



**EMBRACING RIGHTS:
WOMEN AND CHILDREN**

JUVENILE JUSTICE IN MALAYSIA

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Malaysia has seen a considerable rise in children's encounters with the law, as offenders, witnesses or victims of crime. Handling children in the daunting route of legal procedures and processes with utmost sensitivity is paramount to their well-being, as well as ensuring a greater chance of their rehabilitation, restitution or recovery.

The aim of this paper is to provide a broad overview of the Juvenile Justice System in Malaysia and touch upon some issues within it. Bearing International Law in mind, the analysis will focus on how Malaysia is faring with these standards to then proceed and explore areas of the Malaysian law and court procedures that are commendable and those that need further strengthening. The Malaysia Child Act 2001 clearly states that any order made must be in the best interest of the child,¹ yet fails to provide adequate guidance with respect to the principles or criteria upon which best interest determinations are to be made. Using various international instruments as a guideline, the principles of detention as a last resort and prevention of secondary abuse and their application in the Malaysian Juvenile Justice System with the best interest of the child will be examined.

1 Child Act 2001, Act 611, Available at: <http://www.agc.gov.my/Akta/Vol.%2013/Act%20611.pdf> (accessed on 30 August 2013).

1. Introduction

The origins of the Malaysian Juvenile Justice can be traced back to colonial Malaya with the passing of the Juvenile Courts Act in 1947. The Japanese occupation of Malaysia, 1942-1945, and the social upheaval due to the Second World War resulting in the “breakup of homes, school closures and removal of parental control,” necessitated the establishment of a separate court for juvenile crime.² The 1947 Children and Young Persons Act was enacted to protect and prevent child abuse and neglect. Later in the 1950s, the Juvenile Court Ordinance 1950, the Adoption Ordinance 1952 and the 1953 Registration of Adoption further safeguarded the rights and status of children.”³

The Malaysian legal system followed its colonial legacy until much of the last century and the above-mentioned legislation from the colonial era dictated the handling of children in conflict with the law. After signing the United Nations Convention on the Rights of the Child (CRC) in 1995, Malaysia introduced the Child Act in 2001, repealing and incorporating the Juvenile Court Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991 into one statute. The Child Act 2001⁴ included the four main principles of the CRC: non-discrimination, the best interest of the child, the right to life, survival, and development and participation.

The Child Act 2001 (Act 611) provided holistic approaches on matters related to the child and while it remains a strong statute, many sections need further strengthening. The current enormous gap between the law and implementation on the ground has to be addressed to prevent the suffering of children due to unnecessarily long detention periods, which deprives them of their liberty, parental care and love, and exposes them to the risk of secondary abuse. These matters, if left unchecked, will result in the violation of children’s rights, intentionally or unintentionally, by the same instruments that are meant to protect children from abuse and harm.

It is well-established that in all actions concerning children—whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—of paramount importance is the best interest of the child. The Child Act 2001 (Act 611) also states that any order made must be based on the best interest of the child. However, it provides limited guidance with respect to the principle and criteria upon which best interest determinations are to be made.

The Child Act 2001 (Act 611) does not stipulate the principle of institutionalization to be a last resort, so most often what happens is that child protectors and magistrates recommend institutionalization as a first resort. To finalize such decisions children can also be held on remand for long periods of time, because The Child Act 2001 (Act 611) does not clearly stipulate the period of remand. Moreover, it does not stipulate diversion and restorative

2 Dusuki 2011, p.303.

3 Teh Guan Bee 2000, p. 1.

4 See n.1.

justice, and is grounded in formal police and court-based interventions and institution-based rehabilitation. This heavy focus on institutionalization leaves children feeling rejected by their families and results in complicating efforts made for family reunification.

One positive initiative in the juvenile justice system in Malaysia has been the establishment of D-11⁵ to curb the possibility of secondary abuse of child victims and witnesses.⁶ What follows below is a consideration of the best interest of the child as stipulated in the Child Act 2001 and the CRC, and its application in the Malaysian Juvenile Justice System with regards to detention as a last resort and the prevention of secondary abuse.

2. Principle of Detention as a Last Resort

The CRC states that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.⁷ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”) emphasize 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.⁸

It is needless to reiterate that “deprivation of liberty” does not just apply to the placement of children in prisons. It 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.⁹ Therefore the principle of “detention as last resort”¹⁰ refers to all forms of institutionalisation. The underlying reason for the international community’s emphasis on reducing the use of deprivation of liberty as punishment 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...[recidivism], and in fact may increase the chances of a child...[re-offending].¹¹ Thus, legal professionals have to be mindful of the fact that placing children in educational or rehabilitative institutions such as, approved schools, hostels and Henry Gurney,¹² deprives children of their liberty and should also be considered as a measure of last resort for only those children who commit serious crimes.

5 This is the Sexual and Child Abuse Division of the Criminal Investigation Division of the Malaysian Royal Police, established to work with women and child victims of assault and abuse.

6 Interview with Superintendent Ong Chin Lan, March 21, 2012.

7 CRC, Art. 37(b).

8 The Beijing Rules 1985.

9 The UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (The JDLs).

10 This principle is highlighted in Article 37(b) of the CRC.

11 *Ibid.* p. 61.

12 Henry Gurney schools were established in 1949 in Malaysia to cater for juvenile criminals, with a rehabilitative focus, thus the name school and not prison. It is named after Sir Henry Lovell Goldsworthy Gurney because the first school in Malacca was opened by him.

Malaysia has a commendable legal and policy framework for a successful child protection system, yet there are some limits to its implementation. Furthermore, gaps in the laws persist. For example, there is no statutory expression of the principle of institutionalization as a last resort. The Child Act 2001 makes provisions for out-of-home care for both children in conflict with the law and children needing protection through the law. The Act outlines five types of out-of-home care for children in need of protection and/or rehabilitation:

1. Placement in the custody of a “fit and proper person”: applicable to children in need of protection and child victims of exploitation through prostitution;¹³
2. Foster care: applicable only to children who have been abandoned or whose parents cannot be located;¹⁴
3. Adoption: applicable to children who have been subject to a foster care order and whose parent or guardian have not claimed the child or made an appearance before the order expires;¹⁵
4. Placement in a place of safety: for children in need of care and protection;¹⁶ and
5. Detention in a place of refuge: for children who have been trafficked or exploited through prostitution.¹⁷

The Child Act also makes provisions for out-of-home care for children who have committed an offence, including probation hostels (chapter 3), approved schools (chapter 4) and Henry Gurney (chapter 5). Although not formally referred to as prisons, they are nonetheless institutions where children should only be sent to as a last resort. Since police officers, probation and welfare officers, parents, lawyers and magistrates all have a role to play in determining whether or not a child is institutionalized, there are certain areas of interest and practice outlined below that ultimately determine whether or not a child is institutionalised.

3. Remand

Remand concerns children in conflict with the law. Criminal proceedings take place in three stages: pre-trial, trial and post-trial. Within the pre-trial stage, children suspected of a criminal offence can be arrested and detained immediately under the custody of the police. Of all phases of the juvenile justice process, it is upon arrest and immediately thereafter while in police custody that an accused juvenile is most likely to become a victim of torture and other forms of cruel treatment.¹⁸

13 The Child Act 2001, Part XI.

14 *Ibid.* s. 30.

15 *Ibid.* s. 30.

16 *Ibid.* s. 54.

17 *Ibid.* s. 39.

18 Dusuki 2009, p. 148.

The Child Act 2001 stipulates that a child arrested must be brought before a Court for Children (or a Magistrate) within 24 hours and the Court must release the child upon bail.¹⁹ Exceptions to this are for children charged with a “grave offence,”²⁰ (or if the release of the child would “defeat the ends of justice”) who will generally be prohibited from bail. Bail refers to a bond executed by the child’s parents or relative (with or without requiring a cash deposit). In most cases, a cash deposit must be given to the Court, but the amount of the bond varies depending on the seriousness of the crime and the adult’s ability to pay. Although in general the law favours bail for less serious crimes, in practice, children embroiled in criminal proceedings often remain within the custody of the institution. This is generally because parents or relatives do not meet the requirements of bail or are unable to attend bail hearings.²¹ An overwhelming majority of children in conflict with the law being from poor families, the parent/guardian cannot afford bail. This means that in effect, whether a child is released or not is largely dependent on his/her parents, rather than what is in the best interest of the child, or the requirements of the justice system. This is a classic example of a provision being of no use for the very people it is trying to protect, i.e., the underprivileged. Both the Royal Commission Report and SUHAKAM have highlighted shortcomings in bail proceedings including: police requesting remand in cases where it is 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.²²

The other reason children remain in custody is due to police officers requesting remand of the child pending trial. As the maximum period of remand is not stipulated in the Child Act, the Court of Appeal decided in *Public Prosecutor v N (A Child)*²³ that section 117 on remand under the Criminal Procedure Code is applicable. The Criminal Procedure Code stipulates that the period of remand is up to 15 days, however, according to academician and child specialist Dr. Farah Nini Dusuki, the situation has improved and generally for less grave offences, the period of remand is limited to 7 days.²⁴

Even though the period of remand is limited by law, there are reports of children being held on remand for lengthy periods of time. Another serious problem with the long period of remand is that children are often times subjected to torture and abuse. “Although fortunately we have not heard of (at least officially) extreme torturous incidents taking place within police custody in Malaysia, there exist some concerns in respect to treatment of children during these stages.”²⁵

19 The Child Act 2001, s. 84.

20 *Ibid.* s. 83(3).

21 Jabatan Polis Diraja Malaysia 2005 & SUHAKAM 2005.

22 Jabatan Polis Diraja Malaysia 2005.

23 2004 2 MLJ 299.

24 Interview with Dusuki 2012.

25 Dusuki 2009, p. 148.

“For instance, Malaysian Human Rights Commission or SUHAKAM noted that they had received complaints of a 14 year old boy who was allegedly beaten in police custody, detained with adult detainees and his parents were not informed of the date of hearing; a 17 year old boy who was allegedly remanded for 60 days with no family visitations allowed and without being informed of grounds of arrest despite repeated requests and also been denied legal representation. It is to be noted that the right for children to be treated with dignity, the right to life, the right to be presumed innocent, prohibition of torture and ill-treatment of children, the avoidance of the use of harsh language and physical violence should be respected at all times.”²⁶

The JDLs reinforce that children detained under arrest or awaiting trial are presumed innocent and must be treated as such.²⁷ In its Concluding Observations, paragraph 103, the UN Committee on the Rights of the Child expressed concern regarding the long pre-trial detention period and delays in dealing with cases involving children in Malaysia and recommends that the State Party takes efficient legislative and administrative measures to abolish the delays in disposal of cases involving children.

4. Sentencing and Proportionality

The CRC requires State 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.²⁸ As such, the response to child offenders must be based on a full consideration of not just the gravity of the crime, but also of the child’s individual background and personal circumstances. The proportionality principle also means that measures imposed on children should not be more severe than the offence warrants.

Serious issues of proportionality exist in Malaysia when sentencing children. Child protectors and magistrates admit to erring on the side of caution when making their decisions, recommending institutionalization as the “first resort” rather than the “last resort.” Magistrates and other respondents raised concern about the frequency of sending children and young people into institutional care. It was explained that both Protectors and Magistrates – in the absence of risk assessment training and guidance – feel more reassured when a child is physically away from potential harm in the family.²⁹

26 See SUHAKAM, Report of the Forum on Malaysia’s reservations to the Convention on the Rights of the Child, 2008. p. 56, quoted in *ibid.*, p.149. This report is also available at: Available at: <http://www.suhakam.org.my>. (accessed on 10 June 2012).

27 The JDLs, art. 17.

28 CRC, art. 40(2).

29 UNICEF & Child Frontiers, January 2010, p. 78.

Children can be subjected to lengthy custodial orders for petty crimes, such as theft. Between 2003–2009, 52% of children convicted by the Court for Children³⁰ were convicted for theft,³¹ yet many of these children were sentenced for lengthy periods. Children have also been convicted for three years to Henry Gurney for not possessing their identification card.³² This shortcoming is further exacerbated when children with minor behavioural problems are detained together with child offenders. This is contrary to international best practices regarding criminal contamination, and may actually increase the chances that the child will go on to a life of crime. Fahri Azzat, representing a child who had been convicted of possessing drugs, asked the child how he obtained the drugs and discovered that he met his drug dealer while detained in Henry Gurney.³³

One of the main reasons the above issue persists is because many of these children are unrepresented due to a shortcoming in The Child Act 2001. Section 87 of The Act mentions informing the parents and probation officer once a child is arrested, but there is no mention of legal counsel. This occurs despite the fact that the Criminal Procedure Code Section 28A (2&3) does stipulate the right to legal counsel. It should be evident that if an adult has the right to legal counsel, so does the child. But this omission has meant that:

“In 2008, there were 84,376 Malaysians unrepresented in 108,528 criminal trials in magistrate’s courts, while 4,726 juveniles were unrepresented in their criminal trials... [my emphasis]”³⁴

To address this issue, a new scheme, The National Legal Aid Foundation (NLAF), focused on criminal legal aid was introduced, whereby the Government pays for access to legal representation even at the pre-trial stage. Trained legal aid lawyers were to be stationed at police stations in order to interview and represent the accused. The Attorney General’s Department put this programme on hold³⁵ but then the NLAF was established in early 2012.³⁶ Unfortunately, this provision does not reach all children as it is for children whose parents or guardians are of a certain income bracket and is not applicable for those charged with the death penalty.³⁷

30 The Court for Children was established after the Child Act 2001 came to force, replacing the previous Juvenile Court. All cases involving minors are heard in this court. The hierarchy of courts in Malaysia begins from the Magistrates’ Court, where the Court for Children is also placed, followed by the Sessions Court, High Court, Court of Appeal and finally the Federal Court.

31 UNICEF & Child Frontiers, July 2012, p. 16.

32 Interview with Dr. Farah Nini Dusuki, March 13, 2012.

33 *Ibid.*

34 Sayagam, Andrew (2012, March 14), Revamped Legal Aid by End Month, The Malay Mail quoted in, Available at: http://www.malaysianbar.org.my/legal/general_news/revamped_legal_aid_by_month_end.html (accessed on 10 September 2012).

35 Interview with Mr. Fahri Azzat, March 12, 2012.

36 For more information see The Malaysian Bar Council (2012), “2012-2013 National Legal Aid Committee Interim Report,” Available at: http://www.malaysianbar.org.my/national_legal_aid/2012/2013_national_legal_aid_committee_interim_report.html (accessed on 10 August 2012).

37 For more information see The National Legal Aid Foundation Brochure, Available at: <http://www.ybgk.org.my/pdf/YBGK%20Risalah-English.pdf> (accessed on 10 August 2012).

The issue of proportionality is exemplified in the circumstance where children over 14 years of age commit serious offences, such as rape or murder. Adult terms of imprisonment are imposed, including life imprisonment and indefinite detention, without sufficient regard to the child's age, background and personal circumstances. The UN Committee on the CRC 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.³⁸ 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.³⁹

In the Malaysian system, the problem is further exacerbated by lack of review of a sentence. If a child is found guilty or is institutionalized, the Child Act stipulates out-of-home care orders, which are for a defined period of time. There is no requirement for regular, periodic review of placements, or for measures that promote family reunification. Removal from parental custody is presented as a long-term care solution, rather than a temporary measure. Interim care options, such as temporary shelter or fostering, would provide an opportunity for welfare workers from a range of agencies to work to make the home environment safe, or to find alternative longer-term care solutions for the child.⁴⁰ Magistrates have also expressed a concern that they may make important decisions regarding the placement of a child into the care of another beside the parents, but these cases are rarely brought back to the court for review.⁴¹ It is apparent there are insufficient resources to monitor and review children's cases on a continuous basis.

5. Focus on the Child

The last resort principle means that any form of deprivation of liberty, including placement in a Sekolah Tunas Bakti (approved schools), 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. Research conducted by Child Frontiers has shown that "last resort" was generally understood by stakeholders as permitting custodial sentences whenever a parent was unwilling or perceived as unable to provide an appropriate level of supervision over the child.⁴² 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

38 UNICEF & Child Frontiers, July 2010, p. 75.

39 *Ibid.* p. 75.

40 UNICEF & Child Frontiers, January 2010, p. 61.

41 *Ibid.* p. 80.

42 UNICEF & Child Frontier, July 2010, p. 75.

deprivation of liberty for minor, non-violent crimes. Statistics from the Department of Social Welfare [Jabatan Kebajikan Masyarakat 2012] show that the majority of children in its custodial facilities have committed very minor crimes, the most common being theft. Furthermore, the magistrates predominantly obtain information about the child's family from the probation reports. Due to lack of resources and time, these probation reports often focus little on the child, their mental state and chance of reoffending, and more on the factual situation concerning the parents and the family's financial situation and living conditions.

As a result, it is not uncommon for magistrates to find themselves “forced” to sentence a child to an institution due to the fact that the child lacks any family support—financially or emotionally—and therefore they feel the child would be better supported in an institution. Parents often consider their child unruly and naughty and therefore “beyond control.” They believe the child should be detained for discipline, or they explain that they simply cannot afford to care for their child. For example, Fahri Azzat represented a 12 year old boy who had stolen a mobile phone.⁴³ Even though it was the boy's first offence, he was sentenced to three years at Henry Gurney, which Mr. Azzat appealed. Speaking to the boy's mother, Mr. Azzat found out that she has eleven children and does not have the money to support her son—she can neither control nor afford him. Therefore, she desired that her son be institutionalised. In the absence of parental supervision and support, the magistrate deemed it appropriate to decline the appeal, since the child would likely return to the same friends and possibly re-offend.

Parents or guardians of children can request the Court for Children to detain a child in an approved school, place of refuge, probation hostel or centre on the ground that the parent or guardian is unable to exercise proper control over the child.⁴⁴ In practice, this provision is generally used for status offences, such as running away, being disobedient or more frequently, for being a pregnant unmarried daughter. “Parents may request the court to take their daughters into care, although it has been reported that many parents use the court to threaten or punish the girls While Department of Social Welfare officers recognize that these girls are not in need of protection per se, the Protectors prefer to act with caution lest the parents do eventually banish the girl from the family home In Kuala Lumpur, the magistrate, on the advice of the Protectors, will usually refer the girl to the special home for pregnant teenagers.”⁴⁵ Thus we witness children being punished for no fault of their own but due to parental issues, in particular weak parental skills.

Asrama and *Sekolah Tunas Bakti* (approved schools) staff members who participated in a Child Frontiers survey stated that many children who have been detained due to being beyond control, “end up feeling rejected and unloved by their family and become even more rebellious, which can cause family reunification and reintegration to become even

43 Interview with Mr. Fahri Azzat, March 12, 2012.

44 The Child Act 2001, s. 46.

45 UNICEF & Child Frontiers, January 2010, p. 77.

more difficult.”⁴⁶ Some suggested that parents and children should be required to undergo one or two months of counseling before considering sending the child to an institution, or that the parents should be required to visit the facility first, to dispel misperceptions that it is like a boarding school. The UN Committee on the Rights of the Child in paragraph 51 has emphasized that children should not be sanctioned for behaviour that would not be considered criminal if committed by an adult. 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. Dr. Farah Nini Dusuki argues that the concept of children being “beyond control” is outdated and should be abolished.⁴⁷

6. Diversion and Restorative Justice

The most effective way to avoid the issues surrounding children in the legal system is to not have them in the system in the first place. The CRC stipulates that State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.⁴⁸ In order to achieve this, the Beijing Rules outline 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.⁴⁹

“There are two main justifications for taking this different approach to sentencing children in conflict with the law. Firstly, children lack the maturity and judgment of adults and have diminished guilt or responsibility for their actions. Secondly, as 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 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.”⁵⁰

The amendments to the Child Act in 2001 did not include new international global strategies, such as diversion and restorative justice. As such, the State’s fundamental approach to children in conflict with the law has remained fundamentally the same since the law was first introduced in 1947. “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

46 UNICEF & Child Frontiers, July 2010, p. 24.

47 Interview with Dr. Farah Nini Dusuki, March 13, 2012.

48 CRC, s. 40 (3)(b).

49 Beijing Rules, Rule 11.2.

50 UNICEF & Child Frontiers, July 2010, pp. 61-62.

dealing with child offending.⁵¹ Furthermore, although there is no proof as such, anecdotal evidence suggests that some children are forced by police officers to confess, which, is all the more reason to push for restorative justice so children do not have to deal with the police or court system.⁵²

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 Attorney General's office has the power, exercisable at his/her discretion, to institute or discontinue criminal proceedings,⁵³ which could be used as the basis for diversion. Malaysia does not currently have any formal diversion programmes or processes for resolving minor offences through mediation or some other restorative approaches. However, the Ministry of Women, Family and Community Development is currently conducting consultations and negotiations regarding a possible restorative justice system in Malaysia.⁵⁴ Furthermore, it is reported that the police exercise some discretion for minor crimes such as traffic violations, minor shoplifting and fights between children.⁵⁵ Although some of these crimes are mediated by the police, rather than formally going through the court system, in the majority of cases the police conduct a full investigation and submit investigation papers to Deputy Public Prosecutor for a determination of whether the charges are appropriate.

Many countries offer alternatives to the formal court system. This includes a restorative justice process, which involves a mediated settlement between the child, his/her family members and the victim. Otherwise, courts, police or prosecutors can refer children to a diversion programme, such as completing a specific number of hours in community service rehabilitation or vocation training, counselling, or participation in programmes such as conflict resolution, anger management, peer influence resistance and drug and alcohol resistance. Some programmes require the participation of the child's parents also. If the programme is completed successfully, the charges are withdrawn.⁵⁶ In this sense, restoration and rehabilitation can be achieved, while avoiding the court system. In the 2007 UN Committee on the Rights of the Child's Concluding Observations paragraph 103(b), it was recommended that Malaysia develop and implement a comprehensive system of alternative measures to deprivation of liberty, such as probation, community service orders and suspended sentences, in order to ensure that deprivation of liberty is used only as a measure of last resort. The recommendation has yet to be implemented.

51 *Ibid.* p. 110.

52 Interview with Dr. Farah Nini Dusuki, March 13, 2012.

53 Federal Constitution Malaysia, s. 145(3).

54 Interview with Dr. Farah Nini Dusuki, March 13, 2012.

55 UNICEF & Child Frontiers, July 2010, p. 45.

56 United Nations Office of Drugs and Crime (UNODC), 2006. *Handbook on Restorative Justice Programmes*. Available at: http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf (accessed on 10 August 2012).

7. Preventing Secondary Abuse

Secondary abuse occurs when the victim, having suffered from abuse or neglect, is further victimized while liaising with authorities, be it the police, courts or other institutions. The CRC highlights that all measures have to be in place to ensure the child is not further abused within the system and in Article 39 outlines that all

“State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment that fosters the health, self-respect and dignity of the child.”

Social workers and other functionaries play a very important role in the lives of child victims and witnesses of abuse, particularly child sexual abuse. The success of rehabilitation of these victims is dependent on the degree of sensitivity and level of understanding with which the social workers deal with them.

The D-11 at the Malaysian Royal Police was established to work with women and child victims of assault and abuse. It is an example of a positive initiative in Malaysia working to ensure that child victims are not further abused and that children have the best possibility of recovery and restitution. D-11 was established 15 May 2007; however D-9(b)⁵⁷ had been carrying out a similar role since 1986, albeit with narrower functions.⁵⁸ “The division operates under MS ISO⁵⁹ standards and is formally audited and monitored annually to ensure compliance with international obligations. There are 33 D-11 officers in Bukit Aman (all of whom are females except two) and there are 700 D-11 officers nationwide. The main functions of the police officers are to: rescue victims and support them to access a place of safety; investigate all reported cases of child abuse and neglect; and take statements and prepare evidence for the Deputy Public Prosecutor (DPP).⁶⁰ At headquarters level, the division is divided into three specialized units:

1. Children’s Unit
2. Domestic Violence Unit
3. Sexual Crimes Unit⁶¹

57 The unit that handles cases on abused women, i.e., domestic violence, rape, etc.

58 Interview with Superintendent Ong Chin Lan, March 21, 2012.

59 MS ISO or Malaysian Standards are developed by Standards Development Committees (SDCs) within the Malaysian Standards Development System and approved in accordance with the Standards of Malaysia Act 1996 (Act 549). The ISO/IEC Guide 59 – Code of good practice for standardization and Annex 3 to the WTO/TBT Agreement act as guiding principles in the development of Malaysian Standards.

60 UNICEF & Child Frontier January 2010, pp. 38-39.

61 *Ibid.* p. 38.

The Child's Unit deals with abandoned babies, abuse (physical, sexual and psychological), trafficked babies and missing children. Every police officer working at D-11 completes two weeks of in-service training, which is conducted 2-3 times per year.⁶² At these trainings, officers are taught the core elements of abuse and sexual violence and recognizing the symptoms of each. Various sectors of society and organizations are involved in the training, including the Attorney General's Chambers, academicians, and representatives from non-governmental organizations.⁶³

Victims are able to approach D-11's Victim Care Centres (VCC) directly. There is at least one VCC in each of the 14 states in Malaysia. The VCCs have a very home-environment feel, with comfortable couches and flowers on display. There is a playroom with soft toys and books to make the children feel comfortable and at ease, a private enclosed interview room, and a room with a bed for those who need to rest if they have travelled far. All of these features aim to reduce the fear in victims and prevent secondary abuse by making them feel comfortable and relaxed.⁶⁴

An ex-Training and Education Manager at Protect and Save the Children, a Malaysian NGO that works against child sexual abuse, recalled that only 3 VCCs were in operation during her time from 2007-2011. She had dealt with children who had come from other states to be interviewed at the VCC in Kuala Lumpur. Ms. Wong was pleased to know that now there are 14 VCCs. She added,

“Although the idea and intention behind VCC is commendable, the implementation of these ideas and practice needs considerable attention. The VCC is used to make the child feel better but it doesn't necessarily manage to reduce his/her fear. The manner in which staff talk to the child is very important. The aim is to get a disclosure from the child in the child's own time rather than rushing him/her to talk. Very often the child is not prepared for the court as well. It is not uncommon to find the abuser in the same space as the child. Confidentiality, a very important factor, is also not respected. Overall the general attitude is that of pity to the children and often the tendency to dictate or dominate them so as to get a swift disclosure.”⁶⁵

This clearly shows there are some weaknesses in implementation, which can easily be overcome with better training in child-friendly principles and monitoring and evaluation measures. But overall D-11 being victim-focused, officers ensure that a victim is not interrogated for the purposes of the investigations and giving evidence and then suddenly left alone, and that the victim is supported legally, medically and emotionally.⁶⁶ If the victim is required as a witness in a trial, a D-11 social welfare officer will become their witness supporter. They will be taken to court before the date so that they are aware

62 Interview with Superintendent Ong Chin Lan, March 21, 2012.

63 *Ibid.*

64 *Ibid.*

65 Interview with Ms. Wong Lai Cheng, July 14, 2012.

66 Interview with Superintendent Ong Chin Lan, March 21, 2012.

of the court environment and are as comfortable as possible in an otherwise daunting situation. D-11 officers contend that this not only results in a more confident witness, but they also give better quality evidence.⁶⁷ D-11 officers explain that the greatest issue with the process is that in order to make a decision about the case, the DPP requires medical reports of the victim. These medical reports can take months for the hospital to produce.⁶⁸ As perpetrators can only be detained for fourteen days, they are often released and subsequently sometimes disappear. This is a particularly distressing situation for the victim.

Ms. Wong pointed out that not only delays in the issuance of the medical reports occur but also the overall case is a cause for concern. It is not uncommon to find a case commencing when the child is 9, only to be completed by the time the child is 12 or 13. This delay results in a lot being lost or forgotten and the chances of conviction are considerably reduced. She further added that,

“The victims of abuse are sent to the Hospital KL, a government hospital. The SCAN Team (Suspected Child Abuse and Neglect Team) then works on getting the medical report for the child. An area of strength of the SCAN Team is that they run parents support groups. These groups are very helpful for the parents since they have the opportunity to meet other parents in the same situation. Though attempt is made to have these sessions on a monthly basis, they are not very regular and they need to be run by expert staff. This is a very good programme that can be further strengthened with the injection of resources and more expert personnel.”⁶⁹

Besides the VCC, D-11 also has Child Interview Centres (CIC), where children’s evidence-in-chief is pre-recorded. There are six interview centres in Malaysia: Bukit Aman (Kuala Lumpur), Penang, Johor, Melaka, Terengganu and Kelantan. The first centre in Kuala Lumpur was initiated by the British High Commission, which included not only providing the recording machines and funds for the building, but also technical expertise. The Kuala Lumpur centre performs two to three interviews a day, four days a week. The fifth day of the week is reserved for interview transcript writing. Any officer working at the centre completes a Violence Investigation Course, which is organized by D-11 and includes speakers from Protect and Save the Children, Tenaganita, UNICEF and SUHAKAM.⁷⁰ International experts are also invited, who teach the officers specific interview techniques for children.

CIC officers explained that it can be very difficult to interview child witnesses, as some are as young as four years old. Therefore when the child is brought to the CIC, they initially spend time playing with the child in a large and open playroom. The room is painted in bright colours and is filled with natural light and numerous toys. The interviewer spends

67 *Ibid.*

68 *Ibid.*

69 Interview with Ms. Wong Lai Cheng, July 14, 2012.

70 Interview with Superintendent Ong Chin Lan, March 21, 2012.

time conducting ‘play therapy’ with the child in order to build rapport with him/her and try to make him/her feel relaxed in the foreign environment. Once the child is comfortable the same officer takes the child to the technical room for establishing the facts of the case with the child. The room is set up with hidden microphones and cameras, which are controlled by another officer in a separate room. As such the recording can be adjusted and monitored without a third stranger being present in the room. The officer explains to the child the various ways the child can describe the facts: they can talk, they can draw what happened, or they can choose to use anatomical dolls. There is an adult male, adult female, male child and female child doll available, all of which are anatomically correct, which the child can use to demonstrate what occurred. After the interview recording, the child is referred to a psychiatrist. Through the establishment of D-11, a specialized police unit, and comprehensive hospital-based services (OSCC – One Stop Crisis Centre and SCAN teams), child victims of the most serious forms of violence, sexual abuse, and trafficking now have access to medical care, psycho-social support, legal advice, and child-sensitive investigative procedures.⁷¹

The specialized police units and the OSCC and SCAN teams are a positive and commendable development in the Malaysian Juvenile Justice System. The operation of these establishments remains weak or non-existent in smaller cities and towns. Given their success in Kuala Lumpur government should make a concerted effort to see that these services are available to child victims and witnesses throughout Malaysia.

8. Conclusion

Children who become involved in crime do not and should not lose their right to be treated as children.⁷² Children who are victims of a crime should be treated with the utmost care in order to ensure they are not further victimized within the legal system. Although Malaysia has a laudable legal and policy framework with fair practices, there are some areas of the law where a review or reform is required. In particular, implementation of the law together with strong monitoring and evaluation measures need serious attention. This paper applied the international principles of detention as a last resort and the prevention of secondary abuse to the Malaysian context. By strengthening the current legislation and bringing it up to par with International Law, the Malaysian Juvenile Justice System can be based on a solid legal foundation. To ensure proper implementation, proper training of the police, legal professionals and social workers would carry the principles of child justice to the ground. Finally, more awareness amongst all the legal institutions and the community at large on the causes of the increase in child crime and the need for restorative justice will modernize the Malaysian Juvenile Justice System to the standards of a progressive nation in the 21st century.

71 UNICEF & Child Frontiers January 2010, p. 88.

72 Dusuki 2009, p. 141.

References

- Bee, Teh Guan, 2000. Institutional Treatment and Management of Organizations for Juvenile Offenders in Malaysia UNAFEI Resource Material Series no. 59. Available at: http://www.unafei.or.jp/english/pdf/RS_No59/No59_20PA_Bee.pdf, (accessed on 10 June 2012).
- Dusuki, F. N., 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: Human Rights Laws of Asian Countries*. Vol. 1, No 1 April, Korea Legislation Research Institute.
- Dusuki, F. N., 2011. "Criminal Law and the Rights of the Children in Malaysia," in Nisrine Adiad & Farkhanda Zia Mansoor (eds.), *Criminal Law and the Rights of the Child in Muslim States: A Comparative Analysis*, London, British Institute for International and Comparative Law.
- The Human Rights Commission of Malaysia (SUHAKAM), 2005. *Report Forum on the Right to a Fair and Expeditions Trial*, 7-8 April. Available at: http://www.suhakam.org.my/c/document_library/get_file?p_l_id=30217&folderId=26478&name=D LFE-650.pdf (accessed on 4 March 2012).
- UNICEF & Child Frontiers, January 2010. *Child Protection System in Malaysia: An Analysis of the System for Prevention and Response to Abuse, Violence & Exploitation against Children*, Kuala Lumpur. (to be published in Autumn 2013).
- UNICEF & Child Frontiers, July 2010. *The Malaysian Juvenile Justice System: A Study of Mechanisms for Handling Children in Conflict with the Law*, Kuala Lumpur. (to be published in Autumn 2013).

Interviews

- Interview with Mr. Fahri Azzat, Solicitor and Legal Aid lawyer, 12 March 2012.
- Interview with Dr. Farah Nini Dusuki, Senior Lecturer, Faculty of Law, University of Malaya, 13 March 2012.
- Interview with Superintendent Ong Chin Lan, Royal Malaysian Police, 21 March 2012.
- Interview with Ms. Wong Lai Cheng, ex-Training and Education Manager at Protect and Save The Children, 14 July 2012.

International instruments

Committee on the Rights of the Child forty-fourth session, Consideration of Reports Submitted by State Parties Under Article 44 of the Convention: Concluding Observations: Malaysia, CRC/C/MYS/CO/1, 2 February 2007.

Convention on the Rights of the Child, opened for signature 20 November 1989, (entered into force 2 September 1990).

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The JDLs), Adopted by General Assembly resolution 45/133 of 14 December 1990.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), Adopted by General Assembly resolution 40/33 of 29 November 1985.

Malaysian laws, regulations and cases.

Child Act 2001, Act 611, 15 February 2001. *Preamble, Part XI, s. 30, s. 39, s. 46, s. 54, s. 83(3), s. 84.*

Criminal Procedure Code 2006, Act 593. *s. 352.*

Federal Constitution Malaysia, 1963. *s. 145(3).*

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

Government Documents

Jabatan Kebajikan Masyarakat (Department of Social Welfare) 2011, Available at: http://www.jkm.gov.my/index.php?option=com_jdownloads&Itemid=314&task=viewcategory&catid=41&lang=ms (accessed on 20 January 2012).

Jabatan Polis Diraja Malaysia, Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police, 2005.