staff who participated in the group discussions were generally of the view that welfare assistants do not currently have the capacity to undertake individual assessments or case planning.

In general, all children in a particular STB or Probation Hostel follow the same general programme, with no individualised approach to treatment or rehabilitation. Some hostels and STBs have periodic motivational programmes, often organised with the support of the Child Welfare Committees or Board of Visitors. In STBs, counsellors also organise periodic activity-based group work on issues such as self-respect, self-development, future planning, trust-building, and civics/respect for the law. They are also available to

talk to children about their problems, including bullying or problems with their family. However, there are no standardised modules or approaches to this work. For the most part, the approach to rehabilitation is centred around discipline, religious instruction and vocational training, with some individual counselling if the child is experiencing personal difficulties. Heads and staff of institutions were all of the view that additional training and exposure to international rehabilitation models would be highly beneficial. They noted in particular the need for a better understanding of adolescent development, how to deal with children's behaviour problems, how to handle children who are violent or aggressive, and how to understand and help children to overcome their specific behaviour problems.

Both Probation Hostels and STBs have relatively low levels of security and children are generally free to wander the grounds during the day. Children who are going to public schools are permitted to leave daily, while all other children go out only for organised group outings. Children on remand are not permitted to participate in these outings. While the grounds of probation hostels are not as spacious as STBs, all facilities visited by the research team had open areas for outdoor sporting activities, as well as indoor games such as table tennis. The STB in Taiping reportedly has very spacious, campus-like grounds.

Sleeping arrangements are generally group dorm style but with security bars on doors and windows. As noted in Section 3, children on remand in both STBs and Probation Hostels are placed in a separate dorm from children who have already been subject to a final court disposition and are generally not permitted to move freely within the compound. They participate in religious classes, but are generally not permitted to take part in education or vocational training and must remain in locked dorms for all but two hours of the day.

Most institutions set weekends aside for family visits, though parents are allowed to come on other days of the week as well. The policy on family visits in both STBs and Probation Hostels is generally quite liberal and parents are encouraged to visit and / or stay in contact with their child. However, children are not permitted to meet with their family in private and a staff member is present at all times. Staff advised that they take pro-active measures to contact and encourage parents who have not been visiting regularly. The majority of children generally do receive regular visits from their families, but this can be difficult for poor families, particularly if they live some distance away from the institution. Most institutions visited as part of the study were in relatively isolated areas, distant from main residential and commercial centres. Financial support can sometimes be arranged using a "warrant ticket", but this is at the discretion of the district probation officer. Children are also permitted regular home leave, particularly around the holidays. This generally ranges from between 5 to 10 days per year, but is only available to children who have been in the institution for at least 12 months and is not available for remandees.

Discipline is encouraged through a system of rewards and privileges. Children receive points for positive behaviour (doing well in school, performing chores satisfactorily, etc.) and lose points for misbehaviour. The child's grade level is used as basis for granting privileges, such as outings, as well as for determining eligibility for annual leave to visit family and release on licence. Some STBs also use a prefect system, appointing more responsible children with supervision duties over the others. Some have also instituted a practice of weekly dorm meetings, where children can discuss their problems and resolve any conflicts between them.

Each institution also has a discipline committee, which holds mini-hearing whenever there is an allegation of misconduct. Staff advised that punishment for rule breaking generally involves counselling and advice giving, loss of privileges such as participation in outings or family visits, or doing specific chores. Children may also be placed in an isolation cell for lengthy periods of time (up to two months, according to the warden of one probation hostel). Children who participated in the group discussions also noted the use of corporal punishment.

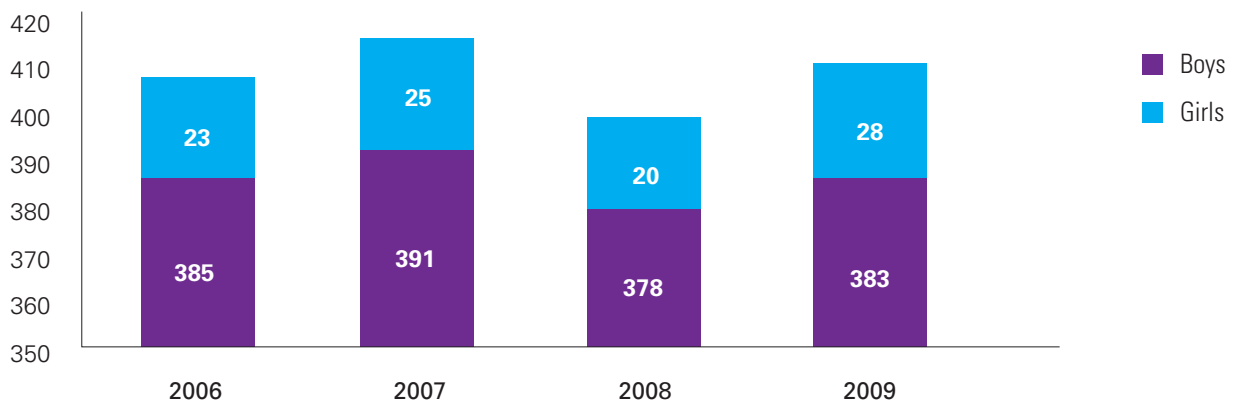
Many staff members in both STBs and probation hostels raised concerns about the practice of mixing beyond control children and children in conflict with the law in one institution, as well as the mixing of children on remand with children who are subject to a final court disposition. It was noted that younger “beyond control” children tend to learn worse behaviour from the older children in conflict with the law. In Probation Hostels, children who have committed very minor crimes are often mixed with children on remand for much more serious offences, resulting in similar criminal contamination. While children on remand are kept in a separate dorm, there is no practice of

separating children by age, resulting in very young children mixed with much older ones, creating potential risk of bullying and abuse.

ii) Henry Gurney Schools

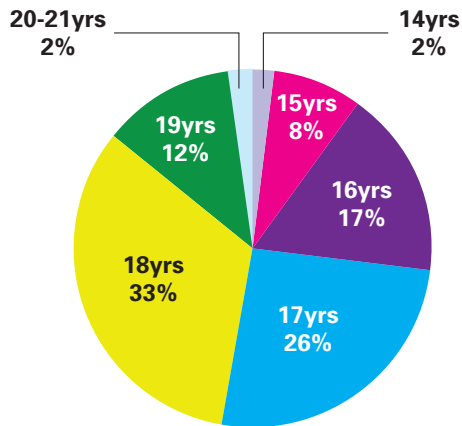
Malaysia currently has three Henry Gurney Schools, one for both boys and girls in Melaka, one for girls in Kota Kinabalu, Sabah, and one for boys in Keningau, Sabah. The schools are generally large, with capacity for approximately 300 students. They cater to children and youth offenders between the ages of 14 and 21, as well as children on remand. They also receive child offenders or beyond control children on transfer from an STB if the child repeatedly runs away, or exhibits serious behaviour problems. This is particularly common with girls.

Number of Residents of Henry Gurney Schools, by Gender (2006 - 2009)



Source: Prisons Department, 2006 - 2009

Percentage of Residents of Henry Gurney Schools by Age (2006 - 2009)



Source: Prisons Department, 2006 - 2009

The majority of children in Henry Gurney Schools are between the ages of 16 and 18, however there is also a significant number of 14 and 15 year olds. These children are mixed together with offenders up to 21 years old.

The Henry Gurney Schools are run by the Prisons Department and operate with a much stricter security regime than JKM facilities. The institution grounds are generally quite spacious, with open green spaces, however the compound is surrounded by high security fencing and guarded by armed prison personnel. Sleeping quarters are dormitory-style, with children divided into different “houses”, each supervised by a house master. Unlike the adult prison system, where personnel are focused on enforcement and security, the Henry Gurney Schools reportedly encourage closer one-to-one relationships between house masters and the children.

Henry Gurney Schools were designed on the British Borstal model, and as with JKM facilities, the approach to rehabilitation is grounded in discipline, a strict daily regime, religious instruction, and vocational training. Emphasis is also placed on development of leadership

skills and sports excellence. Five years ago, the Prisons Department introduced a unique “Putra model” of integrated rehabilitation, which involves four phases:

Phase 1 (2 months): Orientation and Discipline Building. Children are instructed in the School rules and participate in civic and religious education, as well as drills and marching to build discipline;

Phase 2 (6-12 months): Character Reinforcement. This phase uses a therapeutic community model to promote personality development. This includes group counselling session, moral and civic education, religious talks, and academic instruction. The academic programme follows the State school curriculum, with teachers appointed by the Ministry of Education providing instruction in Forms 3 to 6. The School also offers 3M classes for those not participating in academic instruction.

Phase 3 (6-12 months): Skills Building. Boys can choose from a range of certificate-based vocational training programmes through the Malaysian Skill Certificate (SKM) or CIDB programmes. This includes welding, tailoring, electrical, plumbing, construction, landscaping, as well as non-certificate programmes in laundry, carpentry and cooking. For girls, the schools offer courses in landscaping, cooking, tailoring, and batik. Spiritual, counselling and sporting activities are continued through this phase as well.

Phase 4 (6 months): Community Programme. Children are prepared for reintegration by engaging in community volunteer work outside the institution, as well as individual and family counselling.

Each child admitted to the Henry Gurney School has an individual file and his/her progress is reviewed and recorded every three months. However, there is no individual care plan developed and no individualised approach to treatment or rehabilitation. Apart from variations in vocational training, all children follow the

same general rehabilitation programme. The Schools all have prison personnel who have received training in counselling skills, however it was noted that they currently lack sufficient expertise to undertake an individualised treatment or behaviour change approach. All staff undergo general training through the Correctional Academy, but do not receive any specific instruction on the Putra model, or in handling young prisoners.

Discipline is encouraged through a formalised system of ranking and privileges, as well as a prefect system. Children progress through various stages, depending on their behaviour and performance. Those who advance to a higher level receive additional privileges such as additional pocket money and family leave. They are also eligible to be appointed as a Head of House or School Captain. Children who misbehave or violate school rules can be demoted to a lower level, lose all privileges and may also be subject to punishments such as marching or performing chores, placement in an isolation cell for up to 14 days, and as per the Henry Gurney School Rules, caning and restriction of diet.

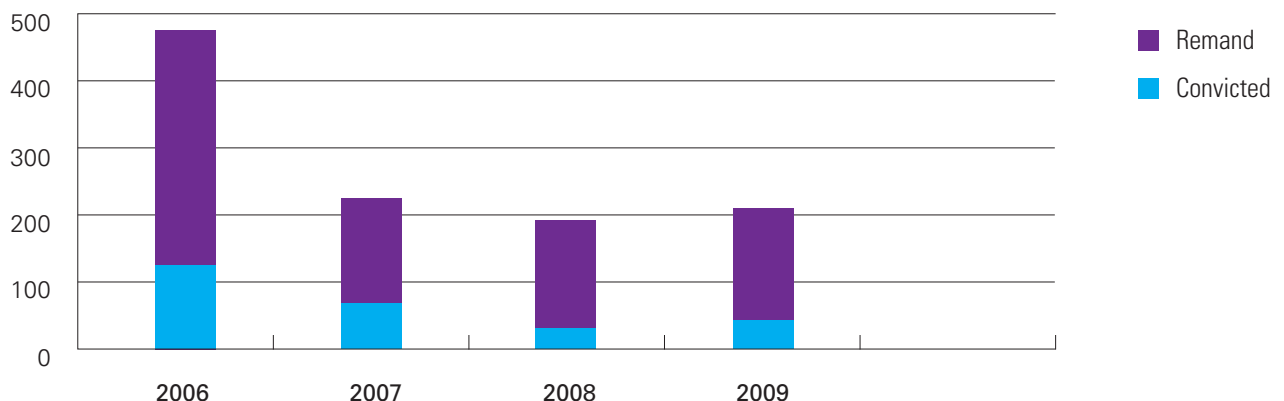
Family visits are determined by what stage a child has reached in the ranking system. At the introductory “brown” level, children are permitted one 45-minute

family visit every two weeks and can send one letter per week. According to the Henry Gurney School Rules, this basic family visit entitlement is guaranteed and cannot be restricted as a punishment for misconduct. Those who advance to “blue” are also permitted 5-hour visits to Melaka City with their family, as well as a seven-day family leave. Security personnel are present throughout the visit but children are permitted physical contact with their family members (hugging, touching, etc.). Most children receive regular visits from their family, unless their families live far away and cannot afford to travel. Staff reportedly take proactive measures to contact and encourage parents to come to the School if they have not been visiting regularly, however there is no financial support for transportation expenses available for poorer families.

iii) Juvenile Correctional Centres

Currently, the Malaysian Prisons Department oversees 29 prisons. This includes one fully separate Juvenile Correctional Centre in Sungai Petani, as well as five Juvenile Correctional Centres co-located with adult prisons. Co-located facilities are fully separate from adult facilities, with their own programmes for young prisoners.

Number of Children in Juvenile Correction Centres (2006 - July 2009), by Status

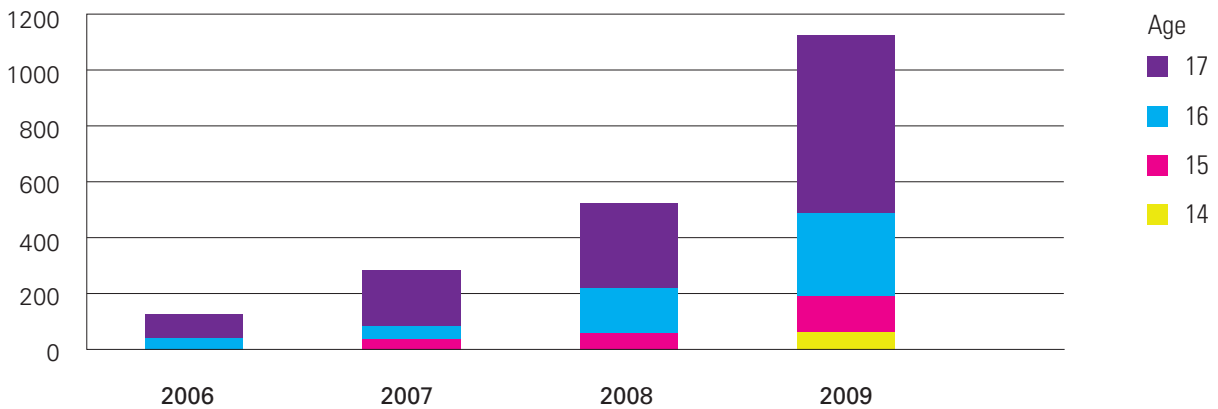


Source: Prisons Department, 2006 - July 2009

Juvenile Correctional Centres cater to convicted boys between the ages of 14 and 21, as well as boys on remand. In the dormitories, children under 18 are separated from those who are 18-21 so as to reduce bullying or exploitation of the younger boys. The

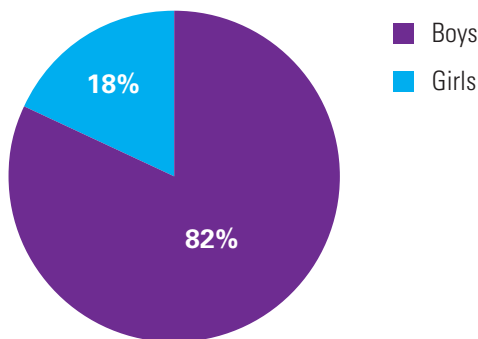
majority of children admitted to juvenile correctional centres are 16 years or older, however, there are a significant number of younger children in prison facilities.

Number of Children Admitted to Juvenile Correctional Centres Annually, by Age (2006 - 2009)¹⁴⁶



Source: Prisons Department, 2006 - 2009

Gender of Children Admitted to Juvenile Correctional Centres (2004 - 2009)



Source: Prisons Department, 2004 - 2009

Girls are currently detained together with adult women in specialised women’s prisons, however they are reportedly kept separated. At the time of the study, construction was underway of a new Juvenile Correctional Centre that will house both boys and girls.

Juvenile Correctional Centres are high-security facilities that operate in accordance with the standard prison regime. Apart from the requirement that they be separated from adults, the Prison Act makes no special provision for the care and treatment provided to young prisoners. As with the Henry Gurney Schools, all personnel at the Juvenile Correctional Centres are correctional officers who rotate between juvenile and adult facilities. Training is provided through the Prison Department’s Correctional Academy, which offers both

¹⁴⁶ Note: Data provided from the Prisons Department on the number of children in juvenile correctional centres is significantly lower than the data they provided on the number of newly admitted convicted children for those years.

induction training as well as in-service short courses. However, there are currently no specialised courses relating to the management of young prisoners. Young prisoners participate in religious classes and self-development courses in accordance with the standard modules developed for adult prisoners, however there is generally no individualised approach to rehabilitation. Pursuant to the Prison Act, prisoners who violate prison rules may be subject to solitary confinement, reduction of diet and corporal punishment.¹⁴⁷

WHAT THE CHILDREN SAID

Hostels staffs are ok. They often invite us for a music jamming session, or to play football together. Relationships between staff members and young people are good. Can always talk and hang out together.

Hostels are a good place to live because there are a lot of activities. Sporting activities, academic classes such as reading the Quran, Maths and English. There are also activities like puzzles games, making origami.

The STBs provides many activities. Many of the activities offered at STBs are things that we won't normally get a chance to be involved in the outside world.

At the Henry Gurney School there are workshops where they can learn new skills – an opportunity they will not get outside.

Academic classes are held once in a while, and the subjects are not fixed.

Once in a while, there are carpentry activities such as plumbing, repairing motorcycles, etc.

Children are always offered choices about what kind of vocational training they want to do.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

Upon entering a Juvenile Correctional Centre, all young prisoners undergo a two-month orientation

period similar to that provided by the Henry Gurney Schools, after which they are evaluated to determine the appropriate level of studies. Until recently, the prison system offered only informal education programmes, often consisting of basic literacy classes organised and taught by volunteer retired teachers, contract teachers or personnel from NGOs and civil society groups involved in various welfare programmes in the prisons. However, in late 2007, officials from the Prisons Department approached the Ministry of Education for assistance in setting up a more formal education system for young prisoners. In response, the "integrity school" programme was developed and gradually introduced in all six juvenile correctional facilities and Henry Gurney Schools in 2008-2009. In all juvenile facilities, qualified teachers have been appointed by the Ministry of Education to provide formal curriculum instruction in Forms 3 through 6, as well as 3M classes. In order to facilitate implementation of the Integrity School system, officers from the Ministry of Education have been seconded to the Prisons Department. The Ministry of Education fully funds the appointment of qualified teachers, as well as the full costs of textbooks and other teaching materials. All the teachers are required to attend a four-day "prisons-orientation" course prior to beginning their new positions.

At present, Integrity School classes are available only for boys who are Malaysian citizens.¹⁴⁸ While the system is quite new, initial feedback revealed that many children found the Integrity Schools to be better than what they had experienced in mainstream schools because the teachers gave them more attention and assistance.¹⁴⁹ Academic staff at both the Henry Gurney School and the Kajang Integrity School advised that the Integrity School programme had significantly improved access to and quality of education for young prisoners. However, they highlighted the challenge

147 Section 50.

148 UNICEF Malaysia (2009), Access to Education for Persons in Detention in Malaysia, UNICEF.

149 UNICEF Malaysia (2009), Access to Education for Persons in Detention in Malaysia, UNICEF.

of dealing with children who had been out of school for some time before entering the institution and were not motivated to learn, as well as the challenge of having children at various educational levels all in one class. It was suggested that a school readiness or modified curriculum would be beneficial, since many of the students were not at an appropriate grade level for their age, or had learning difficulties. It was also noted that many students have behavioural or self-development problems that were not addressed in the standard academic curriculum, and that a greater focus on life skills and cognitive development would be beneficial.

WHAT THE CHILDREN SAID

The environment at the Henry Gurney School is like a family.

The discipline at Henry Gurney School is very tight and it is not fair.

The officers treat the girls like their own daughter or sister.

The food served is good and sufficient, can always go for seconds. There is a variety of food such as chicken, fish, tom yam, chicken rice or noodles.

There are counsellors available who you can talk to for emotional support or if you are having problems.

Doing marching drills and so many roll calls is pointless.

The demerits and merits are not given out equally. For example, you can get 10 merit points for undertaking any charity work, but 50 demerit points for oversleeping. But charity work like cleaning the school compound is hard work and you should be able to earn more merit points for it.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

The Juvenile Correctional Centre in Sungai Petani has both an integrity school and vocational training

programmes in tailoring, welding, carpentry and air conditioner repair. However, the other juvenile centres do not yet have workshop facilities. Students who complete their SPMs are encouraged to continue their studies at the tertiary level. There are currently 13 students at the Kajang Prison who have been accepted for off-campus undergraduate courses. The Open University has also offered ten distance learning places to juveniles, eight of which have been taken up. Scholarships have also been provided to young prisoners by the University of Malaya and the Islamic University.

In addition to these improved academic facilities, Kajang Prison has also recently begun to promote greater involvement of NGOs, students and corporate sponsors in order to expand the types of programmes available to young prisoners. Through corporate partnerships and cooperation with the Ministry of Science, Technology and Innovation, Kajang has been provided with computers and internet facilities, and selected male young prisoners are participating in an e-skills training programme in multimedia and desktop publishing. In addition, Malaysian Care provides religious guidance to Christians and has recently introduced classes in music and character building. The character-building programme, offered three times per week over 16 weeks, focuses on values, responsibility, leadership, loyalty, and future planning. The University of Malaya has also been operating a community outreach programme in cooperation with the Prisons Department. Law students participating in the programme make regular, fortnightly visits to Kajang Prison and also make occasional visits to the Henry Gurney School and STB in Melaka and the STB for boys in Taiping. Under the guidance of a professor, the students prepare educational sessions for the boys using games, music and other activities. The focus is mainly on legal information, basic rights, and

extra tuition for young prisoners involved in tertiary programmes. Other corporate and NGO sponsors have helped to fund the library, television and audio-visual equipment, and computers, as well as provide medical and legal aid services on a voluntary basis.

Stakeholders were generally of the view that the Integrity School and other programmes were much appreciated by both the children and prison officials. It was noted that the increased interaction with outsiders has resulted in improvements in the boys' attitude and behaviour. The majority of respondents were of the view that these additional programmes were very useful to children's overall rehabilitation process and would help reduce the likelihood of re-offending once they were released. However, it was also noted that staff require more skills and experience in dealing with children and, in particular, access to more intensive training and specialised programmes designed to address offending behaviour and promote children's rehabilitation.

KEY FINDINGS

Malaysia has developed a range of custodial institutions aimed at the rehabilitation of children in conflict with the law, including both low security facilities under the JKM, as well as more secure rehabilitative schools and correctional centres under the Prisons Department. In all custodial institutions, boys are now fully separated from adult inmates. However, girls continue to be detained together with adult women, contrary to the requirements of the CRC.

Both JKM and Prisons Department facilities have developed education and vocational training programmes designed to assist children with their reintegration after release. In particular, the recent collaboration between the Malaysian Prisons Department and the Ministry of Education represents a significant step forward in the government's efforts to fulfil its obligations under the CRC. Academic classes in JKM facilities are not as well resourced as the Integrity Schools, however children in both STBs and Probation Hostels are able to study in community schools. Currently very few children benefit from this opportunity and efforts should be made to increase the number of children attending education and vocational training programmes outside of the institution.

While child offenders' access to education has been significantly improved in recent years, there is still a significant way to go, given that some children do not enjoy the same education opportunities as others, most notably girls and non-Malaysians in the prison system, and children on remand in JKM institutions. In addition, while the focus on using the standard school curriculum is laudable, this has presented a challenge for children who have been out of school for some time, both in terms of their motivation to learn and academic abilities. The introduction of a school readiness / re-entry programme or modified curriculum could help in providing children with the catch-up support and motivation needed to successfully re-enter the standard school system.

Through the Henry Gurney School system, children benefit from structured, certificate-based vocational training programmes that provide them with the qualifications necessary to get a job after they are released. However, within JKM facilities, vocational training is relatively unstructured and does not lead to any formal qualifications. Many stakeholders recommended that the JKM invest in improving the quality of vocational training available in STBs and Probation Hostels. However, international experience suggests that a more effective and efficient use of resources would be to facilitate children's access to existing vocational training programmes in the community. This both reduces stigma and also expands the vocational training options available.

In both JKM and Prisons Department facilities, the approach to rehabilitation is based largely on a standardised regime of discipline, religious instruction and vocational training. There is no individualised assessment or care planning and all children follow the same standard programme and daily routine. The Henry Gurney Schools are the only institutions to have developed a special rehabilitation model for young prisoners. However, the Putra model has yet to be evaluated for its impact and effectiveness, and is based on the British Borstal model which is no longer in use in the UK. In general, all institutions for children are large in size, limiting the capacity for individualised treatment and development of trusting relationships between children and staff. While JKM facilities are generally smaller and have a lower level of security, they nonetheless operate largely on a prison-like regime. Recent infrastructure projects suggest that, rather than addressing capacity issues by building more small facilities, emphasis is on replacing existing institutions with even larger ones.

Both JKM and Prisons Department facilities have a mix of professionals on staff, including welfare officers, teachers, vocational instructors, and security personnel. While all staff members undergo a basic induction training programme, none have received specialised training on managing children in conflict with the law. Prisons personnel are transferred regularly between adult and juvenile facilities and do not have opportunities for training or specialisation in working with young prisoners. The majority of staff members were of the view that they did not have sufficient expertise to manage children effectively and highlighted the need for more specialist training in how to deal with difficult adolescents, as well as rehabilitation models and approaches used in other countries.

KEY FINDINGS

Both JKM institutions and Henry Gurney Schools are governed by relatively dated regulations that contain provisions that are not in accordance with the CRC and international standards. Children in Juvenile Correctional Centres are governed by the Prison Act and Rules, which have very limited special provision for young prisoners. Current practices with respect to limitations on private family visits and disciplinary practices are of particular concern. While discipline is generally based on a system of rewards and loss of privileges, there are some practices that are contrary to the CRC and international standards, including the use of solitary confinement, corporal punishment, reduction in diet, stress positions, and restriction of family visits.

The recent experience at Kajang Prison suggests that proactively seeking out partnerships with volunteers, NGOs, and corporate sponsors can help expand the types of programmes and services available to children in institutions. Some JKM facilities also have programmes offered in partnership with external donors and volunteers. However, to date the approach is largely ad hoc and based on the personal initiative of the head of the institution. A more structured and systematic approach could help expand these partnerships and ensure that they endure even after the head of the institution is transferred.

RECOMMENDATIONS

In order to improve the care, treatment and rehabilitation of children in detention, it is recommended that Malaysia:

- **Draft new regulations for STBs, Henry Gurney Schools and Juvenile Correctional Centres that conform to international standards.**
- **Develop smaller, decentralised, open custody facilities** to replace the current model of large-scale STBs and hostels. **Reform the overall regime and physical layout of STBs and hostels to be more home-like and therapeutic**, rather than the current focus on discipline, drills and prison-like regimentation.
- **Allow all children in STBs and hostels to access education and vocational training programmes in the community.**
- **Introduce individualised assessment and case planning for children in all institutions.**
- **Conduct an evaluation of the impact and effectiveness of the Putra model and use the results to modify the model and inform the design of new programmes aimed at addressing offending behaviour for use in JKM institutions and Juvenile Correctional Centres.** The design of programmes should also be informed by a review of international models and new practices in institution-based rehabilitation of child offenders.
- **Introduce a system to provide travel allowances for parents who cannot afford to visit their children.**
- **Develop specialised in-service training programmes for both JKM staff and correctional officers.**
- **In collaboration with the Ministry of Education, develop a school re-entry programme and / or modified curriculum for use with children in institutions. Measures should also be in place to identify and respond appropriately to children with learning difficulties or other special needs.**
- **Developed a standardised, structured process for all institutions (JKM and Prison Department) to promote, recruit and select civil society groups, NGOs and corporate sponsors who can help expand the range of programmes and services available to children in institutions.**



REINTEGRATION

International Standards

All children subject to an institutional placement will one day return to the community. In many cases, children who have spent time in institutions are returning to the same dysfunctional family situation and negative peer influences that contributed to their offending behaviour. Others are blocked in their attempts to start a new life by family rejection, or stigma and discrimination from community members.

For this reason, the UN Rules for the Treatment of Juveniles Deprived of their Liberty (JDLs) emphasise the importance of ensuring that all children in institutions benefit from arrangements designed to assist them in returning to society, family life, education, or employment after release. Procedures, including early release and special courses should be devised to this end. After their release, a competent authority should provide or ensure services to assist children in re-establishing themselves in society and to lessen prejudice against them. These services should ensure, to the extent possible, that the child is provided with suitable residence, employment, clothing, and sufficient means to support himself or herself. The representatives of agencies providing such services should be consulted and should have access to children while they are in the institution, with a view to assisting them in their return to the community.¹⁵⁰

The Beijing Rules also emphasise the need for a diverse range of facilities and services designed to meet the different needs of children re-entering the community and to provide guidance and structural support as an important step towards successful reintegration into society. They also state that conditional or early release of children should be used to the greatest extent

possible and granted at the earliest possible time. Children released conditionally should be assisted and supervised by an appropriate authority, such as a probation officer.¹⁵¹

A comprehensive reintegration process typically begins at the point a child first enters the institution. As noted above, regardless of the duration of a custodial order, the primary objective of the institution should be to prepare the child for his/her release. This should include opportunities for temporary leave and home visits to help the child maintain or re-establish ties with family, as well as to provide a gradual transition from institution life to the community. A pre-release planning and preparation process should also be available in the lead up to the child's release date to ensure as seamless a transition as possible from the institution to the community. This should be followed up with support through the transition process, and then continued aftercare once the child has returned to the community. Ensuring a seamless continuum of support requires close collaboration and timely information sharing between institution staff and community-based social workers.

Malaysian Laws and Policies

Section 70 of the Child Act states that children who are sent to an STB must be placed under the supervision of a probation officer or some other person appointed by the Child Welfare Committee for a period of one year after their release. However, there are no specific provisions regarding reintegration support for children released from probation hostels or from a correctional facility operated by the Prison's Department.

¹⁵⁰ Articles 79-80.

¹⁵¹ Article 28.

Structures, Processes and Practices

Stakeholders advised that child offenders released from institutions often face stigma when they return to their families and communities, particularly if they have been in prison. Some are rejected by their families, denied school re-entry or have difficulties being re-admitted because they do not have a school leaving certificate and are not of the right age for the grade level they are at. With limited choices available to them, many go back to their old friends and the old behaviours that got them into trouble.

Officials working in both JKM and prison facilities were conscious of these challenges and generally tried to take steps to facilitate a child's reintegration once s/he was released. As discussed above, all institutions have developed programmes designed to assist children to become productive citizens once they leave the institution, including formal and non-formal education and vocational training programmes. Vocational training for children in Henry Gurney Schools is certificate-based and nationally accredited, thus providing children with recognised qualifications when they are released. However, the vocational training in STBs and hostels is more informal and reportedly does not provide children with qualifications recognised by employers. In Johor, the probation hostel has attempted to overcome this gap through cooperation with state-level vocational training schools and the CIDB (Central Industrial Development Board). Children who are nearing their release date may be enrolled, free of charge, in a CIDB vocational training programme that builds on the skills they learned in the hostel and provides them certificate qualifications. The boys stay in the hostel at the vocational training school for six months until their training is complete.

Throughout a child's stay in a JKM institution, probation officers act as the "middle-man" between the institution and the child's family, providing the family with regular progress reports about the child and encouraging family visits. However, while there is reportedly some communication and information sharing with parents, there is no systematic process of providing support and guidance to a child's family to bring about necessary changes in the home environment before the child returns. Probation officers advised that they would like to be able to work with families while the child is in the institution, but currently do not have the capacity to do so. STB staff counsellors reportedly provide some family counselling for parents who come to visit, but this is sporadic and dependent on parents visiting.

Stakeholders advised that coordination between district probation officers and the JKM institutions is generally quite good. Several months prior to a child's release, a notification is sent by the principal / warden to the probation officer in the district where the child lives. The probation officer will generally visit the child's parents and send a report back about the parent's willingness and ability to accept the child back. However, there is no formalised pre-release planning undertaken by either the institution or the district probation officers and no written reintegration plan. Sometimes counsellors or welfare assistance will help children to fill out forms to get into school or a vocational training programme, but there is no comprehensive or systematic process of ensuring that all necessary arrangements are in place before a child is discharged.

After their release, children are placed under the supervision of a probation officer for a 12-month period and are required to report on a monthly basis.

As with other children under supervision, these meetings are generally quite cursory and no written reintegration plans are developed. Where possible, probation officers reportedly try to provide children with assistance to re-enrol in school or a training programme. Grants are available through the JKM to assist children to further their vocational training or to start a small business and some examples were given of children being provided financial support.

One of the key functions of the Child Welfare Committees is to assist and mentor children who have been released from institutional care. However, as noted above, the degree to which the Committees are functioning varies, and many have been without official appointment for months at a time. Annual activities focus mainly on organising events for children in the institutions and most Committee members who participated in the study had limited direct contact with children in the community. Some gave examples where the Committee had provided material assistance to help a child start up a small business (e.g. purchase a sewing machine) and facilitated the process of getting a grant from JKM, however they did not seem to be actively involved in providing guidance, mentorship or sustained support.

The mandate of probation officers currently does not extend to children in prisons. Children in prison facilities reportedly receive limited pre-release counselling, release planning or reintegration support when they are released from prison.

KEY FINDINGS

Officials working with children in institutions were conscious of the importance of maintaining a close connection between the child and his/her family and measures are generally taken in both JKM and prison facilities to encourage parents to visit. For children in JKM facilities, linkages and communication with family is facilitated by district probation officers. However, this type of coordination and information sharing is lacking between the Prisons Department and JKM.

While in institutions, most children benefit from some form of programme designed to help them find gainful employment when they leave, generally either basic education, or some vocational training. However, limited assistance is provided to help children maximise these new skills and find opportunities once they are released. While some pre-release counselling and pre-release planning is being undertaken in the STBs and probation hostels, there is no structured pre-release support for children leaving Prison facilities. Coordinated planning between institution staff and district probation officers could be strengthened so that arrangements are already in place prior to the child leaving the institution, for family reunification or alternative living arrangements, enrolment in school or a vocational training programme, or job placement.

Children released from institutions spend an additional year under the supervision of a probation officer, or in the case of children released from prisons, the police. However, emphasis seems to be largely on monitoring and surveillance, rather than providing support. There are no written reintegration support plans and, as with children under other forms of supervision, probation officers have limited time and resources for individualised guidance. The CWCs are currently not functioning effectively in their support capacity, and provide only occasional assistance (mainly financial or in-kind) to children released from JKM facilities. Children released from prison facilities do not have access to ongoing support, other than the requirement to report periodically to a police station.

RECOMMENDATIONS

In order to facilitate children's reintegration and prevent re-offending, it is recommended that Malaysia:

- **Amend the Child Act to extend reintegration support to children and young people released from prison.**
- **Introduce a more structured system of pre-release counselling and release planning before a child is released from an institution, ensuring that appropriate arrangements are in place for the transition period.**
- **Conduct individual assessments and case planning for all children released from institutions, with the degree of support provided tailored to the individual child.**
- **Provide more structured reintegration support for children released from both Prison and JKM facilities, with particular emphasis on transition planning and support in the period immediately after release. All children should receive basic assistance with family reintegration or alternative living arrangements, assistance to re-enrol in school or a vocational training programme, and basic job-seeking advice. Other children and families may require more intensive support to re-build the parent-child relationship and to facilitate reintegration.**



RECORDS AND PRIVACY

International Standards

Both the CRC and the Beijing Rules require that children's right to privacy be respected at all stages of the criminal proceedings in order to avoid harm being caused to them through publicity or by the process of labelling. In principle, no information that may lead to the identification of a child should be published. The official Commentary to the Beijing Rules notes that young people are particularly susceptible to stigmatization and criminological research into labelling processes has provided evidence of the detrimental effects resulting from the permanent identification of young persons as "delinquent" or "criminal".¹⁵²

In addition to restrictions on media, the Beijing Rules also highlight the importance of ensuring the privacy of all records relating to children in conflict with the law. The Rules state that the records of child offenders must be kept strictly confidential and closed to third parties. Access to records should be limited to persons directly concerned with the disposition of the case, or other duly authorized persons.¹⁵³

Furthermore, with a view to avoiding stigmatisation and/or prejudgements, the Beijing Rules state that the records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender.¹⁵⁴ The UN Committee on the Rights of the Child recommends that States Parties introduce rules allowing for an automatic removal of a child's criminal record once s/he turns 18, or if necessary where certain conditions have been met (e.g. not having committed an offence within two years after the last conviction).¹⁵⁵

Malaysian Laws and Policies

The Child Act includes a number of provisions designed to protect the privacy of children in conflict with the law, starting from the point of arrest. The Act states that appropriate arrangements must be made to protect the child's privacy and prevent him/her from being filmed or photographed by the media while at the police station, when being transported to and from the Court and while waiting at the courthouse.¹⁵⁶ Proceedings of the Court for Children are closed to everyone except members and officers of the Court, children and their parents, guardians, advocates, witnesses, and other persons directly concerned with the case.¹⁵⁷ The Act also includes comprehensive provisions restricting the publication of the picture of a child in conflict with the law, or the name, address or any information that may lead to the identification of the child. Contravention of this provision is punishable by a fine of up to RM10,000, imprisonment for up to five years, or both.¹⁵⁸

The Child Act does not include any specific provisions with respect to access to records relating to children in conflict with the law. However, it does state that words "conviction" and "sentence" shall not be used in relation to a child dealt with by the Court for Children. Instead, the words "found guilty", "finding of guilt", and "order made upon a finding of guilt" should be used. In addition, a finding of guilt recorded against a child must be disregarded for the purposes of any disqualification or disability that may be imposed on a convicted person.¹⁵⁹ Notably, this protection applies only to children who are dealt with by the Court for

152 CRC Article 40(2); Beijing Rules Article 8.

153 Beijing Rules, Article 21.

154 Beijing Rules, Article 21.

155 General Comment No. 10 (2007): Children's Rights in Juvenile Justice, CRC/C/GC/10, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

156 Section 85.

157 Article 12.

158 Section 15.

159 Section 91(2).

Children, not children who are adjudicated by the High Court.

Structures, Process and Practices

Stakeholders were generally of the view that children's privacy rights were being respected, and all officials take special precautions to shield children from media exposure. However, it has been noted that, while the media does generally refrain from publishing the names and photographs of children in conflict with the law, they sometimes reveal information about the child's family and background that would readily identify the child.¹⁶⁰ Some stakeholders were also of the view that the media sometimes sensationalised youth crime and were not sensitive to children's rights in general. In its Concluding Observations to the Malaysia Initial Country Report, the UN Committee on the Rights of the Child expressed concern that children in conflict with the law are often subject to negative publicity in the media.

Records in relation to children in conflict with the law who appear before the Court for Children are accessible only to JKM staff and are used only in the preparation of a probation report in the event of a further offence. Steps are taken in all institutions to ensure that children sitting public exams do so as independent candidates, so that their educational qualifications do not include a record of their stay in the institution.

¹⁶⁰ Dusuki (2009); Nazeri (2008).

KEY FINDINGS

Malaysia has relatively comprehensive provisions in place to protect the privacy of children in conflict with the law and to limit the use of criminal records of children who are dealt with by the Court for Children. However, the latter protection does not apply to children who are tried before the regular Magistrates Court or the High Court. This potentially results in stigmatisation, making it more difficult for children to reintegrate into the community.

RECOMMENDATIONS

In order to further protect the privacy of children in conflict with the law and prevent labelling or stigmatisation, it is recommended that Malaysia:

- **Amend the Child Act to provide for the automatic removal of any child's criminal record once s/he turns 18.**
- **Provide training and sensitisation to the media on child justice issues.**
- **Strictly enforce the privacy provisions of the Child Act, sanctioning media outlets that violate children's rights.**



CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

Since 1947, Malaysia has recognised the need to have a separate and distinct approach to handling children in conflict with the law. Both in law and in practice, measures are in place at all stages of the criminal justice process to ensure that children are separated from adults, and afforded special care and protection. A separate Court for Children has been established, and district-level probation officers appointed throughout the country to assist children and their families. The focus is generally on rehabilitation rather than punishment and a range of institutions, both secure and semi-secure, have been established to support children's rehabilitation. More recently, emphasis has been placed on establishing programmes, such as the interactive workshops, to provide community-based counselling and advice to child offenders and their parents.

While the Child Act was amended in 2001, the State's fundamental approach to children in conflict with the law has remained fundamentally the same since it was first introduced in 1947. Drawing largely from the UK system of the day, Malaysia's approach to juvenile justice is grounded in formal police and Court-based interventions and institution-based rehabilitation. However, this approach has been demonstrated to be the most costly and least effective way of dealing with child offending. The trend globally has been to shift away from these formalised approaches, investing instead in the development of diversion and other community-based responses to child offending. Increasingly, formal Court process and institutional placements are reserved for persistent offenders and children who commit very serious crimes, with all other children being dealt with more effectively through community-based processes.

Malaysia's approach to institution-based detention and rehabilitation is also based on the out-dated UK Borstal and Approved School models. All institutions for children tend to be large in size, with the main rehabilitation strategy grounded in a standardised regime of discipline, religious instruction and vocational training. However, it is now recognised that discipline and vocational skills alone are generally not enough to address the complex range of risk factors that contribute to children's offending behaviour. In the UK and other countries, this approach has therefore given way to a much more individualised and treatment-based strategies for promoting children's rehabilitation. Large-scale institutions have been replaced or supplemented with smaller decentralised facilities and new "open" minimum-security models have been developed, with children primarily accessing education, training and other services in the community.

Malaysia currently invests significant resources in remand and rehabilitation facilities for children in conflict with the law. In 2006, for example, a budget of RM12,759,680 was set aside for STBs and an additional RM4,840,800 for probation hostels.¹⁶¹ Significant additional resources have also been made available in 2009 for expansion or upgrade of these facilities. However, data suggests that a three-year period of institution-based rehabilitation is effectively "over treatment" for the vast majority of STB and probation hostel residents, most of whom have committed very minor property-related offences. Lengthy custodial sentences are not in the best interest of the child and do not represent an effective or efficient use of resources; most of these children could likely be deterred from re-offending through much less intrusive

161 2009 UNICEF report on Access to Education for Persons in Detention in Malaysia.

interventions. International experience suggests that channelling more resources to diversion, community-based rehabilitation programmes and small-scale group homes or other residential facilities would be much more effective and cost-efficient.

Malaysia has made progress in recent years in improving community-based supervision and rehabilitation programmes for child offenders, particularly through the introduction of interactive workshops. However, these programmes remain under-resourced, and the volunteer mechanisms meant to support the process (Child Welfare Committees, Boards of Visitors) are not functioning effectively or as per their mandate. Programmes tend to be ad hoc and focus mainly on the parent-child relationship, with limited emphasis on interactive, experiential learning programmes for the children themselves. While family relations are often an important contributing factor in addressing adolescent offending behaviour, improving parenting skills alone is generally not enough. As adolescents become older, parents cannot be expected to exercise full control over their children's behaviour, and children themselves need support in building the cognitive and social skills necessary to behave in a responsible, pro-social manner.

Many Malaysia academics and policy-makers have begun to highlight the need to move towards internationally recognised practices such as restorative justice and diversion, particularly for children committing minor offences. Stakeholders from all agencies who participated in the study were generally quite frank and concerned about the shortcomings in existing approaches and eager to learn from

international models and best practices. Support for reform was high across all relevant agencies, including amongst the police, magistrates, probation officers, lawyers, and institution staff.

RECOMMENDATIONS

For the reasons outlined above, it is recommended that Malaysia undertake a holistic reform of its juvenile justice system. Given the level of integration of the various aspects of the system, it is likely that piecemeal or agency-specific initiatives would not have the desired impact. It is therefore recommended that a high-level, inter-agency Child Justice Working Group be formed to develop an integrated national Juvenile Justice Reform Strategy and Plan of Action. This strategy should draw on international standards and global best practices in the administration of juvenile justice, while at the same time ensuring the system is relevant and appropriate to the Malaysian context. As a starting point, a national conference or seminar could be organised to encourage broad participation in the reform process, as well as to draw together local expertise and experience.

It is recommended that the Juvenile Justice Reform Strategy aim to:

Strengthen the legal framework for the administration of juvenile justice by amending the Child Act to:

- Raise the minimum age of criminal responsibility to 12;
- Include a statement of guiding principles drawn from the CRC and international standards;
- Provide a complete code for the handling of all children in conflict with the law, not just those appearing before the Court for Children;
- Extend the scope of special juvenile justice protections to all children under the age of 18 at the time the offence was committed;
- Introduce diversion and regulate the types of offences for which diversion may be used, the criteria and procedures for decision-making and the types of diversionary programs that should be available;

- Include more detailed procedures regulating arrest and police custody of children;
- Allow bail in all cases, depending on the background and circumstances of the child and nature and circumstances of the case. Introduce a broader range of alternatives to remand and provide guidance on the factors to be taken into account when making decisions about pre-trial release.
- Include strict time limits for completing children's cases, particularly where children are on remand;
- Provide a wider range of non-custodial sentencing options;
- Eliminate the fixed, three-year term for STB and Henry Gurney School orders and ensure that the duration of all custodial placements is in accordance with the principle of proportionality;
- Prohibit life imprisonment and indefinite detention, and set a maximum term of imprisonment in line with international standards.

Improve Arrest and Investigation Practices by:

- Developing detailed Standing Orders for police;
- Establishing specialized police units in major cities to handle all child suspects and designating child specialists in other locations;
- Developing a short course for police specialists and a brief session on children for all new police recruits;
- Involving probation officers (or trained volunteers) from point of arrest;
- Requiring a parent, probation officer, lawyer, or some other supportive adult to be present whenever a child is questioned by the police;
- Ensuring proper monitoring and oversight of cases involving children;
- Establishing more centralized lock-ups for children, with appropriate facilities.

Reduce the Number of Children Being Formally Arrested and Tried by:

- Giving police, DPP and Magistrates greater discretion to refer children to a diversion programme, rather than initiating or continuing with formal charges;
- Introducing a formal screening processes to identify cases that are appropriate for diversion as soon as possible after arrest;
- Developing diversion programmes that will hold children accountable for their actions, and address underlying factors that contributed to their misbehaviour.

Improve Court Proceedings for Children by:

- Developing a practice directive, handbook and training programme for Magistrates and DPP;
- Designating specialized Magistrates and DPP in each district to hear all children's cases;
- Using Magistrates Chambers or modifying courtroom furniture when sitting as the Court for Children;
- Developing handbooks and training programmes for defence counsel;
- Introducing a duty counsel system in the Court for Children.

Reduce the Number of Children in Institutions by:

- Training Magistrates, DPP and probation officers on principles of sentencing;
- Strictly enforcing the principle of institutionalisation as a last resort;
- Building the capacity of probation officers to provide in-depth probation reports;
- Strengthening community-based alternatives for supervision and rehabilitation of child offenders;

- Ensuring timely appointment of Board of Visitors / Visiting Justices and requiring regular, periodic and independent reviews of all children who are in institutions;
- Introducing new strategies for handling "beyond control" children without institutionalization.

Strengthen community-based supervision and rehabilitation of child offenders by:

- Appoint more probation officers and / or amend the Child Act to allow trained volunteer probation officers to provide assistance;
- Build the skills and capacity of probation officers to develop structured, written intervention plans for children subject to community orders, based on a comprehensive assessment of both the child and family. Promote an individualised and multidimensional approach to intervention planning, with support aimed at addressing not just the parent/child relationship, but also the child's cognitive and social skills, peer network, as well as education, training or employment needs;
- Design more structured, interactive experiential learning programmes to replace the existing ad hoc motivational programmes;
- Introduce a mentoring programme;
- Develop an "attendance centre" model using existing Child Activity Centres. This will likely require some additional guidance and skills training for Centre staff;
- Consider introducing a more intensive support and supervision programme for high-risk children who need more guidance and support;
- Reconsider the role and functions of the Child Welfare Committees, which are currently not functioning effectively.

Improve conditions in detention by:

- Promoting the development of smaller, decentralised, open custody facilities to replace the current model of large-scale STBs and hostels;
- Reforming the overall regime and physical layout of STBs and hostels to be more home-like and therapeutic, rather than the current focus on discipline, drills and prison-like regimentation;
- Allowing all children in STBs and hostels to access education and vocational training programmes in the community;
- Drafting new regulations for STBs, Henry Gurney Schools and Juvenile Correctional Centres that conform with international standards;
- Introducing individualised assessment and case planning for all children;
- Exploring international models and new practices in institution-based rehabilitation of child offenders, and developing new programmes more specifically aimed at addressing offending behaviour;
- Providing travel allowance for parents who cannot afford to visit their children;
- Developing specialised training programmes for all institution staff.

Improve prevention and early intervention measures by:

- Developing parenting skills training and peer support programmes that parents who are experiencing difficulties with their adolescents can access voluntarily;
- Establishing greater coordination and referral mechanisms between school counsellors and social welfare officers, so that children and parents who are experiencing difficulties are identified early and referred to appropriate support services;
- Developing specialised non-stigmatising programmes for teenagers who are involved in substance abuse or exhibiting behaviour problems, such as mentoring and interactive, experiential life skills programmes;
- Promote greater opportunities for adolescents to engage in positive social and recreational activities, particularly in low-income and high-crime neighbourhoods;
- Improve access to vocational skills training, career counselling and job placement support for school-leaving adolescents.

WHAT THE CHILDREN SAID

The police should not handcuff young people when arresting at public places.

Police should let young people know what their case is and why they are being arrested.

When arrested, young people should be allowed to immediately contact their parents.

When taking statements from young people, parents should be present.

Certain parties (such as the courts or higher authorities) should conduct spot checks at police stations.

The police should learn to respect young people. Only then will young people respect the police. The police should be trained or taught to be respectful of young people's rights.

Police should respect the rights of young women.

Lessen the number of young police officers.

There should be a separate lock-up with the full amenities for young people.

Reduce remand period in the lock-ups.

Hostels should allow for those on remand to be out of their rooms instead of just being in it.

Increase visitation hours with parents at the hostels.

Lessen the wait for a trial date.

Reduce the amount of bail for families who are poor.

Children should have the right to be able to explain the truth in Court.

Courts should study all the evidence before meting out punishments.

The Courts should make time to hear all appeals.

The Courts should give punishments that are in line with the crime.

Two or three years of probation is too long a time. A more appropriate time would be for one month.

Courts should provide the opportunity for young people to do community work as a punishment.

Programmes should be organized in schools to encourage young people to listen to their parents. A program like PRS: Program Rakan Sebaya – Peer Education Programmes may also help.

Activities should be organized so that young people are occupied with work and things to do and they don't have much time on their hands to do anything bad.

There should also awareness programmes or self-improvement camps (kem jati diri) organized for young people. To prevent young people from committing crimes, there should be programs to help those who are have financial difficulties. Because this is the main reason that they steal or rob. Programs can consist of job placements or help in entering vocational schools.

* These are children's personal views during interview sessions and it does not reflect the views of the Ministry of Women, Family & Community Development and other related government agencies.

KEY

REFERENCES

KEY REFERENCES

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Convention on the Rights of the Child

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ANNEX

ANNEX: INTERVIEWS AND RESPONDENTS

Category	Description	Method	Total
Central Authorities & Policy Stakeholders	Ministry of Women, Family and Community Development Department of Social Welfare	SSI	3
	Royal Malaysia Police	SSI	2
	Attorney General's Chambers	SSI	2
	Legal Aid Bureau	SSI	2
	Prisons Department	SSI	2
	Malaysian Bar Council	GD	8
	Association of Women's Lawyers	SSI	1
	Human Rights Commission	SSI	1
	Faculty of Law, University of Malaya	SSI	3
	Malaysian Crime Prevention Centre	SSI	1
National Child Rights NGOs	SSI	3	
Category	Description	Method	Total
Front-line service providers	Police	GD	20
	Magistrate, Court for Children	SSI	3
	Court Advisors	GD	30
	Child Welfare Committees	GD	30
	Directors of Institutions	SSI	3
	Staff of Institutions	GD	18
	Board of Visitors for Approved Schools and Henry Gurney Schools	GD	16
Category	Description	Method	Total
Service Beneficiaries	Children on Probation	GD	19
	Parents of Children on Probation	GD	26
	Children in Probation Hostels	GD	30
	Children in Approved Schools	GD	41
	Children in Henry Gurney School	GD	19
	Children in Kajang Juvenile Prison	GD	11
	Children at street children shelters	GD	22

SSI= semi-structured interview, GD =Group Discussion

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