

A Memorandum on the CHILD BILL 2000
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INTRODUCTION

The Child Bill 2000 (the Bill) represents a timely and commendable initiative by the government to consolidate and develop the existing and diverse legislation relating to children namely the Child Protection Act 1991 (CPA), the Juvenile Courts Act 1947 (JCA) and the Women and Girls Protection Act 1973 (WGPA).

In considering the Child Bill 2000, WCC would like to emphasise that the context in which the Bill will operate is absolutely crucial.

There are a number of factors which may singly or collectively contribute in placing a child in a situation of risk, and ultimately, lead to the need for protection. These range from individual failings of the parents or guardians to family breakdown, poverty, social deprivation, social dislocation and failings in the education system.

There needs to be greater support and assistance to families which begin to exhibit distress signs. The loss of support previously available from the extended family network must be replaced by the provision of alternative community support systems including basic child care facilities and recreational centres.

Creating specialised and fully trained Family or Child social work teams will enable early, constructive and positive intervention to assist distressed families to preserve the family unit and avert a complete breakdown.

Where aggressive intervention like the removal of a child from a family unit becomes necessary; all agencies, institutions and persons involved in providing care and protection like Magistrates, Advisers, Boards Of Visitors, residential home/hostel workers and other carers need to be fully trained and equipped with the relevant (specialist) skills and expertise to give each child in need not just protection, but the wherewithal to develop his/her full capacity.

Children who have suffered emotional neglect, or physical or sexual abuse need careful nurturing and counselling. They may suffer from low self-esteem and a range of behavioural difficulties like difficulty in relating to others (including those in authority), and may have impaired physical and intellectual development.

Where sexual abuse has taken place, the child may have difficulty relating the incidents of abuse and coming to terms with what has happened. The child may also be confused over role models and relationships with family members with the possibility of increased sexualised behaviour and enhanced behavioural difficulties.

Helping the child deal with the fall-out from his or her experience is a highly skilled task and a very demanding one requiring trained counsellors and staff.

Thus WCC would urge that serious attention be paid to the actual functioning of the alternative avenues for care and protection of children envisaged by the Child Bill 2000 bearing in mind the following:

- that children are being held in police lock-ups and prisons, often for long periods of time, because there are no adequate alternative places of detention;
- that places of safety and refuge are often hopelessly overcrowded;
- that there is no government-sponsored foster parent programme;
- that there are very few child psychologists, child and/or family counsellors, family social workers and properly trained residential home social workers; and
- that in general there is little or no training and development of appropriate skills amongst other agencies who may be involved, including the police, Magistrates, advisers, Board of Visitors, to ensure the sensitivity and understanding of child-related issues.

Whilst the Bill represents a step forward, in some areas it has not gone far enough in providing 'special safeguards' for the children at risk.

Outlined below are WCC's recommendations and comments:

THE CHILD BILL 2000: PROVISION AND COMMENTS

I. Integration of definitions relating to children in need of care and protection, and protection and rehabilitation and places of safety and places of refuge

Recommendation 1:

Integrate the definition and treatment of Children in Need of Care and Protection under PART V and Children in Need of Protection and Rehabilitation under PART VI

Comments:

Part V appears to have been imported from the JCA and CPA while Part VI from the WGPA. Whilst arguably the focus of the WGPA and consequently Part VI is mainly

children involved in prostitution and other sexual activities, the wider definition of Children in Need of Care and Protection under Part V includes children who have been sexually abused – in particular children sexually exploited by any person for that person's sexual gratification.

Due to the "cut & paste" approach taken, the clauses sit uncomfortably with each other. There must be a more systematic arrangement of provisions and a more holistic approach.

By classifying them as two separate Parts, the effect may be to confuse the focus on children who essentially need protection, and to apparently suggest that children who fall under Part V need care and protection, whilst those under Part VI need protection and rehabilitation.

WCC would argue strenuously that all children who fall under both Parts need care and protection. A seven-year old child who has been employed for prostitution, for example, should not be subject to different perceptions or referrals than other children of similar age who have also been sexually abused.

Recommendation 2:

Clarify the definitions and consider the possibility of the integration of places of safety and places of refuge

Comments:

Under the Bill, a child who is sexually abused under Clause 17(1)(a), e.g. by being forced to take part in pornography may be placed in a place of safety (Clause 30(1)(d)) for care and protection whereas a child who is induced to perform any sexual act (Clause 38(a)) may be placed in a place of refuge for protection and rehabilitation. The basis and justification for children in need of care and protection being treated differently from children in need of care and rehabilitation must be seriously re-considered.

II. Offences against Children

Recommendation 1:

Detention of a child in a brothel or for prostitution or immoral purposes (Clause 43(1)(f) & (g)) be made an offence regardless of the child's consent

Comments:

WCC recommends that the words 'against the child's will' be deleted from Clauses 43(1)(f) and (1)(g), since a child's consent should not be relevant when considering the offences of detaining a child in a brothel or with intent that the child be employed for purposes of prostitution / immoral purposes.

Recommendation 2: Delete the option of a fine in sentences for offences of procuring a child for prostitution or sexual intercourse and all other related offences (Clause 43(1)(aa) & (bb))

Comments:

The offences of procuring a child for prostitution, sexual intercourse or any unlawful / immoral purposes or advertising thereof and other related offences are serious offences which under Clause 43(1)(aa) carry sentences of imprisonment for a term not exceeding 15 years. Likewise the offences of aiding or abetting or controlling the prostitution of a child and the engaging or hiring for any valuable consideration a child to provide services for one's sexual gratification carry sentences of not less than 3 years and not more than 15 years. The provision of an option under the same clause for a fine not exceeding RM50,000.00 is not consonant with the gravity of the offences and should be removed.

Recommendation 3:

Remove the option of binding-over for all offences under Clause 43

Comments:

Clause 43(3) provides that Sections 173A and 294 of the Criminal Procedure Code in relation to binding-over of offenders/accused persons shall not apply only to offences under paragraphs (1)(i) and (j). WCC recommends that Sections 173A and 294 CPC should similarly not be applicable to all offences under Clause 43.

Recommendation 4:

Amend the offence of taking a child from person having lawful custody to exclude parents who have been granted the right of access (Clause 52(1)).

Comments:

A person having lawful custody of a child may deny access to the other parent despite a court order to the contrary. In such circumstances, a parent with a right of access should not be deemed to have committed an offence under Clause 52(1) even if the parent having custody does not consent to his/her exercising his right of access.

Therefore, WCC recommends that Clause 52 (3)(c) on defences be amended to read; “.....the other person has unreasonably refused to consent although he was aware of all the relevant circumstances or of any Court order allowing the parent/guardian such access”.

III. Remand in a Place of Detention or Detention Pending Proceedings

Recommendation 1:

Have properly funded and adequate numbers of appropriate places where children are remanded (Clause 86 (1)).

Comments:

Remand or detention in a police lock-up let alone in prisons, whether separated from adults or not, is not an acceptable option for children, as is the current scenario. Suitable places of remand must be set up exclusively with children in mind.

Recommendation 2:

Dispose cases in which the children are remanded (Clause 86(1)) or detained pending proceedings (Clause 45) within 6 months as is the practice with regard to criminal cases involving government servants

Comments:

Clause 45 of the Bill provides that a child with respect to whom a scheduled offence is alleged to have been committed and whom the Court considers to be in need of protection may be detained in a place of safety pending conclusion of court proceedings against the person charged whilst under Clause 86(1), a child alleged to have committed an offence and not released on bail may be detained in a place of detention.

In both circumstances, the child's period of detention must be minimised as such detention is a serious fetter on the child's freedom.

IV. Courts for Children: procedures and practice

Recommendation 1:

Simplify Court Procedures and adapt rules of evidence specifically for application to Children.

Comments:

WCC notes that the Bill more clearly outlines the procedures related to crimes committed by children rather than crimes against children. Not enough thought has been given to simplifying and adapting rules of evidence to facilitate the reception of a child's evidence in court. In particular, provision should be made to enable the child to testify without having to face his/her abuser, for example, by allowing a child to give evidence via video.

Similarly when an identification parade is held, the child should not be subjected to the normal mode of identification whereby a complainant is made to identify the accused in a parade face to face. Instead two-way mirrors should be used.

Therefore WCC proposes that the relevant statutes be amended to achieve the said objectives.

Recommendation 2:

Ensure each child is assigned a court-appointed lawyer if the child is not represented.

Comments:

A child should have a right to be represented by an advocate of his/her choice or, failing that, by one appointed by the court. In many cases, particularly where a parent or guardian is a party, having the parent or guardian assist in the child's representation may not only be inappropriate but may also lead to conflict of interests.

Recommendation 3:

Enhance the weight to be given to evidence given by a child

Comments:

In most cases where an offence against a child is committed, for example in a case of abuse by a family member, the principal evidence would be that of the child. In such cases, there is often little or no corroborative evidence. Serious consideration must be given to enhance the weight currently given to the testimony of a child to ensure successful prosecution of offences against children.

Recommendation 4:

Increase Restrictions on Media Reporting (Clause 15(1))

Comments:

Clause 15(1) which restricts media reporting of cases involving children in order to protect their identity is not wide enough as not all such cases are subjected to the restriction. For example children affected by proceedings under Part VII (children beyond control) and orders placing children with any of the institutions referred to in Part IX are not protected. WCC thus recommends that Clause 15(1)(d) be amended to include proceedings under Part VII and Part IX.

The Court should also be given general powers to make orders restricting media reporting "in any other case" not specifically provided for in Clause 15 if the Court is satisfied that it is in the interest of the child to impose such a restriction.

V. Duration of orders for care and protection, and protection and rehabilitation (Clauses 30(1)(d) & (e) and 40 (3)(a))

Recommendation:

Give the Court for Children the discretion to determine the duration of the placing of a child in a place of safety or refuge, or in the care of foster parents.

Comments:

Under Clause 30(1)(d) the Court may order the placement of a child in a place of safety for a period of 3 years or until he attains the age of 18. Clause 30(1)(e) provides that the Court may order the placing of a child in the care, custody and control of a foster parent for a period of 2 years or until the age of 18 whichever is earlier. Pursuant to Clause 40 (3) (a), the Court may order a child to be detained in a place of refuge for a period of 3 years.

The Court should be given the discretion to determine the period up to a maximum period of 2 or 3 years as the case may be given the varied and often complex nature of the cases appearing before it.

VI. Persons and institutions having care of children

Recommendation 1:

Monitor and provide institutions and persons having care of children (Clause 30(8)(a) & (c) and Clause 34(1)(b), (c) & (d)) with adequate funding and resources

Comments:

WCC notes that the Bill makes several references to institutions, carers, foster parents and follow-up programmes (e.g. Clauses 30(8)(a) & (c) refers to 'interactive workshops' and school consultations). It is crucial that there be adequate funding and resources, and regular monitoring of the options set out in this Bill to ensure that the Orders made achieve their aims.

Many institutions provide basic shelter and food, but probably little in the way of proper assessment, support and re-building of the child's emotional and physical well-being, and stimulating intellectual development. The few Welfare homes available are desperately over-crowded and lack specialist workers e.g. specialists in behavioural management, counselling and general child development skills. Indeed, it may be the case, as elsewhere in the world, that some residential institutions in Malaysia are not free from abuses which result in the further deterioration of the children's self-esteem and capacity to fulfil their potential as human beings.

Recommendation 2:

Allow privately-run institutions to be recognised as places of safety and refuge

Comments:

There must also be provision for the government to recognise and gazette privately-run institutions as places of safety and refuge given the shortage of suitable government-run homes. However there must be:

- a) a comprehensive and effective registration procedure established, which sets minimum standards as above;
- b) guidelines for the running of the homes and for powers of inspection;
- c) sufficient specialist staff employed by the government whose sole responsibility is to monitor and develop the work done in these homes.

VII. The Role of the Protector

Recommendation 1:

Establish proper and adequate support system to assist a Protector in the discharge of his duties and responsibilities

Comments:

The pivotal role given to the Protector under this Bill may be an indication of the difficulties that are bound to arise because of a lack of resources.

It will be noted that the responsibilities ascribed to the Protector include:

- a) dealing with all cases where protection may be required, including responsibility to make detailed reports, deciding on the mode of intervention and possible referral to a temporary place of refuge, and to a medical officer or a hospital;
- b) informing parents and guardians of actions taken;
- c) where parents or guardians have disappeared, tracing them (Clause 30 (4));
- d) assessing the suitability of any person taking a child into care, custody or protection (Clause 35 (2), (3) and (4));
- e) intervening where a carer - child relationship has broken down (Clause 36);

f) dealing with all unreported cases where children have been taken into care, which includes assessing the situation and deciding on the future course of action (Clause 37);

g) acting in all cases affecting the smuggling or sale of children (Clauses 41 and 51);

h) arranging and monitoring supervision procedures following discharge from a place of refuge (Clause 40(9)).

Given the potential number of children who may be at risk in our communities, these tasks are extremely demanding, and without adequate help and specialist social work teams, the Protector will not be able to discharge all these responsibilities effectively. It must be remembered that in any one district only one, or at best, a few social welfare officers are assigned to discharge the responsibilities of a Protector and the tasks imposed upon the Protector may stretch that person and his/her resources to the limit.

Recommendation 2:

Ensure that the Protector is given adequate training and resources.

Comments:

The Protector is also given:

a) magisterial powers in the taking of evidence (Clause 8(2a)),

b) powers to make decisions for the child in certain circumstances regarding hospitalisation and medical or surgical treatment (Clause 20(1)),

c) powers of search which may include without search warrant (Clauses 11 and 112), and

d) powers of inspection of any place in which a child is being cared for (Clause 114).

These are extensive powers and are certainly a cause for extra training and resources to ensure that the powers given are exercised appropriately and judiciously. Without such support, the Protector is vulnerable to having been given powers for which he/she may not be properly equipped to discharge particularly relate to the powers in taking evidence.

Recommendation 3: Ensure availability of Protector to discharge duties prescribed by the Bill

Comments:

WCC also notes the provisions whereby a medical officer or police officer must notify the Protector immediately upon taking a child into care. Likewise any medical officer / practitioner, member of family or child care provider who suspects that a child is being abused (Clauses 27-29) must immediately inform the Protector. This means the Protector

must be available and easily contactable 24 hours a day. It is again another indication of the onerous nature of the responsibilities ascribed to the Protector under the Bill.

Recommendation 4:

Child must be allowed to challenge decision made by Protector (Clause 8(2)(c)).

Comments:

Clause 8(2)(c) shields the Protector from being questioned on the grounds of any decision he/she may have made in relation to a child. This provision denies the child a basic safeguard by making the very evidence that is likely to momentarily change the child's life incontrovertible. WCC sees no reason why a child or an affected party should not be allowed to challenge the contents of a report or the basis of a decision which is likely to have such far-reaching consequences. WCC recommends removing this clause completely.

Recommendation 5:

Remove Clause 8(3) whereby every order or summons purported to be issued by a Protector shall be regarded as prima facie evidence of the facts stated therein.

Comments:

This provision allowing a reversal of the burden of proof makes it difficult for a child or affected party to challenge the Protector's order e.g. once an order is made by the Protector pursuant to Clause 35(4) placing the child in a place of safety or with a particular party the burden is shifted to the child or the affected party to disprove the facts stated in the order. Such a provision will not be in the child's interest.

Recommendation 6:

Retain discretion of Court on dispensation of restrictions in media reporting (Clause 15(3)(b)).

Comments:

Clause 15 restricts the media from reporting the full details in cases involving a child in the interest of protecting the identity of the child. Clause 15(3)(b) compels the Court, upon the Protector's application, to dispense with this restriction. No discretion is afforded to the Court.

It should be for the Court to decide whether to dispense with the restrictions and the Protector should not be in a position to remove this discretion. WCC therefore proposes that the word 'shall' be amended to 'may', thereby reserving to the Court the discretion to decide on such applications.

VIII. Constitution and membership of Advisers and Board of Visitors

Recommendation 1:

Ensure proper selection of suitable Advisers (Clause 11) and provide the necessary training

Comments:

Advisers, like members of the Co-ordinating Council for the Protection of Children should be persons with appropriate experience, knowledge and expertise on matters relating to the welfare, development and education of children.

WCC proposes more comprehensive criteria in selecting and assessing advisers. Experience shows that advisers are rarely active in analysing the facts of the case or more importantly, in discussing the merits of various options available in dealing with the child. Often, advisers merely endorse the Magistrates' suggestions and are in no position to make meaningful contributions. Advisers should therefore be given the necessary training and be sensitised to the needs of children. There must also be a review of the Panel of Advisers every six months.

Recommendation 2:

Persons recruited as members of Board of Visitors should be persons actively engaged in children's issues and sensitive to their needs. Training to be provided if necessary (Clause 82).

Comments:

The Boards of Visitors are crucial as they administer the places of safety and refuge, and approved schools. Pursuant to Clause 40(6), the Boards of Visitors are also empowered to reduce the periods of detention of children in places of refuge. (However, this power appears to be absent with regard to children in places of safety – another anomaly of the Bill).

WCC recommends that members of the Boards of Visitors be given training on children's issues and its members must be assessed annually to ensure that the Boards of Visitors are effective at all times.

IX. Duties of Medical Officers and Practitioners, Members of Family and Child Care Providers

Recommendation:

Impose the same duty on Hospital Administrators to inform incidents of child abuse (Clause 27).

Comments:

WCC welcomes the imposition of a duty on Medical Officers and Practitioners, members of the children's family and Child Care Providers to report incidents of child abuse. This duty should be extended to Hospital Administrators where there is a failure by the Medical Officers/Practitioners to inform the Protector.

X. Definition of Child Care Providers

Recommendation:

Extend the definition to include voluntary or unpaid child care providers (Clause 2).

Comments:

The definition of 'child care provider' is not wide enough. It is limited only to providers receiving valuable consideration for taking care of children. This excludes a whole range of providers who provide child-care on a volunteer basis.

XI. Register of Children in Need and Register of Child Sex Offenders

Recommendation:

Delete the provision for a Register of Children in Need and replace with a Register of Child Sex Offenders (Clauses 118-121)

Comments:

Clauses 118 - 121 provide for the maintenance of a "Register of Children in Need of Protection". Such a register is unlikely to be of much use. The relevant authorities (namely, the Welfare Department and the Court for Children) would in any event have adequate records which should suffice for the duration of the child's need of protection.

On the other hand, a register of Child Sex Offenders is crucial in the protection of children and ought to be maintained scrupulously. Such a register would enable the relevant authorities to keep track of known child sex offenders and would be useful in situations like screening potential foster parents or persons to be employed in places of safety or refuge, probation hostels, approved schools and other children's homes.

XII. Investigation and search procedures

Recommendation:

Protector must inform parents within 24 hours of placing a child in a place of safety (Clause 111(2)).

Comments:

Parents have a right to know the whereabouts of their children. The Bill merely provides that the Protector shall inform the parents / guardian "as soon as practicable" after placing a child in a place of safety. This Clause should be amended to read "...as soon as practicable and in any case within 24 hours..."

XIII. Minister's Power to make regulations

Recommendation:

The Minister's powers to make regulations must be diligently exercised (Clause 128).

Comments:

WCC notes that the items detailed in paragraphs a) - v) of Clause 128(2) are crucial in ensuring the effectiveness and smooth implementation of the Bill. Quite often however, there is substantial delay before the necessary regulations required in support of the implementation of a legislation are formulated and gazetted, thus rendering the principal Act useless.

This should not happen in this case particularly as the Bill proposes to repeal the CPA, JCA and WGPA and consequently all structures set up under them.

XIV. Fostering

Recommendation:

Set down procedures to encourage and facilitate fostering

Comments:

It should be noted that elsewhere in the world there is a trend to encourage fostering as a more viable option to placing a child in institutions. Although the Bill recognises and provides for fostering in some situations (Clauses 30(1)(e), 35 and 37), it does not appear to establish a fostering programme.

A national scheme needs to be fully developed, with a register, proper assessment and monitoring procedures, financial support by the government and, again, specialist staff to ensure that foster parents can carry out their duties with the best possible chance for optimum care and development for the child in their care.

There needs to be tight control over selection, supervision and support of prospective and actual foster parents.

CONCLUSION

Whilst the Bill is comprehensive in many respects, it has also created some inconsistencies and lacunae which need to be addressed. For example:-

a) under the Penal Code, statutory rape refers to sex with a child under the age of 16 regardless of consent. However under the Bill, the definition of 'child' is a person under the age of 18. Hence a child who has consensual sex with another individual at, for example, age 17 may be construed to have been sexually abused under the Bill but otherwise a consenting partner under the Penal Code; and

b) it must also be noted that the Bill purports to repeal the WGPA. This means that some of the offences created under the WGPA which are particular to women (and not merely children) like living on the earnings of prostitution and keeping of brothels (Sections 19 and 21 of the WGPA) which would consequently be repealed must be incorporated into other legislation like the Penal Code.

Bearing in mind that the Bill deals with juvenile offenders or delinquents and also children who have been traumatised by their experiences of abuse, neglect or exploitation the paramount consideration and purpose of this Bill must obviously be to assist these children to recover fully from their negative experiences and to give them a new lease of life.

If the Bill is to achieve its objectives, children's encounter with the system must be positive and productive. Constant monitoring of the implementation of the Bill and progress of the children brought under its purview is necessary to ensure that the objectives are not lost in bureaucratic apathy and indifference.

In dealing with juvenile delinquents and offenders, the approach of the courts cannot be based on the same principles and policies applicable to adult offenders. The Bill must therefore give more scope and power for the Courts in the form of a wider range of orders such as ordering offenders and delinquents to perform community service as an alternative to punishment.

The recommendations outlined in this memorandum advocate, as its underlying theme, the understanding and working out of a careful and sensitive programme for children within the context of today's society. The level of care, protection and treatment given to children must essentially be tailored to their specific needs and level of development.