

Juvenile Justice Handbook

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Acknowledgments

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Foreword

By Caleb Mutandwa: Director Justice for Children

Juvenile Justice Handbook is the title of the handbook prepared by Justice for Children. The issues addressed in the handbook were noted by Justice for Children lawyers and paralegals as they were doing their daily work of providing free legal services to children in Zimbabwe. The Handbook shades light on the international and national legal framework so that those who work with children in the justice system will be aware of the legal provisions that should guide them as they carry out their work. Besides the legal framework, the key stakeholders and their roles and responsibilities were spelt out as most child rights practitioners and the stakeholders themselves do not know what they are supposed to do to ensure that the rights of children who are in conflict are protected. The Handbook makes practical proposals on how children who are in contact with the law can be assisted using the current legal framework.

The Handbook highlights the international treaties with standards that guide the treatment of children in conflict with the law, some of which have been signed and ratified by the government of Zimbabwe. Reference has been made to the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. If the standards set in these international treaties are adopted and followed then the justice delivery system will work for the betterment of our children.

In 2013, Zimbabwe adopted a new Constitution (Constitution of Zimbabwe Amendment (No. 20) Act 2013) which includes children's rights, including the rights of children in conflict with the law in the Bill of Rights. Following the adoption of the Constitution, efforts have and are still being made to align subsidiary laws to the Constitution. This handbook therefore takes cognizance of the fact that some laws are still yet to be aligned to the Constitution and there are also efforts to come up with a Child Justice Act, with a Draft Bill having been drafted.

Implementation of laws in Zimbabwe still remains a challenge, with some laws not being applied at all. For instance, through our work in providing legal services to children in conflict with the law, we have noted that provisions in the Children's Act which provide that some cases of children in conflict with the law should be referred to the Children's Court are not being used as children's cases are handled by the mainstream criminal Courts.

In handling cases of children in conflict with the law, some of the critical questions which should be asked are; what should the society do with children who violate the law? Treat them like other criminals? Impose the sanctions of the law commensurate with the crimes they commit? Mix them with adult offenders? The Handbook thinks otherwise. It posits the view that among other things stakeholders within the justice system, the children's families and the community in which they live need to get their act together to help children restart their lives and become useful members of the society as early as possible. It is urged that reform minded government authorities, legislators and students of law and justice read and benefit from the insights so that we restart the lives of children in conflict with the law rather than destroy them.

Vision, Mission and Values

Justice for Children was registered as a trust in December 2002 under Trust Deed Number MA 1300/2002. It was then registered with the Law Society of Zimbabwe in February 2004 and in January 2012, it was registered with the Ministry of Labour and Social Services as a Private Voluntary Organisation (PVO 07/12) resulting in the change of its name to Justice For Children. Among its staff are lawyers registered both with the High Court of Zimbabwe and the Law Society of Zimbabwe.

Vision

A Zimbabwe in which all children have access to justice and enjoy their human rights.

Mission

Justice for Children ensures access to justice to and the enjoyment of human rights by all children below the aged of 18 years through:

- The provision of legal aid to children in difficult circumstances;
- Empowering the children and adults on child protection laws and child rights and responsibilities; and
- Research on issues affecting children and advocating for reform.

Core Values

JCT is driven by child centeredness, teamwork, dedication, sensitivity, professionalism, transparency, accountability, confidentiality and innovation.

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1 Introduction

1.1. BACKGROUND

In 2013, Zimbabwe adopted the Constitution of Zimbabwe Amendment (No. 20) Act 2013 which unlike its predecessor, provides for the rights of children, including the rights of children in conflict with the law. However, more than 3 years after the adoption of the Constitution, some subsidiary laws are yet to be aligned to the Constitution. This has resulted in the continuous use of the laws before the Constitution by stakeholders within the justice system in utter disregard of the provisions of the Constitution and, in some cases, in complete violation of the children's Constitutional rights.

The past five years have seen the worsening of the socio-economic environment in Zimbabwe with unemployment levels rising and more families pushed below the poverty datum line. Unemployment has reached unprecedented levels in Zimbabwe following the Supreme Court ruling¹ on termination of employment which saw many people losing their jobs without notice and benefits and plunging families further into poverty. Some parents have left Zimbabwe for neighbouring and overseas countries in search for greener pastures; with some children have been orphaned due to the HIV/AIDS pandemic. This has resulted in children being left either with negligent relatives or by themselves thereby increasing children's vulnerability as some are forced to steal as a means of survival whilst others are engaging in crime, drug and substance abuse due to lack of guidance and support. Research has shown that "juvenile offenders often have multiple problems and difficulties which need to be addressed, such as disruptive or abusive family life, a background of institutionalization and inadequate support structures, addictions, illiteracy and interrupted education, and poverty."²

In addition to the Constitution and other subsidiary laws which protect the rights of children, Zimbabwe has ratified both the United Nations Convention on the Rights of the Child (CRC)³ and the African Charter on the Rights and Welfare of the Child (ACRWC).⁴ These provide for the manner in which children in conflict with the law must be handled. However, despite these laws being in place, in practice these are not being fully implemented.

¹ Nyamande & Anor v Zuva Petroleum (Private) Limited SC 43/15

² Penal Reform International "Making Law and Policy that Work: A Handbook for Law and Policy Makers on Reforming Criminal Justice and Penal Legislation, Policy and Practice" London 2010 p60

³ United Nations Convention on the Rights of the Child U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990

⁴ African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990)

1.2. PURPOSE OF THE HANDBOOK

The Handbook focuses on the current legal framework which should be implemented to protect children, analyses the current practices in handling cases of children in contact with the law and the role of officials in the justice delivery system. The human rights approach adopted in this Handbook will lead to suggestions for improving the situation of children in contact with the law in Zimbabwe. The Handbook seeks to promote a uniform practice in accordance with international human rights law and national laws in handling cases of children in contact with the law. It will also generate a platform for the creation and amendment of laws to meet the best juvenile justice practices. The Handbook seeks to promote a juvenile justice system based on human rights which focuses on rehabilitation and reintegration of juvenile offenders rather than retribution. The Handbook will also serve as a resource material and an advocacy tool for those in the justice delivery system.

1.3. METHODOLOGY

This Handbook is based on the work that Justice for Children has been conducting in providing legal services to children in contact with the law and a desk research which revealed the gaps within the current legal framework. JCT takes cognizance of the fact that some laws are still to be aligned to the Constitution hence recommendations are made on the proposed recommendations for the various laws. In addition to these methods, Justice for Children also monitored court cases involving children in contact with the law. In some of the cases, Justice for Children represented the children in contact with the law. The organisation has further drawn from its participation in the implementation of the Pre Trial Diversion Programme.

1.4. DEFINITIONS

Child: every boy or girl under the age of eighteen years as defined by the Constitution

Child in conflict with the law: a child alleged as, accused of, or recognised as having infringed the criminal law

Convention: is a formal agreement between states and is open to participation by the international community as a whole⁵.

Accession: is an act by which a country signifies its agreement to be legally bound by the terms of a particular treaty and has the same effect as ratification. The difference is that accession is not preceded by signature⁶.

Ratification: is an act by which a state signifies an agreement to be legally bound by the terms of a particular treaty, the state will sign the treaty and fulfill its national legislative requirements⁷.

Diversion: involves the removal from criminal justice processing and frequently, redirection to community support service. This is commonly practiced on a formal and informal basis in many legal systems. This

⁵Definitions of key terms used in the UN TREATY collection, www.unicef.org/files/definitions.pdf accessed on the 3/9/10

⁶ibid

⁷ibid

practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration for example stigma of conviction and sentence. This usually applies to offences of a non serious nature⁸.

Restorative Justice: aims to achieve restorative outcomes for both the offender and the victim such as reparation, restitution and community service. This is achieved through processes which involve the offender, the victim and, in some cases, the community such as mediation and conciliation. Both the offender and the victim should be reintegrated into the community.

Rehabilitation: focuses on restoring the offender through education and therapy to useful life in which they contribute to the society. This prevents habitual offending (recidivism). The punishment inflicted on the offender should make their reintegration into society easier. Such punishment may take the form of community service, probation orders, and any form of punishment which entails some form of guidance and aftercare towards the offender.

He/she: the use of the word “he” in this Handbook shall be construed to include “she” whenever appropriate.

1.5. HANDBOOK STRUCTURE

This introductory chapter is followed by Chapter 2 which deals with the international legal framework in respect of juvenile justice. This is followed by a review of the national legal framework in Chapter 3 which pays attention to the application of the law in dealing with children in contact with the law. Chapter 4 draws on the workshops that were done with officials in juvenile justice to summarise some of the roles and responsibilities of these officials. Chapter 5 contains the pre-trial diversion programme whilst Chapter 6 contains the conclusions and recommendations.

⁸Ibid Rule 11

2 International Legal Framework

2.1. INTRODUCTION

Zimbabwe is a state party to the CRC and ACRWC, which treaties impose a legal obligation on Zimbabwe to align its laws to the international legal framework governing child justice. The CRC specifically calls upon States “*to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law.*”⁹ The conventions have provisions that deal with children in contact with the law. The intention of the instruments was for the development of conditions that promote the well-being of children in conflict with the law, with a view of reducing the need for intervention under the law, and to effectively, fairly and humanely deal with children in conflict with the law¹⁰. Zimbabwe is yet to achieve full compliance with these conventions as they are yet to be domesticated to become justiciable. Some of the key requirements of the conventions are discussed hereunder.

2.2. RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT

Article 6 of the CRC provides for the right to life. Article 5 of the ACRWC also provides for the inherent right to life, survival, protection and development of every child. The right to life encompasses basic needs of a child for their survival and development. These include shelter, food, health facilities, education, play, leisure, access to information, freedom of thought and religion. Children are prone to all sorts of delinquency if they fail to get these needs in life for their development. It is the duty of the government to ensure enjoyment of these rights to avoid the delinquency. Both the CRC and ACRWC prohibit the imposition of the death penalty on children¹¹.

2.3. NON DISCRIMINATION

Article 2 of the CRC obliges states parties to ensure that every child enjoys the rights set out in the Convention without any discrimination irrespective of the child's, his parents or legal guardian's “race, colour, sex, language, religion, political or other opinion, national, ethnic, social origin, property, disability, birth or other status.”¹² The state must take appropriate measures to ensure that children are not discriminated or punished on the basis of their status. The ACRWC goes further to require the state to take measures to end harmful customary practices, particularly those that discriminate on the grounds of sex, that affect the welfare, dignity and normal growth and development of the child¹³. Children in contact with the law deserve the protection like any other child; the law should be applied “impartially and without distinction of any kind.”¹⁴

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¹⁰The Beijing Rules op cit Rule 1

¹¹Article 37 (a) of the CRC and Article 5(3) of the ACRWC

¹²See also Article 3 of the ACRWC

¹³See Article 21 of the ACRWC

¹⁴The Beijing Rules op cit Rule 2

2.4. THE RIGHT TO BE HEARD

Both the CRC and the ACRWC provide for the right of a child who is capable of forming and communicating his views, to freely express those views or opinions in all matters affecting him¹⁵. The views should be given due weight in accordance with the child's age and maturity. The CRC particularly points out that a child should be provided with an opportunity to be heard either directly or through a representative in any judicial and administrative proceedings affecting him¹⁶. The child must therefore be informed not only of the charge but the juvenile justice process and possible measures that can be taken in dealing with his case. This right must be fully respected and implemented throughout every stage of the juvenile justice process¹⁷. The CRC committee has explained that in the context of judicial proceedings, implementation of this right involves five stages which are preparation, the hearing, assessment of the child's capacity, information about the weight given to the child's views and availability of complaints or appeal procedures and remedies.¹⁸

2.5. BEST INTERESTS OF THE CHILD

One of the fundamental principles of children's human rights is the best interests of the child. This is contained in Article 3 of the CRC and Article 4 of the ACRWC. The principle, in summary, provides that in all actions concerning a child the primary consideration shall be the best interests of the child. In the context of juvenile justice the principle means that the "traditional objectives of criminal justice (repression/retribution) must give way to rehabilitation and restorative justice objectives in dealing with child offenders."¹⁹ This takes into account the physical, emotional and psychological vulnerability of children. The ACRWC goes further to link this principle with an obligation to provide an opportunity to a child who is capable of communicating his views to be heard in judicial and administrative proceedings affecting him.²⁰

2.6. DIGNITY AND RESPECT

Article 37(c) of the CRC provides that a child deprived of liberty should be treated with humanity and respect for his inherent dignity. This is buttressed by Article 40(1) of the same Convention which requires that a child accused or recognized as having breached the penal law has the right to be treated in a manner consistent with his sense of dignity and worth. The ACRWC essentially recaptures these provisions in Article 17(1). This requires the elimination of all forms of violence in juvenile justice. This treatment should be accorded to the child throughout the whole process of juvenile justice.

Such a child should also be treated in a manner that promotes his self respect and respect for the rights and fundamental freedoms of others²¹. The treatment of children within the juvenile justice system should be directed to the development of respect for human rights and freedoms. The officials within the juvenile justice system such as the police, prosecutors, magistrates and probation officers must respect and implement all the guarantees of a fair trial.²²

¹⁵See Article 12 of the CRC and Article 7 of the ACRWC

¹⁶Article 12 (2) of the CRC

¹⁷Committee on the Rights of the Child, General Comment No. 10 (2007) Children's Rights in Juvenile Justice CRC/C/GC/10 2 February 2007 p3

¹⁸ Committee of the Rights of the Child, General Comment No. 12 (2009), The Right to be Heard, U.N. Doc. CRC/C/GC/12

¹⁹ibid p3

²⁰Article 4(2) of the ACRWC

²¹Article 40(1) of the CRC and Article 17(1) of the ACRWC

²²General Comment No. 10 (2007) op cit p4

The CRC further requires that the treatment takes into account the child's age and promotes the child's reintegration into society. Professionals involved in the juvenile justice system must therefore be “knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children.”²³

2.7. MINIMUM AGE OF CRIMINAL RESPONSIBILITY

Article 17 of the ACRWC categorically provides that “there shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”²⁴ The Committee on the Rights of the Child (the Committee) has argued that a minimum age of criminal responsibility below the age of 12 years is not internationally acceptable and recommended that States Parties increase the age to 12 years as the absolute minimum²⁵. The UN General Assembly has also argued that “if the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless.”²⁶

2.8. GUARANTEES FOR A FAIR TRIAL

Both the CRC and the ACRWC contain guarantees that are meant to ensure that a child in contact with the law receives a fair treatment and trial.²⁷ These guarantees are minimum standards.

2.8.1. No retroactive juvenile justice

Article 40(2)(a) of the CRC provides that no child should be charged with or sentenced under the penal law for acts or omissions which at the time they were committed were not prohibited by national or international law.²⁸ International law also prohibits the imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed. A child should however benefit from a change of law providing a lighter sentence than the one that was applicable at the time of the offence.²⁹

2.8.2. The presumption of innocence

Both the ACRWC and the CRC provides that a child accused of having committed an offence shall have a right to be presumed innocent until proven guilty.³⁰ The prosecution bears the onus to prove the charge against the child beyond reasonable doubt. All public authorities or others involved in the juvenile justice must refrain from prejudging the outcome of the trial.

2.8.3. The right to effective participation in the proceedings

A fair trial requires that a child effectively participate in the trial. The proceedings should be conducive to the best interests of the juvenile and conducted in an atmosphere of understanding which allows the juvenile to participate therein and to express himself freely.³¹ It is crucial to consider the child's age, maturity and other special needs in dealing with effective child participation hence courtroom procedures and practices may have to be modified in dealing with children.

²³ibid p4

²⁴See also Article 40 (3) of the CRC

²⁵General Comment No. 10 (2007) op cit p8-9

²⁶The Beijing Rules op cit Rule 4

²⁷Most of the guarantees are also contained in Article 14 of the ICCPR.

²⁸See Article 15 of the ICCPR

²⁹See Article 15(1) of the ICCPR

³⁰Article 17(2)©(i) of the ACRWC and Article 40(2)(b)(i) of the CRC

³¹The Beijing Rules op cit Rule 14.2

2.8.4. Prompt and direct information of the charges

A child accused of an offence should be informed promptly and directly of his charges in a language he understands. This may be done in the presence of the child's parents or legal guardians.³² An oral explanation is encouraged than simply providing the child with the official document.

2.8.5. Legal and other appropriate assistance

Both the CRC and the ACRWC provide that a child must be afforded legal or other appropriate assistance in the preparation of his defence.³³ There should be adequate time and facilities for the preparation of the defence.³⁴ The child is also entitled to free assistance of an interpreter if he cannot understand or speak the language used.³⁵ The assistance of an interpreter should be afforded to the child throughout the juvenile justice process. The Committee has also recommended that states parties should ensure that children with speech impairment or other disabilities are provided with adequate and effective assistance by well trained professionals where they are subject to the juvenile justice process.³⁶

2.8.6. Decisions without delay and with involvement of parents

The child has a right to have the matter determined without delay by a competent, independent and impartial authority or court.³⁷ The time frame from the commission of the offence to the final decision should be as short as possible. The CRC also provides that every child deprived of his liberty should have the right to prompt access to legal and other appropriate assistance and to a prompt decision on any such action.³⁸ States should set and implement time limits from the commission of the offence to the final adjudication and disposition by the court. The parents or legal guardians must be notified of the apprehension of the child so as to promote parental involvement so that they provide general psychological and emotional assistance to the child during the proceedings.³⁹

2.8.7. Freedom from compulsory self-incrimination

A child should not be compelled to testify against himself or confess guilt.⁴⁰ A child must therefore not be subjected to torture, cruel, inhuman and degrading treatment meant to force an admission or a confession. The child's age, development, the length of the interrogation, the child's lack of understanding, the fear of the unknown consequences or of a suggested possibility of imprisonment may lead a child to make a confession which is not true.⁴¹ This can be avoided by the presence of legal and other representative during questioning. The Constitution protects the right of every accused person, including children, to remain silent and not to testify or be compelled to give self incriminating evidence,

2.8.8. Presence and examination of witnesses

A child has the right to "examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality."⁴² The child should be informed of the possibility to examine witnesses and to allow him to express his views in that regard, views which should be given due weight in accordance with the age and maturity of the child.⁴³

³²Article 40(2)(b)(ii) of the CRC and Article 17(2) © (ii) of the ACRWC

³³Article 40(2)(b)(ii) of the CRC and Article 17(2)©(iii) of the ACRWC

³⁴Article 14(3)(b) of the ICCPR

³⁵Article 40(2)(vi) of the CRC

³⁶General Comment No. 10 (2007) op cit p15

³⁷Article 40(2)(b)(iii) of the CRC, Article 17(2)(c)(iv) of the ACRWC and Article 14(2)© of the ICCPR

³⁸Article 37(d) of the CRC

³⁹General Comment No. 10 (2007) op cit p13

⁴⁰Article 40(2)(b)(iv) of the CRC and Article 14(2)(g) of the ICCPR

⁴¹General Comment No. 10 (2007) op cit p 14

⁴²Article 40(2)(b)(iv) of the CRC

⁴³Article 16 of the CRC

2.8.9. The right to appeal

The CRC, ACRWC and ICCPR highlight that a child has a right to appeal to a higher court against a decision by which he is found guilty of the charge brought against him.⁴⁴ The appeal should be determined as speedily as possible.

2.8.10. Full respect of privacy

The child should have his privacy respected from arrest until the final decision is made by the court.⁴⁵ The child should not be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, and unlawful attacks on his honour and reputation.⁴⁶ This is to avoid harm being caused to a child by undue publicity or by the process of labeling. In principle, no information that may lead to the identification of the juvenile offender should be published.⁴⁷ The Committee has recommended that States Parties introduce the rule that all hearings of these cases should be conducted behind closed doors with the exception of the presence of experts or other professionals with a special permission of the court.⁴⁸

2.9. IMPRISONMENT AS A LAST RESORT

Detention of a child should be in conformity with the law and used as a measure of last resort and for the shortest period of time.⁴⁹ The liberty of children is important as it promotes their right to survival and development. The State must therefore use other effective alternatives to imprisonment. Where the child is then detained as a last resort the duty lies with the State to make sure that the child's right to development is respected and promoted. The child should therefore “receive care, protection and all the necessary individual assistance which are social, educational, vocational, psychological, medical and physical that they may require in view of their age, sex and personality.”⁵⁰

2.10. SEPARATION FROM ADULT PRISONERS

International human rights law provides that children should be separated from the adult prisoners.⁵¹ The CRC allows for a mixture of adults and children only when it is in the best interests of the child.⁵² Children by being young they tend to imitate what they see or hear and by keeping them among adult prisoners the juvenile justice system will do more harm than good. “The danger to juveniles of criminal contamination while in detention must not be underestimated.”⁵³ Alternative measures which promote rehabilitation and reintegration must therefore be stressed.

2.11. SENTENCING OPTIONS

Article 40(4) of the CRC provides the sentencing options available and suitable for children in contact with the law. It provides for care, guidance and supervision orders which include counseling, probation, foster care, education and vocational trainings. This is to ensure that children in contact with the law are dealt with in a manner appropriate to their wellbeing and proportionate both to their circumstances and the offence.

⁴⁴Article 40(2)(b)(v) of the CRC, Article 17(2)(iv) of the ACRWC and article 14(5) of the ICCPR

⁴⁵Article 40(2)(b)(vii) of the CRC

⁴⁶Article 16 of the CRC and Article 10 of the ACRWC

⁴⁷The Beijing Rules op cit Rule 8

⁴⁸General Comment No. 10 (2007) op cit p15

⁴⁹Article 37(b) of the CRC, see also Article 9 of ICCPR

⁵⁰The Beijing Rules op cit Rule 13

⁵¹Article 10(2)(b) and (3) of the ICCPR, and Article 17(2)(b) of the ACRWC

⁵²Article 37© of the CRC

⁵³The Beijing Rules op cit Rule 13

The focal idea is to promote the well being and best interests of the child as well as their reintegration into the society. Juveniles are supposed to enjoy the rights that every child will be enjoying besides the fact that they are in contact with the law.

Corporal punishment has been held to be a violation of Article 37(a) of the CRC which prohibits all forms of cruel, inhuman and degrading treatment or punishment.⁵⁴ International human rights law also outlaws the death penalty in respect of juvenile offenders.

2.12. CONCLUSION

The juvenile justice should embody all the above in order to achieve rehabilitation of the juvenile offenders. This should start from the national legal provisions to the institutions that administer the law. The next chapter will therefore considers the legal position in Zimbabwe as well as assess its practical implications to the rights of children in contact with the law.

⁵⁴General Comment No. 10 (2007) op cit p16

3. The National Legal Framework

3.1. INTRODUCTION

This chapter looks at the laws that have been promulgated to protect children in contact with the law in Zimbabwe. The chapter measures these laws against the international standards set out above as well as looking at how the practical application or lack of it affects the rights of children in contact with the law. In as far as that is possible, the organization of this chapter follows the statutes that deal with juvenile justice in Zimbabwe. It is pertinent to note that some of the laws are still to be aligned to the Constitution hence recommendations are made on how these laws can be aligned to the Constitution.

3.2. CONSTITUTION OF ZIMBABWE

Zimbabwe's Constitution provides for civil and political rights in the Bill of Rights.⁵⁵ These rights protect every citizen of Zimbabwe, including children. It is clearly set out that the State must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount⁵⁶. In addition the State has undertaken to ensure that children enjoy family or parental care, or appropriate care when removed from the family environment, have shelter and basic nutrition, health care and social services, are protected from maltreatment, neglect or any form of abuse and have access to appropriate education and training⁵⁷. The state is also compelled to take appropriate legislative measures to protect children from exploitative labour practices and to ensure that children are not required or permitted to perform work or provide services that are inappropriate for the children's age or place at risk the children's age, their children, education, physical or mental health or spiritual, moral and social development⁵⁸.

In addition S81 further highlights the rights of children including the right to equal treatment before the law and the right to be heard, the right to be given a name and family name, the right to family or parental care, the right to be protected from economic and sexual exploitation, from child labour and maltreatment, neglect or any form of abuse. This section also highlights that every child has a right to education, health care services, nutrition and shelter. In addition a child has right not to be recruited into militia force or take part in armed conflict or hostilities.

In the context of juvenile justice, the Constitution clearly states that a child should not be detained except as a measure of last resort and if detained, to be detained for the shortest appropriate period, to be kept separately from detained persons over the age of eighteen years and to be treated in a manner, and kept in conditions that take into account of the child's age⁵⁹. Further emphasis is also placed on the importance of taking into consideration a child's best interests in every matter concerning them. Children are also entitled to adequate protection by the courts, in particular the High Court as their upper guardian.

⁵⁵ Part 2 of the Constitution

⁵⁶ Section 19(1) of the Constitution

⁵⁷ Section 19(2) of the Constitution

⁵⁸ Section 19 (3) of the Constitution

⁵⁹ Section 81(i) of the Constitution

3.3. CRIMINAL LAW (CODIFICATION AND REFORM) ACT

The Criminal Law (Codification and Reform) Act⁶⁰ (the Code) deals with the ages of criminal liability in Zimbabwe.

a. Children Below Seven Years

A child below the age of seven years shall be deemed to lack criminal capacity to commit any crime. The child cannot be tried or convicted of any criminal offence.⁶¹ The Committee on the Rights of the Child has stated that the age of 7 years is way too low and the recommendation has been to increase the age to an absolute minimum of 12 years.⁶²

b. Children between the Age of 7 and 14 Years

Children between the age of 7 years and 14 years are presumed to lack the capacity to form the intention or where negligence is an element of the crime concerned, to lack the capacity to behave in the way that a reasonable adult would behave in the circumstances.⁶³ This is rebuttable depending on the circumstances of each case. The onus is on the state to establish beyond reasonable doubt that the accused child was mature and did understand that the act constituting the offence was wrongful.

The presumption of immaturity can be rebutted “if, at the time of the commission of the crime for which the child is charged, the child was sufficiently mature to understand that his or her conduct was unlawful or morally wrong; and to be capable of conforming with the requirements of the law.”⁶⁴ In deciding whether a child was sufficiently mature to have the required understanding and capacity, the court must take into account the following;

- nature of the offence the child is charged with,
- child`s maturity and background,
- the child`s knowledge, education and experience, and
- the child`s behavior before, during and after the conduct which forms the basis of the charge.⁶⁵

This approach has been criticized because it leaves the assessment of the child's maturity in the sole discretion of judicial officers and may result in confusion and discriminatory practices.⁶⁶ This is particularly the case in Zimbabwe where there is a shortage of probation officers and resources for those who are there to carry out assessments of the circumstances of the child and report to the court. It is however pertinent to note that the Code provides that no child under the age of 14 years shall be tried without the authority of the Prosecutor General.⁶⁷

c. Sexual cases

The irrebuttable presumption that a boy below the age of 14 years is incapable of having sexual intercourse does not apply in Zimbabwe for boys who have reached the age of 12 years. There is now a rebuttable presumption that a boy over the age of 12 years but below 14 years is incapable of performing sexual

⁶⁰Criminal Law (Codification and Reform) Act Chapter 9:23

⁶¹Section 6 of the Code

⁶²General Comment No. 10 (2007) op cit p8

⁶³Section 7 of the Code

⁶⁴Section 230(1) of the Code

⁶⁵Section 230(3) of the Code

⁶⁶General Comment No. 10 (2007) op cit p8

⁶⁷Section 231 of the Code

intercourse unless the contrary is shown on a balance of probabilities.⁶⁸ There are cases where the Prosecutor General has wrongly authorised the prosecution of boys below the age of 12 years for rape and the courts have continued with trial on the basis of that authority. This has strengthened the need to build the capacity of officials in the justice system. Zimbabwe recently introduced the crime of aggravated indecent assault which can be committed even by any female person who has sexual intercourse with or commits upon a male person any other act involving the penetration of any part of a male person's body or of her own body or commits upon a female person any act involving the penetration of any part of the other female person's body or of her own body with indecent intent without the other person's consent.⁶⁹ There is no minimum age limit prescribed for this offence yet for rape the legislature has provided for the age of 12 years. This causes discrimination between girls and boys.

d. Criminal Capacity of Children Over 14 Years

Children above the age of 14 years are presumed to have the capacity to form the necessary intention to commit any crime or, where negligence is an element of the crime concerned, to behave in the way that a reasonable person would have behaved in the circumstances of the crime.⁷⁰ These children can therefore be tried for offences without the Attorney General's consent. The onus is upon them to rebut the presumption.

3.4. CRIMINAL PROCEDURE AND EVIDENCE AMENDMENT ACT, 2016

The Criminal Procedure and Evidence Act was amended in 2016 to align to the Constitution. The Act defines a legal representative in relation to an accused person under the age of sixteen who is assisted by his natural or legal guardian as that particular guardian.⁷¹ The court can also permit another person to assist any person who is charged with a criminal offence in his defence.⁷² This provision can be used to allow a child above the age of 16 years to be assisted by any other person, including his natural or legal guardian. The Act compels the police officer, unless otherwise directed by a Magistrate, upon arresting a person under the age of 18 years to warn the parents or guardians of such to appear in court. However, despite the Constitutional provisions on non-discrimination, this provision still does not apply to a person under the age of 18 years but has been married or emancipated. The parent should be available to offer support to the child during the process of juvenile justice.

Section 135 of the CPEA provides for the release of juvenile offenders without bail by a judge, magistrate or police officer. This is in respect of accused persons under the age of 18 years charged with any offence other than murder, treason and rape. The child can be released and warned to appear in court, or released to the care of the person in whose custody he is and warn that person to bring or cause him to be brought to court. The child may also be placed in a place of safety pending his appearance in court. It is undesirable to remand a juvenile in custody except in exceptional circumstances. The police must operate according to a presumption against detention. In terms of the law, a child can be released even where he does not have a guardian but the general practice at the police stations and courts has been to detain all those children without a guardian.

In its work providing legal representation to children, JCT noted that police officers even use the offence allegedly committed by the child to determine his age where there is no birth certificate. In the majority of cases children are arrested without the birth certificates. Many children who are alleged to have committed serious offences end up being treated as adults and thereby detained until they appear in court. If the magistrate is not satisfied about the age of the child, estimation by a dentist is required. This has only worked where there are government doctors close by while those children in remote areas languish in remand prisons for inordinate periods awaiting the medical report. This violates the fundamental rights of the child like the right to liberty.

⁶⁸Section 63 of the Code

⁶⁹Section 66 of the Code

⁷⁰Section 8 of the Code

⁷¹ Section 2 of the CPEA

⁷²Section 191(c) of the CPEA

The Act prohibits the publication of the name, address, school, place of occupation or any information that is likely to reveal the identity of any person under the age of 18 years who is being tried or has been tried in court except with the consent of a Magistrate, Judge or Minister. That consent can be given where it is considered just and equitable and in the public interest to have such publication.⁷³ This protects the right to privacy of juveniles in contact with the law. The challenge is that of non implementation of this legal provision as reflected in the media where publications of details which reveal the identity of juveniles in contact with the law is common. The Constitution of Zimbabwe⁷⁴ generally provides that court hearing shall be held in public. Parliament of Zimbabwe has elaborated on the constitutional provisions through the Courts and Adjudicating Authorities (Publicity Restriction) Act⁷⁵ which allows the Court when it considers it necessary or expedient to do so to make the following orders, either on its own initiative or on the application of a party to the proceedings:

- That all persons shall be excluded from the proceedings provided that
 - I. the parties and their legal representatives shall be allowed to be present or
 - ii. any person may be present when the decision of the court is made;
- that the name, address or other information likely to reveal the identity of any person concerned or mentioned in the proceeding shall not be publicly disclosed;
- that information revealing or likely to reveal any place or locality concerned or mentioned in the proceedings shall not be publicly disclosed; and
- that the whole or any specified part of the proceeding shall not be publicly disclosed.

Such orders may be made where the court considers it necessary or expedient to do so in the interests of the welfare of persons under the age of eighteen years.⁷⁶

The CPEA further provides for special provisions relating to the punishment of juveniles from Sections 351 to 353. Section 351 of the CPEA provides for the manner of dealing with juveniles. The section provides that a court which has convicted a person under the age of 19 years may, instead of imposing punishment or imprisonment for that offence, order that the juvenile be taken before a Children's Court and be dealt with in terms of the Children's Act⁷⁷ or, after ascertaining with the Minister responsible for social welfare that accommodation is available, that the child be placed in a training institute or reform school. A child placed in an institution or reform school shall remain there until after 3 years has lapsed from the date of the order, or he is released or discharged from the order in terms of the Children's Act.⁷⁸ This section is important in promoting alternative measures to imprisonment which are aimed at the rehabilitation and reintegration of the child. The advantage of referring a convicted juvenile to the Children's Court is that "the conviction shall not, for the purposes of any enactment, be regarded as a conviction."⁷⁹ This is however rarely used. Cases handled by JCT showed that some are not even aware of the provisions let alone procedure to be followed in referring cases to the Children's Court. This then results in children being sentenced harshly.

Section 353(1) of the CPEA provides for corporal punishment of male juvenile offenders under the age of 18 years.⁸⁰ The section goes on to provide for how that punishment should be administered. The punishment should be moderate and the strokes should not exceed 6. A medical practitioner should examine the child first and certifies if he is fit to have the corporal punishment. If not, the child is sent back to the magistrate who will decide on another option. The medical practitioner assessing the juvenile should prescribe the

⁷³Section 195 of the CPEA

⁷⁴Section 18(10)(11) and (12) of the Constitution of Zimbabwe

⁷⁵Courts and Adjudicating Authorities (Publicity Restriction) Act Chapter 7:04

⁷⁶Section 3 of the Courts and the Adjudication Authorities (Publicity Restriction) Act

⁷⁷Children's Act Chapter 5:06

⁷⁸Section 352(2) of the CPEA

⁷⁹Section 351(7) of the CPEA

⁸⁰See also Section 336(1)(e) of the CPEA which allows a court to impose corporal punishment upon a convicted male person below the age of 18 years.

manner in which and where corporal punishment should be inflicted. This is sometimes not done resulting in juveniles being abused during the process. There is a shortage of medical practitioners to urgently assess the child before the punishment can be executed. The punishment may have to be inflicted before the report is produced for the child not to be incarcerated. A designated officer should administer “*moderate*” corporal punishment in the presence of a medical officer. The parents of a child who is to receive corporal punishment have a right to be present when it is being administered. Corporal punishment in Zimbabwe applies to boys only. Corporal punishment should be administered in private but in practice this has not been followed in all cases. However, it is pertinent to note that the Constitutional Court of Zimbabwe is reserving judgment on a corporal punishment case brought before it.

The High Court has repeatedly encouraged the use of corporal punishment for serious offences such as rape and unlawful entry into premises as an alternative to imprisonment. In the case of the *State v Hunda & Anor* HH-124-10 the court held that a 17 year old accused who had been convicted of theft and unlawful entry could have been sentenced to corporal punishment, plus a wholly suspended prison term. He was now above the age of 18, and must be treated as an adult, in the sense that corporal punishment is no longer applicable. The offence was a serious one. He must now be sentenced to a term of imprisonment, as he could no longer be subjected to corporal punishment. Other forms of punishment, like community service or a fine, would trivialize the serious offence he committed. In the *State v Mahuni* HH-4-09, a 14 year old accused had sexually assaulted two girls who were aged 6 years. He was charged with, pleaded guilty to and was convicted of rape. The magistrate disregarded the recommendation of the probation officer that the accused receive corporal punishment, saying that such a punishment would be too lenient. She sentenced him to 9 years imprisonment, of which three years were suspended on appropriate conditions. The High Court held that the magistrate had misdirected herself. To sentence such an immature person to prison at all, let alone for the length imposed, was so harsh as to induce a sense of shock. She also misdirected herself in holding that corporal punishment was lenient. Corporal punishment is brutal, inhuman and degrading and can never be characterized as lenient. Juvenile offenders convicted of rape should not be treated as little adults. Their very ages denote their mental immaturity. Non-custodial options other than fines and community service should be pursued. Some of these options are counselling, institutionalization in juvenile reformatories and corporal punishment. The choices in Zimbabwe are limited by our level of economic development and our prevailing economic challenges which impact negatively on the development of new institutions and the funding and staffing of existing ones. Our courts therefore are obliged to resort to the disproportionate use of corporal punishment, coupled with a suspended term of imprisonment as the only available and viable option.

Besides these special provisions dealing with the punishment of juveniles, the CPEA also provides various sentencing options. Section 338 of the Act prohibits the passing of the death sentence upon a person who was under the age of 21 years at the time of the commission of the offence. This is also supported by the Constitution where it provides that the death penalty must not be imposed on a person who was less than twenty-one years when the offence was committed⁸¹. This complies with international human rights law which prohibits the death sentence on juvenile offenders. The Act however does not outlaw life imprisonment for juvenile offenders. In practice children are not being sentenced to life imprisonment. This Act is also silent on the effects of mandatory sentences on children hence in some cases like stock theft juveniles are sentenced to imprisonment for the prescribed mandatory period. A court can also impose a fine and community service upon a convicted juvenile.⁸² Community service can be useful in rehabilitating the juvenile offender. The Act is also relevant in juvenile justice in that it empowers the courts to postpone the passing of sentence and to suspend the operation of the sentence passed.⁸³ Both options can give a child the

⁸¹ Section 48(c) (i) of the Constitution

⁸²Section 336 of the CPEA

⁸³Section 358 of the CPEA

chance to reform. Lastly, the Act allows the court to “discharge the offender with a caution or reprimand.”⁸⁴ This should be used to deal with juveniles, especially where they commit minor offences. One challenge that has been realized from the workshops is that the courts sometimes do not consider the age of the juvenile at the time the offence was committed in sentencing but focus more at the time of conviction and sentence.

3.5. CHILDREN'S ACT

Efforts are currently underway to align the Children’s Act to the Constitution. Section 2 defines the child as a person under the age of 16 years and a young person is defined as a person who has attained the age of 16 years but not attained the age of 18 years. This is in variance of the Constitution which define a child as anyone below the age of 18 years of age⁸⁵ and current efforts to realign the Act should include the Constitutional definition of a child.

The Act provides for two ways in which a Children's Court can be established. Firstly, the Minister of Justice may establish a Children's Court after consulting the Minister responsible for the administration of the Act. Secondly, every magistrate's court shall be a Children's Court.⁸⁶ The Minister of Justice shall designate a magistrate to preside over a Children's Court he would have established.⁸⁷ The Minister has not established any Children's Court hence Magistrates Courts are serving, as they should, as Children's Courts.

The Court may sit with assessors or any two persons who have, in the Court's opinion, experience in any matter which may arise for decision at any sitting, inquiry or hearing.⁸⁸ This Court shall have a probation officer appointed by the Minister responsible for the administration of the Act in consultation with the Minister of Justice who shall be responsible for “safeguarding the interest of any child or young person brought to this court and be present during all the proceedings.”⁸⁹ The Act also provides that every Public Prosecutor “shall ex officio be a children's court assistant of any children's court held within that province.” The office of the children's court assistant shall be a public office and his duties are to adduce any available evidence relevant to the proceedings, cross-examine any witness giving evidence during the proceedings whom he had not called and generally assist the Children's Court in performing its functions.⁹⁰ The challenge is that these noble provisions are not being used.

The Minister responsible for the administration of the Act has not appointed any probation officer which is a clear breach of a mandatory statutory obligation. A probation officer's report is a special requirement for the court but this is not being produced due to, inter alia, lack of resources. This is not in the best interests of the child. There are no juveniles who are being referred from the criminal courts to the Children's Court for them to be dealt with in terms of the Children's Act. The Public Prosecutors have therefore not encountered any situations where they were called upon to act as the children's court assistants.

The Children's Court is not bound by any rules relating to criminal or civil proceedings. The presiding officer determines and adopts the manner of proceedings which seems to be best fitted to do substantial justice except in situations provided for by the Act.⁹¹ The use of the procedure would advantage juveniles if they are referred to the Children's Court. The Court can promote the best interests of the juvenile.

⁸⁴Section 358 of the CPEA

⁸⁵ Section 81 (1) of the constitution

⁸⁶Section 3 of the Children’s Act

⁸⁷Section 4(1) of the Children’s Act

⁸⁸Section 4(2) of the Children’s Act

⁸⁹Section 4(2a) of the Children’s Act

⁹⁰Section 4(8) of the Children’s Act

⁹¹Section 5(1) of the Children’s Act

At the sitting of the Children's Court, no person shall be present unless he is an officer of the court, parent or guardian of the child, legal practitioner, a person permitted by the court or a person in charge of a home or institution in which the child is residing.⁹² This guarantees the right to privacy of the child.

The Act details the manner in which juveniles referred to the Children's Court by a criminal court which has convicted them are dealt in the Children's Court. The Children's Court will hold an inquiry in the presence or absence of the child and “shall, wherever it is possible and appropriate to do so, seek the opinion of the [juvenile].”⁹³ It is necessary to promote the right to participation of every juvenile in cases affecting them.

There are various orders which the Children's Court can opt for after holding the inquiry. The Court can;

- Upon being satisfied that a certified institution will accept the juvenile, order that the juvenile shall be placed in a named certified institution;
- Order that the juvenile shall be placed in, returned to or remain for foster care in the custody of any named suitable person;
- Order that the juvenile be placed in, returned to or remain in the custody of his parent or guardian;
- Order that the juvenile shall reside in a place determined by the court;
- Order that the juvenile shall render service for the benefit of the community; or
- Upon being satisfied that a training institute will accept the juvenile, order that the juvenile be placed in a named training institute.⁹⁴

Where a child is placed in the custody of a parent or guardian, foster care of any named suitable person or where the child resides in a named place the court may also order the child to be under the supervision of a probation officer for a period not exceeding 3 years.⁹⁵ These provisions, could work towards the rehabilitation and reintegration of juveniles for they seek to avoid the imprisonment of children. The major challenge is that these provisions are not being implemented. The number of institutions in Zimbabwe which can accommodate juveniles is limited and there are under resourced. Officials in the juvenile justice indicated that there is no clear policy on how juveniles are supposed to be treated while in these institutions. Children who acquire any qualification in these institutions suffer from discrimination as they are treated as ex-convicts rather than rehabilitated members of the society.

3.6. PRISON ACT

The Prison Act defines a young prisoner as a person under the “apparent age of nineteen years.”⁹⁶ This definition could assist all juveniles below the age of 18 years. The challenge is however the use of the word apparent particularly in view of the fact that many juveniles may not have a birth certificate with them to prove their age. The prison officers could then just adjudge these to be above the age of nineteen especially where they are involved in serious crimes.

Section 63 of the Act provides that in so far as the prison accommodation renders it practicable, young prisoners shall be kept apart from other prisoners. The challenge is that in many prisons there are no separate juvenile sections hence juveniles are kept together with other prisoners. The prisons are also congested because of, inter alia, the number of people awaiting trial and the amount of time that is taken to have criminal cases completed. This poses a danger to juveniles who are hardened by adult offenders. “A hostile and punitive juvenile justice system increases recidivism rates among young people, while a system focused on education and social reintegration can reduce them.”⁹⁷

⁹²Section 5(6) of the Children’s Act

⁹³Section 19(2) of the Children’s Act

⁹⁴Section 20(1)(b) of the Children’s Act

⁹⁵Section 20(2) of the Children’s Act

⁹⁶Section 2 of the Prison Act Chapter 7:11

⁹⁷Penal Reform International op cit p60

This Act also entrenches the practice of corporal punishment.⁹⁸ The Act adds to the provisions of the CPEA in that it provides that a medical officer who examined the prisoner in terms of the latter and officer in charge of the prison should be present during the administration of corporal punishment. These officers may stay the infliction of corporal punishment at any time during the process and prohibit the remainder of the sentence if in their opinion the punishment is likely to cause more serious injury than was contemplated in the sentence. In practice, these provisions are not adhered to as the officials are sometimes not present when the punishment is inflicted. The definition of moderate corporal punishment is subjective. What is there to measure “moderate” when corporal punishment is being administered?

3.7. CONCLUSION

There is urgent need to align the subsidiary laws to the Constitution and ensure the implementation of the said laws. The officials in the juvenile justice system are not aware of some of the laws hence the need to continuously build their capacity. The juvenile justice system should also be resourced for the laws to be implemented.

⁹⁸Sections 101-105 of the Prison Act

4. Roles of Stakeholders in Juvenile Justice

4.1. INTRODUCTION

The workshops with officials in the juvenile justice revealed that some stakeholders were not aware of their duties and what the law provides when it comes to the handling of juveniles. The Committee has emphasized that the proper and effective implementation of rights of juveniles within the justice system depends on the quality of the persons involved in the administration of juvenile justice. Training of the police, prosecutors, magistrates, probation officers, legal and other representatives of children is therefore crucial and should take place in a systematic and ongoing manner.⁹⁹ This chapter sets out to outline the roles and responsibilities of stakeholders in juvenile justice in order to promote consistent practice when dealing with children in contact with the law. It draws from the workshops that were held with the officials.

4.2. THE POLICE

The Constitution of Zimbabwe provides that the function of the police is to detect, investigate and prevent crime, upholding the Constitution and enforcing the law without fear or favour, preserve the internal security of and maintaining law and order in Zimbabwe among other functions.¹⁰⁰ The Police Act provides that a police officer shall exercise such powers and perform such duties as are conferred or imposed by the law.¹⁰¹ The officials indicated during workshops that the police are first port of call when it comes to juvenile justice. They should investigate then arrest and not arrest to investigate.

When the case involves a child offender the police should treat that matter differently. Police are generally intimidating to children. While the police should ensure that peace and tranquility exist and law is upheld, when dealing with children in contact with the law they should treat them like children. The way the police should approach, talk to or behave in the presence of a child should be different. The police should not handcuff a child.

On effecting arrest, the police should bring the child to the police station where the charge should be presented to child promptly in the presence of a guardian or parent. The police should strive to release children into the custody of their parents or guardians whilst waiting for the court day or investigations. If the police keep the child in detention, the child should be separated from adults. The police should also consult a probation officer as soon as possible upon arresting a juvenile.

4.3. THE PROBATION OFFICER

Probation officers have a major role when it comes to cases of children in conflict with the law. The functions of a probation officer are provided for in terms of the Children's Act. In addition to what has been stated above a probation officer should:

- Inquire into and report to the court upon the character and environment of any minor on trial, or undergoing a preparatory examination or inquiry. The report should show the causes and circumstance contributing to the child's delinquency;
- Devise and carry out measures for the observation and correction of tendencies to delinquency in children and for the discovery and removal of conditions causing or contributing to juvenile delinquency; and
- Counsel, supervise and control any person placed under their supervision.¹⁰²

⁹⁹General Comment No. 10 (2007) op cit p10

¹⁰⁰Section 219 of the Constitution of Zimbabwe

¹⁰¹Section 19 of the Police Act Chapter 11:10

¹⁰²Section 46 of the Children's Act

Soon after the arrest, the probation officer should be available to go to the child's residence in order for him to prepare the report. In circumstances where a child's parents are not known, for example for children living in the streets, the probation officer should stand in as the guardian for that child.

4.4. PUBLIC PROSECUTORS

The CPEA provides for the functions of a Public Prosecutor. These are representatives of the Attorney General who are charged with the duty to prosecute criminal cases. From the police, the juvenile is sent to the court where he will meet the prosecutor first. The juveniles should not be treated like adults. Officials stated that usually juveniles should only be prosecuted for serious cases. There are other methods that can be used in place of criminal prosecution in the interest of the development of the child. The prosecutor should normally rely on the recommendations by the probation officer on how to deal with the juvenile.

4.5. MAGISTRATES

Magistrate should try the child brought to court and see to it that justice is done. Where a child is put on trial, it is important where possible that the child be assisted by a parent or guardian if not by a legal practitioner. Where the court considers that he requires the assistance of another person, court may permit him to be assisted by that person. Honorable Justice Mr.Chitakunye highlighted that it is ironic that the criminal justice system in Zimbabwe tends to prosecute juveniles and in most cases unassisted and expect them to be able to defend themselves whilst the civil law denies them such. They are deemed incapable to ably represent themselves.¹⁰³ The magistrate should assist the juvenile in canvassing important aspects of his defence and mitigation if unrepresented.

4.6. PRISON OFFICERS

The prison is the last call after a child has been remanded in custody or sentenced to imprisonment. The prison service has the mandate to incarcerate as well as to rehabilitate the child offenders for successful reintegration into the society. On admission, a rehabilitation officer should induct the juvenile or provide counseling to the child to mitigate the shock associated with incarceration at such a tender age. This is not the usual position as most children are being kept amongst adults prisoners due to the shortage of space. These children are also not being inducted and counseled due to the shortage of the rehabilitation officers at the prison. There is need for a clear policy which would guide the prison services on rehabilitation of juveniles.

While serving, juveniles should be afforded a chance to pursue academic goals. The Zimbabwe Prison Service reportedly only offers free primary education to inmates. The challenge will come when it comes to high school education. Some juveniles are sent to Whawha Young Offenders' Prison and Northcourt Institute for Young Offenders, which institutions accommodate juveniles only up to 20 years only. These institutions operate along the lines of an ordinary college where juveniles will totally engage in schooling or technical pursuits so that on completion of their sentences they would have acquired a skill.

4.7. CONCLUSION

The officials in the juvenile justice must exercise their functions in a manner that promotes the rights of juveniles. This can be achieved through implementing the provisions in the current legal framework which are in the best interests of the child and highlighting to the legislature those that need to be amended.

¹⁰³Honourable Justice A M Chitakunye "Treatment of Juvenile Offenders in Criminal Matters" Harare 2010

5. The Pretrial Diversion Programme

5.1. INTRODUCTION

In 2009, Zimbabwe introduced the pre-trial diversion programme (PTD) aimed at channelling cases of children who commit non serious offences from the formal justice system to extra-judicial programmes thereby ensuring that children do not receive a criminal record for actions committed due to immaturity or lack of guidance. The programme is currently being implemented in Harare, Chitungwiza, Gweru, Bulawayo and Murehwa. This chapter highlights the key aspects of the programme.

5.1.1. Background and Objectives

The Government of Zimbabwe realized that there was need to move away from the punitive and retributive practices towards rehabilitative, educative and restorative options. A national steering committee involving all the relevant Government Ministries and departments, as well as other key stakeholders in the juvenile justice system was constituted and given the task of implementing the pilot programme.

The objectives of the Pre-trial Diversion Programme would be to make offenders responsible and accountable for their actions, provide an opportunity for reparations, identify underlying problems motivating offending behaviour through personalised services, prevent offenders from receiving a criminal record and being labeled as criminals, open up the judicial process for educational and rehabilitative procedures to come into action to the benefit of all the parties concerned, and reduce the caseload on the formal justice system.

5.2. TARGET GROUP

This programme caters for children in conflict with the law who would have committed non serious offences which would attract a sentence up to twelve months imprisonment. The young persons must not have been a repeat or serious offender and must accept responsibility of the crime. They should also be willing to take part in the activities identified by the diversion officer. It is important to note that young offenders who deny their guilt would not be eligible and are entitled to due process.

5.3. ROLES AND RESPONSIBILITY OF THE STAKEHOLDERS

5.3.1. Police

The police should use the power to arrest as a last resort. The arresting detail should consider diversion options before effecting an arrest depending on the nature and seriousness of the offence. The juvenile should be assessed within the shortest period of time and in any event, within a week. If the police decide to arrest the child, minimum force should be used. The police officer should explain all the rights entitled to the child in a language that he understands. Investigations should be completed urgently and promptly and notification of the arrest must be given to the diversion officer, giving all relevant details of the young person. Young offenders should not undergo identification parades or fingerprinting. Where a young offender is incarcerated, the arresting detail and the officer in charge should ensure that the offender has proper food, medical treatment if required, adequate clothing, access to religious counselors, his lawyer, parents, guardians and should be separated from adult offenders to avoid criminal contamination. Where the police fail to determine whether the matter should go for diversion or not, they should prepare the docket which would be sent to the prosecutor, who upon receipt of the docket should refer the case to the diversion officer to make investigations.

5.3.2. Diversion Officer

The diversion officer should immediately investigate the personal circumstances of the young person and his eligibility for diversion after notification from the police. Where the diversion officer is satisfied that a warning is necessary at this stage, he will refer the young offender to the police so as to be dealt with in terms of the police guidelines. The diversion officer would produce a report which will be submitted to the Area Public Prosecutor for consideration. The report should contain the age of the offender, the socio-economic and demographic circumstances, the personal circumstances and contact details of relatives or guardians, the nature of crime committed, the circumstances surrounding such commission, whether the young person admits his guilt, the justification for diversion and the recommended activity to which the young person will be subject.

5.3.3. Area Public Prosecutor

After preparing the docket, the police should bring the young offender together with the docket with the diversion officer's report to the prosecutor. The prosecutor can make a decision after going through the evidence and circumstances of the case including recommendations by the diversion officer in the report. The prosecutor would then cause a meeting to be convened by the diversion committee to deliberate on whether the case is suitable for diversion. Where necessary, the diversion officer may be required to provide additional information on the offender. The prosecutor would proceed to decline to prosecute and endorse such decision on the police docket or arrange for the charges to be formally withdrawn before plea before a magistrate when a matter is finalized without due process.

A prosecutor is a representative of the Prosecutor General's Office and has the power to decide whether to prosecute or not in any matter. Reservations were made about the desirability of the prosecutor to solely decide on the suitability of an offender for diversion in an impartial manner considering that the prosecutor represents the victim's rights and is in the business of bringing offenders to trial and seeking their conviction. The result is that they may be fewer cases for diversion hence the small multidisciplinary committee to make the decision had to be constituted as the diversion committee.

5.3.4. The Diversion Committee

The Diversion Committee consists of the Area Public Prosecutor, the Provincial or Resident Magistrate, Superintendent in charge of crime and in his/her absence a Commissioned Officer appointed by him/her to represent him for the Zimbabwe Republic Police, preferably not in charge of a station, the District child welfare officer or a senior child welfare officer in his/her absence and the Diversion Officer.

Where the committee agrees by majority that the young offender should be diverted, such decision should be implemented immediately by the Diversion Officer. All record of proceedings and decisions reached by the committee should be kept. Where a finding is made that the young offender is not suitable for diversion, the diversion officer should refer the case together with the assessment report to the public prosecutor who would deal with the matter in a normal way. Where a matter is before a Magistrate who is of the opinion that the matter is eligible for diversion, he should request the public prosecutor to urgently consider the matter for diversion and refer the matter to the diversion officer for a report to be made. When a report is made, the diversion committee will also be called to handle the matter.

5.4. DIVERSION OPTIONS

A young person may be made to undertake the following activities before charges can be withdrawn or prosecution declined.

- **Reparation**

This refers to community service or work or service for the benefit of the victim. It may also include compensation in cash or in kind.

- **Counseling**

This may depend with the nature of the offence and will be facilitated by the persons trained in this field.

- **Attendance at a Particular Institution for Educational or Vocational Purposes**

This could be full time or part time depending on the circumstances. This is desirable where it is felt that the offender may benefit from such attendance. Attendance however, must not be recommended if it results in the separation of the young offender from family.

- **Victim -Offender Mediation**

This involves a meeting between the offender and the victim, with their close relatives. The intention is to facilitate the healing of wounds and encourage societal healing. Issues such as feelings, compensation, apology, performance of community service or work that benefits the victim are considered. This should be done by trained social workers.

- **Constructive Use of Leisure Time**

This is intended to occupy the leisure time of the juvenile in order to prevent him from engaging in criminal activities through boredom. This may include activities such as sport, church youth groups, training in areas such as horticulture.

- **Police Cautions**

The police could issue cautions in deserving cases categorized into two namely, formal and informal cautions. Informal Cautions should be administered for minor offences that do not warrant a suspect/accused young offender to be taken to a police station, charge office, base or post. It is a verbal warning that is administered at the scene of the crime by the attending detail or arresting officer. All cautions of this nature should be recorded in a register which should be destroyed after 12 months. Formal Cautions would be issued in writing and be administered in the presence of a diversion officer or social officer or probation officer and the parent or guardian of the juvenile.

- **Family Group Conferencing**

This is similar to victim offender mediation but is more comprehensive and will include all persons such as local leaders, church leaders and others who may have a stake in the matter. This option is particularly beneficial to victimless cases or where the offender is a corporate.

- **Community Service**

Community service is one of the activities which a young person diverted from the criminal justice system can be made to undertake. The young offender would be required to commit himself or herself to performing specified tasks for the benefit of the community or a section thereof for a recommended number of hours. The young offender would be placed at a recommended institution specified by the Diversion Committee. Placements would be done at both public and private institutions as long as the activities performed directly benefit the public. The institutions, where necessary should ensure that tools and protective clothing is made available.

5.5. CONCLUSION

The programme promotes the rights of children who are in contact with the law especially those facing non serious offences. All the stakeholders should play their role in ensuring that the programme is successful and becomes operational. There is however need to expand the programme to cover the whole of Zimbabwe so that all children benefit.

6. Conclusion

Zimbabwe's legal system, though containing many guarantees for children in contact with the law, still needs to be reformed. The Constitution of Zimbabwe specifically provides for the rights of children in contact with the law but is not aligned to various other acts of parliament. It also allows corporal punishment which violates children's rights as recognized in terms of international human rights law. The Constitution further provides that international conventions properly ratified by the government do not automatically form part of the Zimbabwe's domestic law, a factor which has led to violation of the rights of juveniles. Besides the Constitution, there are various laws which provides for juvenile justice and this tend to cause confusion as to which law to apply. In some cases this makes it difficult for the officials in juvenile justice to comprehend the law.

The major challenge confronting juvenile justice in Zimbabwe is however the non implementation of that legal framework. This is due to reasons which include lack of capacity on the part of the juvenile justice officials, lack of resources to implement the law and just the lack of political will to implement the law. There are other challenges which inhibit juveniles from accessing justice such as the lack of birth certificates and the breakdown of the family structure due to the HIV and AIDS pandemic.

The Constitution should specifically outlaw the use of corporal punishment and provides for a juvenile justice system that is aimed at rehabilitation and reintegration of juveniles. The position of international law should also be reviewed so that conventions which are properly ratified by the government can become applicable in Zimbabwe without the need for Parliament to pass an Act.

The various legal provisions dealing with juvenile justice should be harmonized in one Act of Parliament so that the law becomes easy to access and understand for officials in juvenile justice. Therefore efforts to enact a Child Justice Act should be finalized. Other countries like South Africa have taken this approach and enact comprehensive Acts which deal specifically with juvenile justice. This can avoid the confusion which is sometimes caused by various Acts which provide for different positions on the same subject.

The law must also be reformed to allow for the diversion of juveniles in contact with the law from the time of their arrest. The police, working with probation officers and the community, must be empowered to dispose of cases of juveniles especially where they are accused of petty offences. The legislature should consider decriminalizing certain types of behaviour among children such as minor infractions and status offences and have these handled in a diversion system that can involve the parents, community and probation officers. The diversion system would foster accountability within children for their actions without exposing them to the damaging effects of the criminal justice system. There is also need to expand the diversion programme to other areas in which the programme is not being implemented.

The main recommendation is however the need to ensure that the current legal framework is implemented in a manner that promotes the rehabilitation and reintegration of juveniles. The CPEA is particularly crucial in that it allows for a situation where convicted juveniles are referred to the Children's Court where they will be dealt with in terms of the Children's Act. The latter Act offers many options which can be used to create a juvenile justice system that promotes the rights of children. There is already a framework for juvenile diversion which needs to be operationalised.

There is need for the popularization of the current legal framework dealing with juvenile justice. This can be achieved through the simplification of the legal provisions and disseminate these to officials in the juvenile justice system. There should be continuous capacity building activities for officials in the juvenile justice system in order for them to be empowered to use the law to protect the rights of juveniles. The capacity

building activities can result in the officials using other forms of dealing with juveniles like non custodial sentences.

Bibliography

Conventions

1. African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990)
2. International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976
3. United Nations Convention on the Rights of the Child U.N. Doc. A/44/49 (1989)

Statutes

4. Children's Act Chapter 5:06
5. Constitution of Zimbabwe
6. Courts and Adjudicating Authorities (Publicity Restriction) Act Chapter 7:04
7. Criminal Law (Codification and Reform) Act Chapter 9:23
8. The Criminal Procedure and Evidence Amendment Act, 2016
9. General Laws Amendment Act Chapter 8:07
10. Legal Aid Act Chapter 7:16
11. Police Act Chapter 11:10
12. Prison Act Chapter 7:11

Websites

13. www.unicef.org/files/definitions.pdf
14. <http://www2.ohchr.org/english/law/beijingrles.htm>
15. <http://www.un.org/docs/ocosoc/documents/2002/resolution/eres>

Other

16. Committee on the Rights of the Child, General Comment No. 10 (2007) Children's Rights in Juvenile Justice CRC/C/GC/10 2 February 2007
17. Penal Reform International "Making Law and Policy the Work: A Handbook for Law and Policy Makers on Reforming Criminal Justice and Penal Legislation, Policy and Practice" London 2010
18. UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly Resolution 40/33 of 29 November 1985