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LEGAL REFORM FOR THE PROTECTION OF CHILDREN IN MOZAMBIQUE

Prepared for

**THE GOVERNMENT OF THE REPUBLIC OF
MOZAMBIQUE**

by



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For every child
Health, Education, Equality, Protection
ADVANCE HUMANITY



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Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
CAT	Convention Against Torture (1994)
CRC	Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights (1996)
ILO	International Labour Organisation
INGO	International Non-governmental Organisation
IOM	International Organisation for Migration
IPEC	International Programme on the Elimination of Child Labour
JDL	Standard Rules for Juveniles Deprived of their Liberty (1990)
MCR	Mozambique Country Report to the Committee on the Rights of the Child (CRC/C/41/Add 11)
MMCAS	Ministry for the Co-ordination of Social Action
NGO	Non-governmental Organisation
OVC	Orphaned and Vulnerable Children
SJAM	Statute on Jurisdictional Assistance to Minors (Decree 417/71)
SMR	Standard Minimum Rules concerning the Treatment of Prisoners (1955)
TDM	Tribunal de Menores

Executive Summary

Objective and methodology

The objective of the study was to undertake a legislative review of child law in Mozambique. This has been achieved through a desk review of literature pertaining to the status of child law and policy in the country as well as various consultative processes undertaken between August and December 2003 in various regions in Mozambique. Workshops were held with participants from all the zonal regions in Mozambique. Individual interviews with key officials and stakeholders were held. A study based on the views of children was completed. The results of all of these have been collated in this report. Recommendations have been made based on the concerns and needs identified through the consultative process, on the demands arising from Mozambique's ratification of international treaties, and on the gaps and weaknesses identified through the desk top legal review.

This report examines the broad context of vulnerable children in Mozambique and establishes the reasons for the law reform process being undertaken. This has been done by examining reports on existing law, and by auditing the views of participants during the consultative process. From this study it is evident that whilst there is legislation pertaining to children in Mozambique, a number of problems can be identified. The laws are fragmented and not easily accessible to those who are supposed to be charged with their implementation. They are scattered in different codes, and even where they purport to give effect to particular rights (such as education, or access to health), they are weak in substance and in detail. This has proved to be an impediment to successful enforcement.

Furthermore, existing legislation is by and large outdated – the major statute dealing with child offending predates significant international instruments regulating this area, and was enacted in 1971. Moreover, only portions of this Act have ever been implemented. There is, in addition, a glaring absence of provisions for the implementation of laws. Roles and responsibilities are poorly defined, and co-ordination and monitoring as important facets of legislative validity are absent.

The desktop review was undertaken with reference to a report compiled in 1998 by Dr. Luis Sacramento. The key problem areas that have emerged from this study can be categorized as follow:

1. Areas where laws are absent are:

- A clear definition of childhood that conforms to the CRC
- Laws that combat child trafficking
- Laws on child pornography
- Minimum standards of care for children in institutions is being developed at the level of policy, but have not yet been enshrined in legislation.
- There is no law protecting children from stigma and discrimination due to HIV/AIDS.
- Existing statutes relating to children in conflict with the law do not provide protection to child offenders between the age of 16 and 18 and neither to those younger than 16 who are criminally not liable for their conduct.
- Access to basic services for orphans and vulnerable children is not provided for in legislation.
- There are no provisions in the penal law that criminalizes child prostitution, except where parents facilitate the prostitution of their child.

- There is no legal provision that defines orphaned and vulnerable children, and therefore mechanisms for their protection is not clear. Further, legal recognition of child headed households is absent.

2. There are significant areas where law exists, but they are weak, such as:

- In relation to the commission of offences against children – laws to protect children from exploitation, domestic violence and abuse are not well articulated and do not sufficiently protect children as victims and witnesses. Definitions of the range of offences, e.g. indecent assault, sexual abuse, and abuse and neglect generally require more substantive definition to give effect to Articles 19 and 34 of CRC.
- In the field of child labour, legislation exists, but does not define what hazardous labour is nor does it list those occupations that are regarded as the worst forms of child labour. In addition, new ILO treaties, which Mozambique has ratified, need to be given effect to in Mozambican law. Further, penalties and criminal sanctions do not exist to punish those who employ children in hazardous occupations. The regulation of permissible child labour is also not legislated. Furthermore, although the Mozambican law provides that children above 15 are entitled to work, conditions under which such work must be performed have not been articulated.
- Children in need of alternative care – the law fails to enumerate a range of placement options for children in need of alternative care and consequently does not meet the standards outlined in article 20 of the CRC.
- Inter-country adoption needs to be legislated if for no other reason than to strengthen anti-child trafficking laws (as required by the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which Mozambique has ratified).
- Inheritance rights reveal a potential conflict between customary law and civil law, the former promoted inheritance by adult family members instead of descendant children.
- The present law permits punitive responses to children for status crimes such as loitering, not having a property identity card, and petty theft. This is discriminatory because adults committing similar offences are not punished.
- The procedural system for dealing with children in trouble with the law is not child-centered, nor child-friendly and does not meet the standards set by articles 37 and 40 of the CRC.

3. In many areas reviewed, legislative provisions to implement and monitor the laws are inadequate. For instance:

- With the exemption of the courts to some extent, State organs/institutions have not been identified nor have their responsibilities been defined in order to implement the law.
- There is an absence of clear guidelines and procedures.
- Many stakeholders alluded to the lack of coordination of services to children.
- Mozambicans highlighted the absence of monitoring mechanisms.
- In the important area of birth registration, the legal environment is characterized by cumbersome and bureaucratic procedures. Forms can be filled in only by officials, and only in black pen, and there are penalties for late registration.
- Although by establishing a minimum age of criminal responsibility at 16, Mozambique clearly more than meets the international standard required, and in fact exceeds conventional norms in this regard. Children below 16 continue to be arrested and de-

tained in adult prisons. Further, there is no adherence to the minimum time stipulated to process such cases and children can be detained indefinitely.

- Legislative provisions extending the powers and functions of a competent legal forum (i.e. TDM, Tribunal de Menores) would greatly enhance monitoring and accountability, and ultimately promote children's rights.

Determining the scope of the legislative review

This report, as a starting point, deals with the issue of the proposed scope of the law reform process. This has been undertaken against the backdrop of the CRC and other international treaties on children to which Mozambique is a party. The child rights approach enshrined in the CRC has been used throughout this study as the standard against which the adequacy of Mozambican law and its implementation have been measured. The study proceeds from the basic tenet that children are full bearers of human rights, and that the object of the proposed law reform process is to advance, protect and fulfil the rights of all Mozambican children. Hence, it is recommended in Chapter 3 that a clear statement of the rights of children vis a vis their caregivers, and of the duties and responsibilities of parents be set out in accordance with the internationally accepted child rights approach. There are numerous other recommendations flowing from the report that will target (and benefit) all children in the country.

Nevertheless, within the broad scope of comprehensive rights that are reflected in the CRC, the focus of this study has been on protective rights, socio-economic concerns relevant to the Mozambican context, and the need to ensure that discriminatory aspects inherent in present legislation and practice are addressed, together with establishing the principle of non-discrimination for new laws. Hence, civil and political rights, such as freedom of expression (Article 13 of the CRC) and freedom of religion (Article 14 of the CRC) which are adequately reflected for all citizens (including children) in the Mozambican constitution did not constitute a priority area for this legal review.

The priority areas of concern were determined by a range of factors. These include:

- The factual situation regarding social problems in the Mozambican context
- The identification of focus areas that were established in the terms of reference for this study
- The view of persons interviewed during the consultation process, the results of the zonal workshops, and the themes that emerged from the consultation process with children
- Independent law reform processes that have been underway in two key areas, namely in relation to family law and in relation to the laws of inheritance, and the desire to harmonize children's legislation with these processes.

The results of the different elements of the methodology employed reveal a broad consensus as to the most pressing concerns that should determine priority issues for inclusion in a proposed new children's statute. There was agreement that the focus should fall on children involved in child labour, child prostitution and trafficking, children in conflict with the law, orphans and abandoned children, child abuse and exploitation, children in trouble with the law and specialized courts for the implementation of protective measures for children in need of care and protection. In addition, the report targets specific socio-economic rights (in the spheres of health and education) which, whilst being of relevance to all Mozambican children, will specifically address the needs of the most vulnerable amongst them.

The relevance of customary law

Customary law is a vital aspect of the Mozambican legal regime and has been considered to be an important reality embedded in the lives of many Mozambican children. Many interviewees stressed the need to consider customary law as part of this legal review, and to introduce a child rights perspective in this milieu. The findings in this regard constitute an attempt to strike a balance between the child rights orientation required of the law reform process and the importance of indigenous tradition and custom. The recommendations focus particularly on aspects of customary law that perpetuate discrimination, and those which could harm children.

Strategies for implementation and co-ordination

Finally the report highlights the need for co-ordinated action amongst the various government departments and ministries as raised by participants in the consultative process and by the Committee on the Rights of the Child. The establishment in legislation of an intersectoral, national co-ordinating committee is recommended. The legislative framework for the structure and functions of this committee is also discussed.

Throughout the report, discussions around the thematic areas are interspersed and followed by recommendations specifically aimed at the drafters of the new legislation. Readers of this report are reminded that it was compiled with a specific purpose in mind, namely, the drafting of child legislation. Therefore, the discussions and recommendations are of a technical and specific nature aimed at informing the future drafting process. The summary of recommendations at the end of the report must be read in conjunction with the whole document and cannot stand alone for the purpose of the drafting process.

1. INTRODUCTION

1.1 Background to this report

This report represents the culmination of a process of legal review and consultation that has taken place in Mozambique from August until December 2003. The consultants have interviewed numerous key stakeholders dealing with children in the country, including the judiciary, police, social workers, and representatives from NGOs, INGOs and government departments. In addition, consultative workshops were convened in Xai Xai, Beira, Nampula and Maputo with the view to complete a detailed questionnaire aimed at soliciting participants' views on law reform relating to children. Representatives from all the provinces attended the regional workshops¹.

The study has been enriched by the participation of six Mozambican facilitators, who have contributed in a variety of ways to the results of this study.

A dedicated aspect of the legal review was a child participation exercise. This process involved focus group discussions with children from marginalized groups, and in some instances with their parents. The results of the focus group discussions, although reproduced as a stand-alone report,² have been used to inform the findings and recommendations in this report. This report on the Legal Review of Child Law in Mozambique aims to conclude the processes undertaken by the team of consultants by outlining concrete and specific proposals for law reform. These proposals are derived from:

- International law requirements
- Weaknesses and gaps in the current situation as identified by participants in this study, by the Committee on the Rights of the Child in its response to the Mozambique country report, and as derived from complementary reports on specialized topics compiled over the past few years by Government and NGOs in Mozambique³
- Comparative research
- The requirements of the Terms of Reference of this study, which determined the brief and focus on specific vulnerable groups
- Further required by the Terms of Reference were a review of judicial practice and views concerning the implementation of existing legislation, and the holding of a child participation exercise with identified vulnerable groups of children. These groups were:
 - Orphaned children
 - Children involved in commercial sexual exploitation
 - Children involved in child labour
 - Children in custody as a result of their having been in conflict with the law
 - Children subjected to child trafficking
 - A 'control' group of children attending a secondary school

¹ After conclusion of the consultative process, (the workshops and the individual interviews with stakeholders), a report was compiled in October 2003 and was submitted to the stakeholders concerned with the legal review setting out the results thereof.

² L Ehlers and V Mathiti "Children's Perspectives on Children's Rights in Mozambique" Community Law Centre 2003.

³ For example, the study on trafficking of children and women in Mozambique compiled by the IOM, and the report commissioned by Save the Children, Norway, on Children in Conflict with the Law (September 2003).

- Analysis of the questionnaires completed at the workshops and those administered in communities, as well as expectations participants had of the law reform process as provided at the outset of the four workshops.⁴
- Guidance received from the inter-sectoral steering committee established to oversee the conclusion of this work.

A study detailing the main laws applicable to children in Mozambique was conducted on behalf of the MMCAS in 1998 hereinafter referred to as the Sacramento report. This study was framed within the context of the CRC, ACRWC, the Mozambican Constitution, and various domestic codes and decrees. It does not cover the Optional Protocols to the CRC (1999), nor the Hague Convention on International Adoption or the Hague Convention on the Civil Aspects of International Child Abduction.

As has been noted by the Committee on the Rights of the Child, Mozambique is a nation whose recent past is characterized by extreme poverty and the devastating effects of a long lasting civil war. Not only poverty, but also HIV/AIDS and recurring natural disasters such as floods and droughts have made many children very vulnerable. Lack of adequate national infrastructure and human rights bodies to monitor the implementation of legal instruments for the care and protection of children has seriously hindered the realization of the rights of children. As the MCR states:

“At the same time, with the end of the conflict, expenditure on defense and security was replaced by a heavy foreign debt service burden, which has delayed much needed investment in the social area to provide the majority of Mozambicans, particularly in the rural areas, access to basic health services, education, drinking water, electricity, housing, employment and well-being.”⁵

Poverty has exacerbated many infringements of children’s rights. Children are subjected to crimes such as trafficking, child sexual exploitation, including child prostitution, and exploitative child labour. A significant number of children live on the street. Poverty plays a major role in the spread of HIV/AIDS, which in turn creates many challenging problems in the implementation of children’s rights in Mozambique due to the high prevalence of the pandemic in the country. These factors have had an enduring influence on the course and objectives of this study.

1.2 Main objectives of the study

The specific objectives of the study are to:

- Critically review the present legislation on children
- Analyze the views of stakeholders about how best the law can be improved to ensure that children’s rights are optimally promoted in Mozambique
- Ensure that children’s voices are heard, and their views taken account of, in the legal review process
- Ensure that the needs of the most vulnerable groups amongst Mozambican children are addressed via legislation
- Suggest how international instruments can be domesticated in Mozambique

⁴ See appendixes 2, 6, 7, 8, and 10 of the Report on the Consultative Process for the Legislative Review of Child Law in Mozambique dated 31 October 2003 (hereafter Report on Consultative Process).

⁵ Para 8.

- Ascertain the level of support amongst stakeholders in Mozambique for a new statute dealing with children
- Produce a report that motivates clearly the reasons for law reform to be undertaken
- Highlight specific areas that law reform drafters should consider
- Suggest measures for strengthening implementation and advocacy around child law and child policy in Mozambique.

2. PROBLEM IDENTIFICATION

The desk top review of current legislation in Mozambique is based on an analysis of the Sacramento report as described above. A further source used by the consultants is a chapter detailing the laws of Mozambique published in 1996⁶ and a brief review of the proposed new Family Law of 2003.

An examination of the Sacramento report reveals that the domestic legislative framework includes many protective rights for children in Mozambique. The legal framework concerning children in Mozambique is derived from the civil code, the penal code, the civil registry code, the Statues on Jurisdictional assistance to children and the penal code of laws. There are also relevant constitutional provisions. These include the right to equal protection, the right to a name and nationality, freedoms of expression, thought and assembly, the right to a family, the right to special protection for physical, mental and social development, the right to health, the right to education, the right to special protection for the physically or mentally disabled, and the right to protection from abuse, exploitation and abandonment.⁷ These constitutional protections provide a sound basis for the elaboration in domestic legislation of concrete measures to ensure their implementation at grass roots level.

2.1 Analysis of the four pillars of the CRC and their reflection in Mozambican Law

Article 4 of the CRC requires a comprehensive assessment of legislation in relation to all the discrete areas covered by CRC articles, and places the obligation upon the State to ensure the realization of adequate protective, developmental, participation and survival rights in domestic law. The four "pillars" of the CRC around which all other rights are to be adjudged are the rights enshrined in article 2 (non discrimination), article 3 (the best interests of the child), article 6 (the right to survival and development, and article 12 (the child's right to participate in matters affecting him or her).⁸ However, apart from the four central rights highlighted above, there are numerous specific articles covering children's circumstances, which also need to be articulated directly in legislation. Examples include: measures to protect children from abuse and neglect (article 19), special protection for children temporarily or permanently deprived of their family, and legislation ensuring access to alternative care for such children (article 20), ensuring by law that the best interests of the child be the paramount consideration in adoption proceedings (article 21), ensuring that inter-country adoption practices are governed by appropriate safeguards and standards (article 21(c) and (d)), addressing the rights of children with physical and mental disabilities (article 23), the obligation to ensure that children who have been placed by competent authorities for the

⁶ See Sacramento and Pessoa "Implementation of the rights of the Child in the Mozambican context" in *Children's Rights: A Comparative Perspective* (M Freeman ed), Dartmouth Publishers 1996 (hereafter Sacramento and Pessoa).

⁷ Sacramento and Pessoa pp 146- 150.

⁸ For a general analysis, see J Sloth Nielsen "Ratification of the Convention on the Rights of the Child: Implications for South Africa" 1995 *South African Journal on Human Rights* pp 401- 420.

purposes of care, protection or treatment of their physical or mental health receive regular review of treatment and of the circumstances relevant to the placement (article 25), the recognition of children's rights to social security and the establishment of measures to ensure progressive realization of this right in accordance with national law (article 26), not to mention detailed and specific requirements concerning the establishment of a separate juvenile justice system for children in conflict with the law.⁹ Of note, further, is that both the CRC and ACRWC establish a clear parameter for the definition of childhood, namely the age of 18 years. This legal limit overrides custom and traditional methods of establishing adulthood.¹⁰

2.1.1 Definition of age

The Sacramento report reveals the existence of a number of age determinants, which define the end of childhood. Thus, with regard to measures for civil protection, the Mozambican law provides for an upper age of 21 years,¹¹ whilst in relation to certain health provisions, protection is extended to persons below the age of 18 years. The need for a clear legislative re-statement in this regard is obvious, and supported by some comments addressed to Mozambique by the Committee on the Rights of the Child.¹²

2.1.2 Non- discrimination

By comparison to the level of detail and breadth of scope required by the CRC provisions, the Sacramento report reveals that in respect of the right to non-discrimination, it is only with regard to the areas of education and labour that provisions granting equal opportunity exist.¹³ Thus a gap is presented, for example as regards the elimination of discrimination against girl children (e.g. inheritance rights under customary law), and against children infected or affected by HIV/AIDS where legal provisions outlawing discrimination would be desirable. However, it must be stressed that there should be a general non-discrimination clause in the new law that covers all children and protects them from any form of discrimination, for example, discrimination on the basis of economic status as this will affect children with parents who live in poverty, traditionally vulnerable groups, such as abandoned children, and discrimination against girls.

2.1.3 Best interests of the child

As regards the best interests of the child as a paramount principle governing matters affecting children, close scrutiny of the provisions elaborated by Dr Sacramento does not lead to the conclusion that this principle is articulated clearly with regard to the best interests of the Mozambican child. In conventional statutory provisions, the best interests principle will be a major determining criterion in regard to legal decision-making around children, such as care

⁹ As Sloth- Nielsen (supra) points out the two articles of the CRC dealing with juvenile justice constitute (together) the longest and most substantial contribution on any one theme in the CRC. Not only have the due process rights relevant to children in trouble with the law been substantially upgraded through the provisions of article 37 and article 40 (2)(b), but the CRC requires (for the first time at the level of international law) that diversion should be a component of juvenile justice, and that it be articulated by legislation. This legislation should also ensure that children's rights are properly protected during diversion procedures (article 40(4)).

¹⁰ Such as puberty or traditional rites. For further discussion see Chapter 5.

¹¹ Sacramento report p. 117 (translated version).

¹² For instance, in relation to children in conflict with the law, as the Committee was of the view that the benefits accorded children under 16, in terms of the SJAM should be extended to those under the age of 18 years as well. See further Chapter 7 in this regard.

¹³ It is of note that these provisions do not specifically refer to children, but talk more generally about citizens (see pages 12 and 13 of the translated text).

and placement of abandoned children or those without families or caregivers. It can play an important role in affecting decisions concerning diversion and sentencing of children in trouble with the law, and is an obvious criterion affecting adoption placements.

Traditionally the best interests of the child has played a role in determining the allocation of custody and access when parents separate, and increasingly it is used to underscore children's rights to maintenance from their parents and extended family. Consequently, failing to incorporate the best interests principle as central to all child laws represents a significant gap.

2.1.4 Right to survival and development

The CRC includes a number of rights relevant to survival and development in addition to the 'pillar' constituted by article 6.¹⁴ As pointed out by academic commentators, article 6 must be interpreted to extend beyond the mere right to life and must be interpreted dynamically to refer to the developmental processes that all children undergo in the passage to adulthood. "Recognition of this right expanded the range of positive measure to be adopted by States to further the health of the growing child".¹⁵ In other words, it is not merely a right that pertains to the death penalty, and offences such as infanticide and murder. In his discussion of the right to life, the Sacramento report details that infanticide and murder are indeed adequately catered for in current Mozambican legislation. The question arises though, whether the right to survival as understood in its wider sense (as outlined above) is properly dealt with in internal provisions.

Dealing with health-related provisions, the Sacramento report appears to refer to provisions that enshrine free preventive health care, free in- and out- patient diagnostic examinations, free access to treatment when prescribed consequent to a consultation, and free basic medicines for out- patient treatment. Further analysis shows that there are a range of costs involved in the national health system, and numerous laws¹⁶, which exempt certain categories of patients, including children under 18 years and children in institutions from payment of certain costs for specific health services. These appear to have been well articulated in considerable detail, and the legislation is in the main of recent origin (1997).¹⁷

Next, as regards the right to survival, maintenance rights of children are explained.¹⁸ These laws are well established and explain conventional private legal rights and reciprocal duties in a manner common to many other legal systems in this area of jurisprudence. What distinguishes the modern approach to this area of law (since the adoption of the CRC particularly) is that legislation since 1989 has generally framed maintenance of children within a rights based context.¹⁹ This approach proceeds from the vantage point of the child's rights, with

¹⁴ Article 6 provides for the recognition by States Parties of the child's inherent right to life and places an obligation upon States 'to ensure to the maximum extent possible the survival and development of the child'.

¹⁵ J Sloth Nielsen 'Ratification of the Convention on the Rights of the Child: Implications for South Africa' op cit.

¹⁶ Detailed in the Sacramento report on pages 20 – 26 of the translated version.

¹⁷ One problem in the legislative scheme concerns different definitions of childhood, e.g. a clear definition that exempts children under the age of 18 years, compared to a vague rule applying to 'young children' (pp 20 and 22 of the translated version of the Sacramento report).

¹⁸ pp 26 - 39 of the translated version of the Sacramento report.

¹⁹ See for example the Children's Act 1989 (UK), the Kenya Children's Act 2001, the Uganda Children's Act 1996 and a host of other examples.

corresponding responsibilities being placed upon parents and other designated family members, such as grandparents, aunts and uncles.²⁰

Mozambican provisions outlining parental responsibilities and further details concerning family law (legitimacy and illegitimacy, guardianship or tutelage) appear to be elaborate, but the provisions discussed have probably been largely superceded by the new legislation on family law that has been prepared.²¹

As regards areas other than health, which are usually considered being part of the child's right to survival and development, the next areas for discussion concern education and social assistance. The existing laws concerning education are discussed fully in Chapter 8 and are not repeated here. However, the Sacramento report clarifies that whilst the Constitution provides both for the protection of orphans and abandoned children, as well as for the rights of all citizens to assistance in the case of disability and old age, no clear right or system of social security (or social grants) for children in need prevails.²² Furthermore, although it appears that there is a system of security in Mozambican law, it is restricted to the field of employment law and is limited by the categories of persons to whom it is applicable.²³ Children, in so far as they are regarded as relatives under the responsibility of workers governed by the law, are able to benefit from the provisions contained therein.²⁴ However, it is clear that a comprehensive system of social security for children (and the progressive realization thereof) as envisaged by the CRC is not catered for in Mozambican laws. This has definite implications particularly for OVCs, as pointed out in chapter 10 of this report.

2.1.5 Participation rights

The fourth 'pillar' of the CRC is encompassed in Article 12, which has been described as giving the children's rights movement its soul. This is so because it recognizes that children are to be consulted, and that they have the right to participate and express their views freely in all matters affecting them, that the international human rights community has acknowledged children as true bearers of human rights, rather than being mere objects of concern and charity, or recipients of welfare benefits.²⁵

Children's participation rights are not generally recognized in Mozambican law. However, the new family law provides that the consent of children over 12 years who are to be adopted, or those of potential adoptive parents, are to be sought²⁶. This assertion that Mozambican laws do not generally recognize the right of the child to participate in the decision affecting his/her life covers both the provisions of Article 12(1) and the narrower provisions of Article 12(2).²⁷ Whilst there is limited evidence of acknowledgement of children's participatory

²⁰ It is questionable whether the limitation on the duties of aunts and uncles to provide maintenance only to children aged below 16 years should be retained, as the child rights approach favours a uniform definition of childhood as ending at 18 years. (See pp 27 of the translated version of the Sacramento report for this provision).

²¹ The consultants have not had access to translated versions of the proposed new family law, and are therefore not in a position to establish the extent to which child rights are adequately elaborated via this law.

²² For constitutional provisions see pp. 76 of Sacramento report (translated version).

²³ The main purpose of the social security system is to provide for incidents of illness, old age and death.

²⁴ See pp. 77 of Sacramento report (translated version).

²⁵ D McGoldrick "The United Nations Convention on the Rights of the Child' 1991 (5) *International Journal of Law and the Family* p 132.

²⁶ Lei da Familia article, 1971

²⁷ Article 12(2) provides for the child's right to be heard in any judicial proceeding affecting the child, either directly or through a representative.

rights to be found in relation to the right to rest and leisure,²⁸ and in relation to the right to freedom of association,²⁹ a major gap exists in regard to the recognition of the rights contained in article 12 in Mozambique. This should be addressed not only in the overall context of child law, but more particularly, participation rights in areas such as court proceedings (civil, welfare and criminal proceedings) should be carefully articulated.³⁰

2.2 International treaties and Child Protection

Apart from the gaps identified in relation to the pillars of the CRC above, there exist a range of other problems as regards the present legislative milieu in Mozambique as it pertains to children. One issue concerns the absence of legal provisions to incorporate international treaties that Mozambique has ratified. As these post-date the Sacramento report to a considerable extent, and as the treaties generally contain specific internal requirements for law reform they are dealt with separately in Chapter 3. Second, the entire sphere of child protection, as evidenced by articles 19 - 40 of the Convention, does not fall to be considered in terms of a framework based on the four pillars of the Convention. However, as child protection is a predominant theme of the substance of this report, the individual laws and regulations, the extent to which they meet or do not meet international standards, and the gaps that exist, are detailed in the chapters where the actual content is discussed (such as juvenile justice and child abuse).

2.3 Further general comments concerning weaknesses in the present legal provisions

A brief review of the family law revealed that it consists of many unenforceable rights that have been articulated as legal norms, and that certain rights are guaranteed through subjective criteria instead of objective criteria (such as reasonableness). As a result they are unenforceable.³¹ Moreover, provisions such as article 1604 of the Family Law, which states "A woman older than 16 years...", clearly indicates the failure to apply a child-centered approach to the drafting of the law. Despite the fact that the Family Law is a new law, a review is recommended in view of the process of drafting the children's law and where it falls short of the CRC standards, recommendations are made for amendments thereof.

In addition, a further review of the legal mechanisms for the care and protection of children revealed that the legislative provisions relating to children fall short in four central ways. This is outlined below.

²⁸ In the context of the specific objectives of Mozambican Youth Policy, which elaborates the objective of elevating the level of participation of youths in economic, social, cultural and sports development: Sacramento report p 68 (translated version).

²⁹ In the context of a provision granting citizens under the age of 18 the freedom of association to set up youth organisations: Sacramento Report p 138 (translated version).

³⁰ Another area for consideration is in the context of OVC, where the child participation study showed a lack of participation by children in the planning and preparing for their futures.

³¹ Lei da Familia articles 57 to 60 defines parent-child relationships for natural and adoptive relations in an abstract way that constantly refers to undefined legal systems of the parents, and article 2003 which simply states that maintenance/support between brothers is reciprocal without necessarily outlining any enforcement measure.

2.3.1 Legislation does not accommodate the local context

Many laws appear not to reflect the realities Mozambican children experience due to socio-economic hardship. Children do not have access to social security that can prevent delinquency, life on the street, dropping out of school to work, and so forth. As respondents reported, orphans cannot be placed in care due to lack of funds.³²

Similar comments can be made about the special protection of children with disabilities, detailed extensively in the Sacramento report on p 99. Whilst in theory, special education and vocational training is concretized in legislation (art 29 of Act 6/92), which provides for it to be available for all youths with physical, sensorial and mental disabilities or children of difficult school integration, implementation of this provision remains largely non-existent.

Mention can be made of the extensive sections of the Sacramento report that explain subsidies and bursaries to ensure that children have access to education (see page 52 et seq, detailing Decree 47/89 of 28 December which created the School Social Action Fund). In the present study, barriers to schooling as a result of poverty, the need to pay school fees and lack of birth certificates were highlighted as major challenges facing Mozambican children.³³ The 1998 study is largely uncritical of the wide gap between stated laws and the ability of the Mozambican government to implement these noble aims.

2.3.2 Granting rights without providing for obligations

A second key shortcoming in the legislation reviewed is that, with the exception of a description of the powers of the Children's Court both in civil and crime prevention matters, the decrees focus largely on granting rights, without specifying in detail the nature of the state's obligations, and which body bears responsibility for ensuring fulfillment of the rights mentioned. There is, for instance, no mention of the roles and responsibilities of social workers or people deputized by them to fulfill social work functions, nor is there any mention of the role of the police in child protection or in relation to juvenile justice.³⁴ The provisions on sexual abuse of children do not provide detail about who should act, by when and what actions need to be performed. In other words, existing legislation is too general, and not specific, thus permitting a half-hearted approach to implementation.

For this reason, the recommendations provided in the body of this report in the following chapters attempt to give guidance on how future legislation should be framed to spell out far more precisely the obligations of various actors who are charged with child protection and the fulfillment of children's rights.

³² Interview with presiding officer, TDM 26 September 2003.

³³ Ehlers and Mathiti op cit: 'The majority in the group said they made the decision [to work] because their families could no longer afford to pay their school fees'.

³⁴ Pages 109 – 115 of the Sacramento report describes only clauses related to the penal code. There are no provisions for reporting child abuse, procedures for dealing with child victims and so forth. Whilst probably not deliberate, the result is a singular lack of a child rights focus.

2.3.3 Fragmentation of existing laws

A third issue that stands out clearly from the 1998 report is the fragmentation and inaccessibility of the decrees that have been adopted from time to time, and the persistence of gaps. For instance, child trafficking remains unregulated, as do the rights of children who are in institutional care. While the focus of the Sacramento report is on describing what legislation are in place without critical analysis, the focus of this study is on what legislation needs to be put in place to cater for the expressed needs of Mozambican children.³⁵

A further example explaining this point relates to children in conflict with the law. While the Sacramento report details the proposed role of the children's court in relation to crime prevention measures, no specific mention of children in custody in police cells or prisons is made,³⁶ as required by CAT, ICCPR, the JDL and other international juvenile justice standards.

The fragmentation is further evident in the numerous statutes that contain one or more aspects pertaining to children, enacted over more than half a century. They identify a host of different role players and lead departments responsible for various children's entitlements.

2.3.4 Practicalities of co-ordination, monitoring and implementation

Fourth, examining the legislation covered in the 1998 study reveals the legislative absence of co-ordinating, monitoring and implementation mechanisms. The laws relating to prohibitions upon children visiting certain places of entertainment and casinos are quite detailed and specific.³⁷ However, what is not clear is who monitors compliance with this recent law. Similarly, the role of the commissioning entity, namely the Ministry for the Co-ordination of Social Action is not spelt out in the text of either the report or the legislation it profiles.

The overwhelming impression is of a legislative environment characterized by pious wishes, and general elaboration of discrete rights, rather than a coherent national framework for development, protection, participation and action in children's best interests.

³⁵ As evidenced in the Ehlers and Mathiti report and the various consultations that have taken place. See further for graphic representation below.

³⁶ Pages 135 – 137 of the Sacramento report (translated version): 'The competent court to deal with children' related matters and 'Jurisdictional process of children'.

³⁷ A 1998 decree dealt by Dr Sacramento on page 113 of the translated version.

3. PERCEPTIONS OF THE MOZAMBICAN STAKEHOLDERS ON THE NEED FOR LAW REFORM

Although during initial visits and interviews the need for law reform was not uniformly articulated by many respondents,³⁸ it became clear during the course of the study that there is now overwhelming support across all sectors for a new children's law.³⁹

Ten key reasons were given by respondents to underpin this conclusion:⁴⁰

1. Fragmentation that everyone agreed characterizes existing legislation;
2. Widespread lack of knowledge of the content of existing laws;
3. View that existing measures to protect children from exploitation and harm are not well articulated and implemented to protect children against crimes, child trafficking, sale of children and sexual exploitation;
4. The need to ensure that legal provisions are accompanied by provisions aimed at securing the enforcement and implementation of legislation through specified ministries and clearly stating the obligation of the state thereof, such as ensuring that limits on the detention of children in police custody are adhered to;
5. The need to rigorously define vulnerable children i.e. who falls into the categories of orphaned or abandoned children, what the distinction between permissible child work and hazardous child labour is;
6. The need to enshrine a child-rights approach in child legislation and ensuring that national legal provisions are harmonized with the international human rights instruments in order to ensure that they are given effect to (such as Article 12 of the CRC dealing with the child's right to be heard and to participate);
7. The need to address the gaps that exist between current legislative provisions and ratified international conventions, including the CRC;
8. The urgent need to review the juvenile justice system within the umbrella of child protection principles;
9. The need to shed outdated legal provisions and to commence afresh with a comprehensive children's statute;
10. The need to spell out in far greater detail the precise nature of government's responsibilities and obligations in regard to the care and protection of children (such as who may approve an application for an inter-country adoption).

Various NGOs viewed the law reform process as a way of positively promoting grass roots development, transformation and poverty alleviation more generally.

³⁸ Some respondents were of the view that existing legislation was sufficient but that implementation was lacking.

³⁹ See the PowerPoint presentation entitled 'Report on the Workshops (Xai Xai, Beira, Nampula)' presented to the steering committee in Maputo on 22 October 2003.

⁴⁰ Appendices 5 - 8 of the Report on the Consultative Process dated 31 October 2003.

3.1 Scope of envisaged law reform

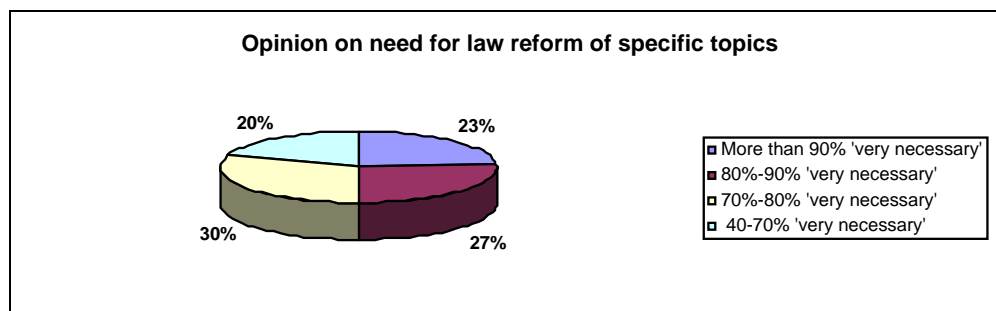
3.1.1. Local Context

From the outset of the legal review, one of the main questions raised by participants and consulted parties was about what the scope of the study ought to be. Although the TOR set out specific categories of vulnerable children in respect of whom specific proposals were sought, there are vast areas of penal, civil, personal and criminal law that were to a greater extent considered in this review, including customary law (which was explicitly identified for inclusion in the TOR).

Consequently, a significant aspect of the questionnaire sought response from participants at the regional workshops about the scope of envisaged law reform. Preceding the development of the questionnaire,⁴¹ significant comparative research was undertaken in relation to contemporary law reform processes elsewhere in Africa in the child rights sphere, with substantial differences in approaches noted.⁴² In some countries (Ghana, South Africa) juvenile justice has been separated from child protection more generally, and two different but complementary statutes enacted. In others, a broad reaching, more unified statute was drafted.

3.1.2 Specific results and recommendations

Quantitative analysis of the questionnaires received from workshop participants, community members contacted by the Mozambican facilitators and other stakeholders revealed the following results:

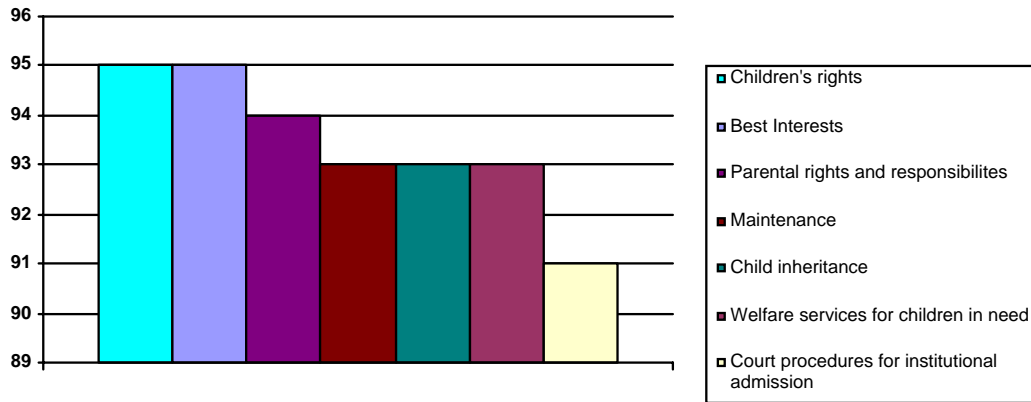


More respondents answered 'very necessary' than any other response (the others being 'maybe' and 'not really required') for each of the 30 general topics suggested, except for customary law, for which 54% answered 'maybe' and 44% said reform was 'very necessary'.

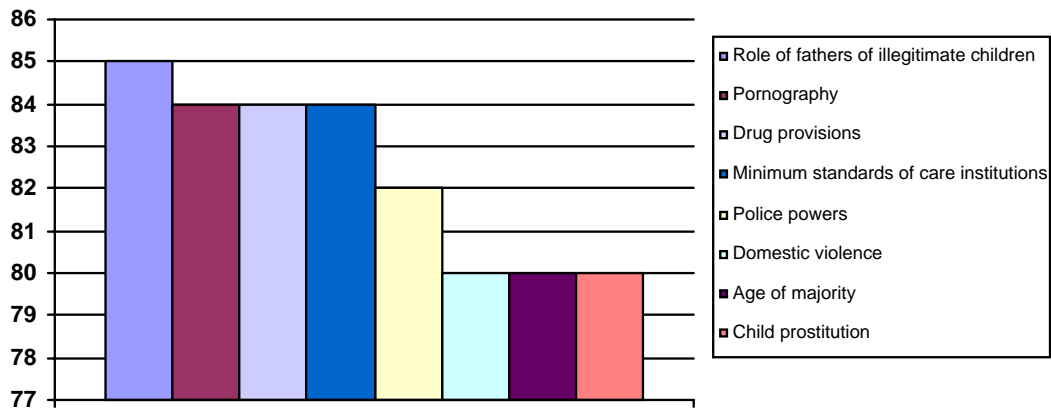
⁴¹ The questionnaire is provided in appendix 3 of the Report on the Consultative Process for the Legislative Review of Child Law in Mozambique dated 31 October 2003. A checklist of potential topics for legislative review appears at the end of the questionnaire, and respondents were required to indicate what level of priority for inclusion in new legislation should be accorded to each topic.

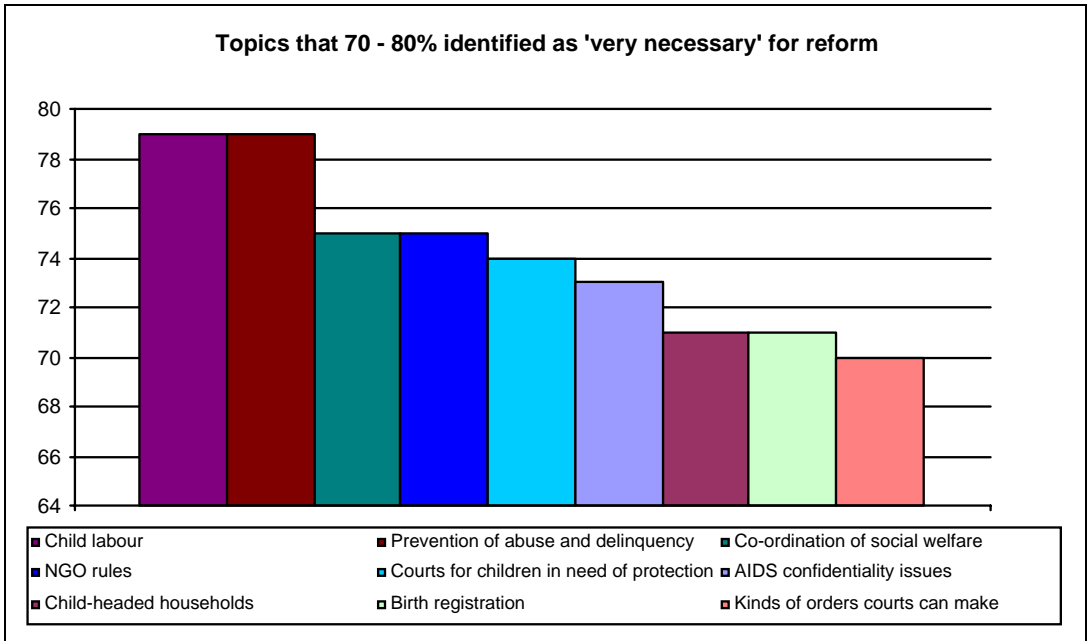
⁴² See the report entitled "International Law and Child Law Reform in the period after the Convention on the Rights of the Child: some examples from Africa", included as appendix 28 of the Report on the Consultative Process for the Legislative Review of Child Law in Mozambique dated 31 October 2003.

Topics that more than 90% identified as 'very necessary' for reform

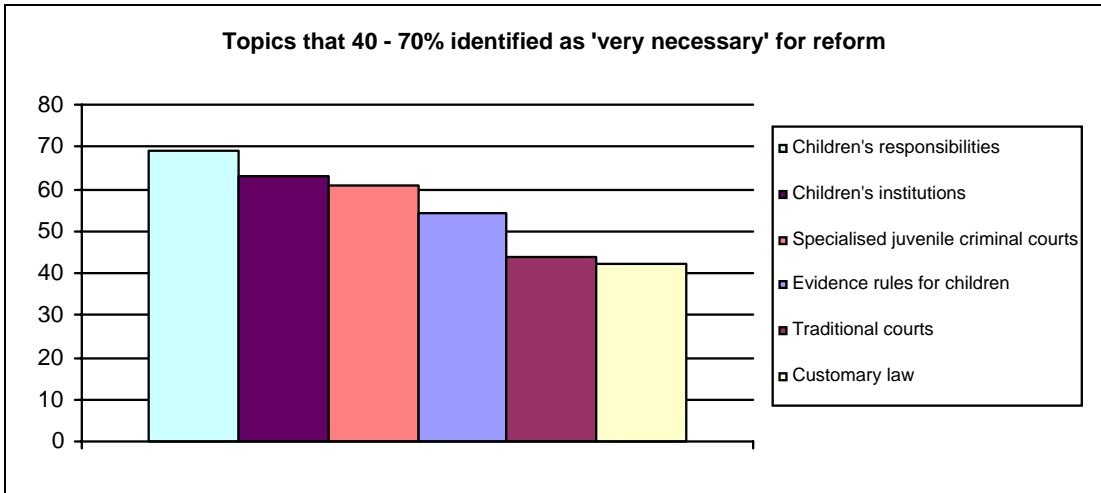


Topics that 80 - 90% identified as 'very necessary' for reform





40% - 70% answered 'very necessary' for the following topics:



Recommendation

The scope of the legislative drafting process should be informed by the responses obtained above. The prime focus of law reform should include those areas most favoured by respondents (such as children's rights, parental rights and responsibilities, definition of the best interests of the child, the role of welfare institutions, and court procedures for admission to institutions that are involved in reintegrating child offenders).

3.2 Conceptual and rights related issues

In this report, a number of terms and concepts have been widely employed. The most important of these is the modern conceptualization of children's rights and with it, corresponding parental responsibilities within the context of the parent-child relationship. The concept of children's rights has supplanted outdated notions of exclusive parental control of children. In almost all societies, law and society had all along considered children as "property" of their parents (the *parens patriae* doctrine). Modern theory has been correctly considered as ushering in a new notion: that of parental rights and responsibilities. Parental responsibilities diminish in the context of the evolving capacity of the child, as the child matures and begins to understand societal values, norms and cultures. The CRC acknowledges the place of the family and the parents in particular and provides in several of its articles for the State's role in protecting and preserving the role of the family.

The ACRWC follows the approach of balancing children's rights with responsibilities of the child. The ACRWC therefore expressly catalogues "duties" of the child in Article 31. These include the child's responsibility to work for the cohesion of the family and "to respect parents and elders at all times and to assist them in cases of need". Despite the positive aspects of these duties, caution must be to the danger of justifying abuses of children's rights by virtue of the existence of duties. For example, as has been pointed out, in cases where family members are abusing or exploiting children, to insist on "the responsibility to respect parents and elders at all time" would be too unquestioning and general as it would set the precedent that children are obliged to respect the abuser (Van Bueren, 25).

Since the feedback from respondents overwhelmingly supported the shift from parental rights over children, to the concept of children's rights and parental responsibilities, it is recommended that a detailed set of children rights be included in the legislation, mirrored by a corresponding set of parental obligations⁴³. Where parents or guardians are not available legislation must place a duty on the State to ensure that the child is placed in alternative care, in for example substitute families or communities, that are aimed at caring for and protecting orphans and other children who do not have primary care-givers.

Key rights would include, but are not limited to:

- The right to protection from violence, abuse, and harm
- The right to be adequately maintained
- The right to participate in matters affecting him or her, with due regard to the child's level of development and maturity
- The right to have his or her best interests promoted at all times
- The right to a name and to have his or her birth registered
- The right not to be subjected to harmful cultural practices
- The right to have access to education
- The right to an adequate standard of health.

The corresponding parental obligations would be:

- The obligation to maintain children adequately
- The obligation to protect children from violence, abuse and harm
- The obligation to register children's births

⁴³ See Appendices 2, 6, 7 and 8 of the Report on the Consultative Process dated 31 October 2003.

- The obligation to ensure that the best interests of children are a paramount consideration in any decision affecting the child
- The obligation to give due regard to the expressed views of the child
- The obligation to ensure that children have access to education
- The obligation to ensure that children's health rights are respected.

Although Articles 57 and 59 of the new proposed Family Law deals with relationships between parents and children (adoptive as well as natural child-parent relationships), these provisions are abstract as they relate to the applicable law regulating such relationship, for example article 59 sub-article 2 provides that the relationship between parents and their natural children is regulated by law of general application of the parents, in the absence of this, by the law of their habitual residence. If the parents' habitual residences are in different countries, the personal law of the child is applicable. These provisions do not cover a range of parental rights and responsibilities neither of child rights that are required of a child rights approach for the drafting of such clauses. In our opinion the new Family Law is too broad, therefore raising legal uncertainty about guaranteeing the rights of the child.⁴⁴

Recommendation

Legislative provisions should concretize the rights of children and the obligations of parents to ensure that the parent-child relationship is understandable even by lay people. The new law should place a duty on the State to provide alternative care in the absence of a parent or guardian for the child.

Insofar as children's responsibilities are concerned, articles 1865 of the Family Law requires of parents to transmit to their children cultural and family values, ethics and morals to construct a stable personality that tolerates and have respect for the family and respect for adults. This is a particular feature of the ACRWC and care must be taken not to burden children with responsibilities that adults are not forced to comply with. In addition, only 40 – 70% of questionnaire respondents (which can be regarded as a low proportion in relation to other identified issues) mentioned the inclusion of children's responsibilities in future legislation, despite the ACRWC provision. Therefore, it is recommended that if any legislative provisions are to be adopted that impose responsibilities upon children, they be very broadly formulated -

Examples in point are:

The responsibility to contribute to community life
The responsibility to work for the cohesion of the nation

During the course of the report stakeholder's perceptions are examined in more detail in relation to all themes dealt with.

Recommendation

Given the broad-based support for legislative reform, and that the current impetus in this regard should be sustained, it is recommended that the Government of Mozambique, with the technical assistance of INGOs, and in an atmosphere of international collaboration, commence a drafting process based on the recommendations contained in this report without delay.

⁴⁴ Lei da familia articles 57 to 61.

Given the fact that Mozambique has ratified the CRC and is therefore obliged to ensure that the rights contained therein are incorporated into domestic law, it is imperative that the drafters carefully consider the rights forming the basis of the four 'pillars' of the CRC and translate them in a manner that they are reflected in national law.

The concern of many participants was focused on the fact that certain laws exist but were not being implemented. This relates, at least in part, to the manner in which laws have been drafted. In order to have adequately enforceable laws that deliver the intended outcome, the drafting process should proceed to design specific, narrow provisions that grant rights, identify duty bearers, and assign responsibilities.

The area of child law transcends the legal fraternity and requires many different disciplines to give effect to the requirements set by legislation. The fragmentation of present laws and the legal, technical nature thereof aggravate the proper delivery of children's rights by the numerous role-players in the sector. The new law should therefore be comprehensive, easily accessible and user-friendly in order to ensure widespread understanding and knowledge of its provisions.

4. INCORPORATING INTERNATIONAL TREATIES AND ISSUES, WITH A FOCUS ON CHILD LABOUR AND TRAFFICKING

4.1 Introduction

Besides the CRC and the ACRWC, a number of international treaties dealing with the rights of the child have been adopted under the auspices of different inter-governmental organizations. These include the Optional Protocol to the CRC dealing with the Sale of Children, Child Pornography and Prostitution and that on the Involvement of Children in Armed Conflict. Many child rights-specific treaties have also been concluded and ratified under the auspices of the International Labour Organization (ILO) to deal with the global problem of exploitation of children in labour. These include both the ILO Minimum Age Convention, 1973 (No. 138) and the latest Convention to be adopted within the ILO treaty framework; the ILO Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999. At the Hague Conference's level, a number of treaties including The Hague Convention on the Civil Aspects of International Child Abduction (1980) and the 1993 Convention on the Protection and Co-operation in respect of Inter-country Adoption are child-specific in their theme.

All the above six treaties entail a number of international obligations including those of reporting to treaty monitoring bodies. All of them oblige State parties to undertake domestic steps to bring about their local implementation. This entails the adoption by the State of **legislative, administrative and other measures** to this effect. A number of treaty provisions call for specific legislative provisions.

Mozambique has undertaken, by ratifying several of the above international instruments, to harmonise domestic legislation with international norms, and furthermore to incorporate specific provisions in civil, penal and other law. In this section, an outline is given of what the individual provisions in these treaties demand with regard to the need for domestic legislative provisions. These were, in the main, not addressed directly in the Sacramento report, as ratification (or signature) occurred after that report.

In this section detailed consideration is given **only** to treaties that Mozambique has ratified or signed. The requirements pertaining to other treaties, which Mozambique may ratify in future, are provided in Appendix A. The reason for this is that these treaties give **substantial guidance** relating to the necessary legal standards in respect of some of the groups of children who were explicitly identified in the TOR. These include:

- Victims of child labour
- Child prostitutes and child victims of sexual exploitation
- Child trafficking
- HIV/ADS, orphans and abandoned children

Hence, reference to these treaties has been retained, albeit in the aforesaid appendix.

4.2 Optional Protocol to the CRC on the sale of children, child prostitution and child pornography

4.2.1 Local context

Mozambican legislation to protect children from prostitution (in particular) reveals huge gaps. Indeed, in the discussion of the relevant article of the CRC that deals with child prostitution (article 19), the discussion relates to protection (via the penal law) of children from indecent acts and from violence, but does not refer to the coercive (commercial) nature of prostitution at all. Indeed, numerous respondents referred to the fact that clients of child prostitutes escaped the reach of the criminal law.⁴⁵ Mozambican laws to curb the sale of children was described by stakeholders as wholly inadequate.⁴⁶ Mozambique acceded to the Protocol on 6 March 2003 and therefore domestic legislation is needed to fulfill Mozambique's treaty obligations under the Protocol.

The need for this is clearly evidenced by the consultation with children. It appears that Mozambican children that are at high risk of being trafficked are those who have left home due to problematic family circumstances. This results in the children's need to find ways of meeting their physiological, belonging and esteem needs and these in turn make them susceptible to traffickers who promise food, work and shelter.⁴⁷

4.2.2 Specific recommendations

In order to address existing gaps, and illustrative of the extensive provisions required to fulfill international commitments, Mozambican legislation should:

- Define what constitutes the 'sale of children', 'child prostitution' and 'child pornography' (The definitions offered by the Optional Protocol itself, Article 2 may be used in this regard). The definition of 'child pornography' should be wide to cover **by whatever means** it is perpetrated, through including the growing availability of child pornography on the Internet and other evolving technologies⁴⁸
- Criminalize and penalize the following acts whether committed within the jurisdiction of the State party or transnationally and whether committed by an individual, organized group(s) of individuals or by juridical persons:
 - The offering, delivering or accepting, by whatever means, a child for the purpose of
 - Sexual exploitation of the child
 - Transfer of organs of the child
 - Engagement of the child in forced labour
 - Improperly inducing consent, as an intermediary, for the adoption of a child internally or transnationally
 - Offering, obtaining, procuring or providing a child for child prostitution or producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the purposes of child pornography.

⁴⁵ E.g., Dr Justina Cumbe, Co-ordinator of the Programme of Women and Children in the Ministry of the Interior in an interview dated 1 September 2003, Appendix 18 of Report on Consultative Process, dated 31 October 2003.

⁴⁶ As above, and see also interview with Terres des Hommes 26 September 2003, Appendix 20 of Report on Consultative Process, dated 31 October 2003.

⁴⁷ "Children's Perspectives on Children's Rights in Mozambique" (Ehlers and Mathithi), Chapter 8.

⁴⁸ It should be noted that the legal provisions regarding access to child viewers of video cassettes that are inappropriate for their age do not extend to either prohibiting or defining the meaning of child pornography itself: see pp. 110 –115 of the Sacramento Report (translated version).

- Criminalize *attempts* to commit any of the prohibited acts and **complicity** or **participation** in any of them
- Spell out the penalties applying to each of the offences and what the aggravating or attenuating circumstances applicable to them are.⁴⁹

4.3 ILO Minimum Age Convention No. 138 (1973)

4.3.1 Local context

Mozambique has an enduring problem concerning working children, one of the focal points of this study. The MCR (Mozambique Country Report) details (para. 575 - 577) the scope of this problem: In rural areas, over 30% of children work due to poor socio-economic conditions. According to the 1997 population census over one million children are subjected to child labour.

Mozambique is among 99 ILO States that have ratified all the ILO's eight fundamental Conventions (two on Forced Labour, two on Freedom of Association, two on Discrimination and another two on Child Labour). It recently ratified the ILO Minimum Age Convention on the 16 June 2003 and is therefore bound to modify legislative provisions in this regard.

The present situation in Mozambique is regulated by Law 8/98 of 20 July (Labour Law).⁵⁰ Upon ratification, Mozambique specified the age for admission to employment as 15 years in its instrument of ratification. This is echoed in Article 79 of this law, although this article permits derogation from the minimum age where decreed jointly by the Ministers of Labour, of Health and of Education, and where the legal guardian of the child consents. According to the Sacramento report, too, legislation is required to determine the nature of tasks and conditions of work prohibited for minors between 12 and 15 years.⁵¹ However, whilst provisions exist in the labour law that prohibit tasks detrimental to children's health, those that are dangerous or those that require a lot of physical energy, this provision evidently covers all children aged under 18 years, and therefore no apparent laws have been put in place to give effect to the provisions of Article 79 concerning children aged between 12 and 15 years. This may well be a gap.

The consultation with children was especially informative on the stark realities facing Mozambican children.⁵² The child participants in the child labour focus group enumerated domestic work, informal trading and manual labour as the types of work they are engaged in. In addition, the reasons for working included lack of money for school fees and the need to support the family where there is no other form of income. The parents of these children stated that they allowed their children to work because they couldn't afford to provide for their material, nutritional and educational needs.

⁴⁹ These are a selection of the most important of a series of legal provisions that should be considered.

⁵⁰ Sacramento Report, pages 62, 66 and 67 (translated version).

⁵¹ Ibid.

⁵² "Children's Perspectives on Children's Rights in Mozambique", (Ehlers and Mathithi), Chapter 6.

4.3.2 Specific recommendations

Despite going some way towards complying with the requirements of international law, the legislation is nevertheless very broad, and does not appear to contain the following requirements:

- A catalogue of the types of work, which by their very nature or the circumstances in which they are carried out, are likely to jeopardize the health, safety or morals of young persons and specifying that in such cases, the minimum age for admission shall not be less than 18 years.
- Criminal sanctions and penalties in fines and/ imprisonment and other measures to be imposed upon any person(s) enlisting children below the prescribed age into work, especially harmful or hazardous work.
- More particulars about the limited categories of work in which the application of the minimum age would not apply, where derogation has taken place.⁵³

There are no apparent criminal provisions when employers breach this legislation, and the only remedy appears to be a civil remedy that the child may terminate the contract of employment.⁵⁴ Legislative provision is also absent pertaining to the keeping of registers and other documents by the employers of child labour, such as details on the names and ages of persons younger than 18 years.

4.4 ILO Worst Forms of Child Labour Convention No. 182 (1999)

4.4.1 Local context

Mozambique recently ratified this Convention (on 16 June 2003) and should therefore bring its domestic legislative provisions in line with its provisions. Present legislation concerning child labour, as discussed above, does not deal with the issues covered below and there are significant gaps that the drafters will have to attend to. According to the Rapid Assessment on child Labour 1999/2000 there are three types of the worst forms of child labour in Mozambique; namely child sex work, child farm labour, and child domestic work. Despite the fact that these forms of child labour are common they are not forbidden by law.

4.4.2 Specific recommendations

Legislation should define the term **worst forms of child labour** as comprising:

- All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage, serfdom and forced or compulsory labour, including the forced or compulsory recruitment of children for use in armed conflict
- The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances
- The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs

⁵³ The Convention provides that the minimum age of employment would apply as a minimum, in relation to: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes (but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers).

⁵⁴ Article 82 (3).

- Work, which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children⁵⁵
- The three worst forms of child labour identified in Mozambique

Further, the law should prohibit (through both employment and criminal law) the worst forms of child labour for persons under the age of 18. Ideally, the law should also provide for the right of child victims of worst forms of child labour to get direct assistance and removal from the worst forms of labour and for their rehabilitation and social integration,⁵⁶ as well as compensation from the employer. This should include the right to access free basic education and wherever possible, appropriate vocational training for such children. In order to ensure maximum efficacy of the law, the institution responsible for monitoring these provisions should be clearly identified and designated. Given the NGO expertise available in Mozambique in this area, it is recommended that appropriate NGOs be given a formal role in implementation of the ILO Convention 182.

4.5 International law more generally and the protection of refugee and undocumented migrant children

4.5.1 Local context

As identified in the MCR,⁵⁷ Mozambique, as a country with numerous borders, is a receiving state for undocumented migrant and refugee children from elsewhere on the continent. The question arises what legal provisions exist to ensure the protection of those children from (amongst other things) harmful practices such as trafficking, and whether they would be subject to any future comprehensive children's legislation of Mozambique.

The rights of refugee and migrant children can be derived from a number of international instruments including the 1951 UN Convention Relating to the Status of Refugees and its 1966 Additional Protocol, the 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa, the CRC and the ACRWC. The word "refugee" explicitly appears in both the CRC and ACRWC.

The cardinal principle that underpins refugee law under the 1951 UN Convention, the 1969 OAU Convention and customary international law is the principle guaranteeing the right to refugees, including child refugees, to *non-refoulement* (the obligation on states not to forcefully return a refugee to the country from which the refugee fears political or other persecution). This appears to be well established in Mozambican law.⁵⁸

Under Article 22 of the CRC and Article 23 of the ACRWC, States are required to provide protection and assistance in obtaining the rights mentioned in the CRC to refugee children, unaccompanied migrant children, internally displaced children and child asylum seekers in general. In effect, this means that refugee children are to be guaranteed all applicable human rights without discrimination on whatever grounds, including that of nationality. According to the Sacramento report,⁵⁹ constitutional protection of foreign children's rights to a name and nationality is well articulated. However, in accordance with the CRC, the potential array of rights for non-national children would include the right to be protected from unfair

⁵⁵ The provisions in the two Optional Protocols to the CRC also address the first three of these.

⁵⁶ Endorsed by Terres Des Hommes, the specialist NGO working in this field in Mozambique, with IOM support.

⁵⁷ See para 512 and 513.

⁵⁸ Law 21/91.

⁵⁹ At p. 41 of the translated version.

discrimination, the right to participation, the right to protection from torture and degrading treatment, the applicability of the best interests of the child, the right to parental care, the right not to be separated from the family or parents, the right to property, the right to protection from armed conflicts, the right to protection from abuse, neglect, degradation, abandonment and other harmful practices as well as economic exploitation, the right to protection from harmful social and cultural practices, the right to leisure and recreation and the rights to education, basic health care and social security.

These rights should apply, within the ambit of the right to non-discrimination, to undocumented migrant children, i.e. children born outside a state's jurisdiction but who live in that state without the legal permission of the state's government.

More specifically, however, both the CRC (article 22) and the African Children's Charter (article 23) place explicit obligations on States with regard to providing for two related aspects of the rights of child refugees and migrant children. These are:

- The right to receive appropriate protection and humanitarian assistance in the enjoyment of the above rights, and
- The right, in case of separation from the parents or family, to re-unification with the parents or family and to be assisted and protected in the process of tracing the parents or family. Where no parents, guardians or relatives can be found (particularly as may be the case with unaccompanied refugee children), legislation should exist to ensure the right to be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason.

It is consequently recommended that the proposed children's statute be made, at least in part, applicable to non-national children in their best interests, and in compliance with children's rights precepts. The TDM (Tribunal de Menores) should possibly be authorized to adopt specific measures in relation to non-national (unaccompanied) children who are brought before it, to secure family re-unification and support.

Recommendation

The drafters should consider including specific provisions to ensure protection of the rights of undocumented migrant children.

5. CUSTOMARY LAW

5.1 Local context

In Africa, customary law is of particular significance when one is dealing with any law reform process. There is a balance that needs to be struck between legislating new laws to comply with international obligations (which are generally western in origin) and traditional laws indigenous to a particular country. In this regard Mozambique is no exception as it will have to manage the issue of how to protect and provide for its children in the face of some customary laws that may violate children's rights. This is borne out by the following:

"The assertion of 'universal' human rights, is in fact culturally relativist – usually influenced by Western society, as it is impossible for there to be one set of wholly universal human rights principles – such a standard of human rights could only belong to one culture. Each society is inherently bound to regard its own standards as universally valid. Underlying the presumption of universality is the belief that all peoples think the same way. It is plausible that individuals from the same culture might agree to the same principles, but within an international setting, it is doubtful that all participants would acquiesce." ⁶⁰

Lloyd goes on to note:

"The distinction between human dignity and human rights needs to be made. The term is often used interchangeably, yet they are two distinctly separate dichotomies. Fully developed notions of human dignity exist in many African cultures, yet the modern conception of human rights emanates from the contemporary articulation of legal entitlements, which individuals hold in relation to the state. The absence of the concept of human rights in certain cultures and contexts is not unusual to African societies. The idea of human rights, as rooted in modern society is an entirely new concept, distinct from human dignity. The notion of an 'African concept of human rights' could also be asserted, by stating that such a concept is actually a concept of human dignity; defining the worth of a human person and his proper relations with society." ⁶¹

5.2 Perceptions of Mozambican stakeholders

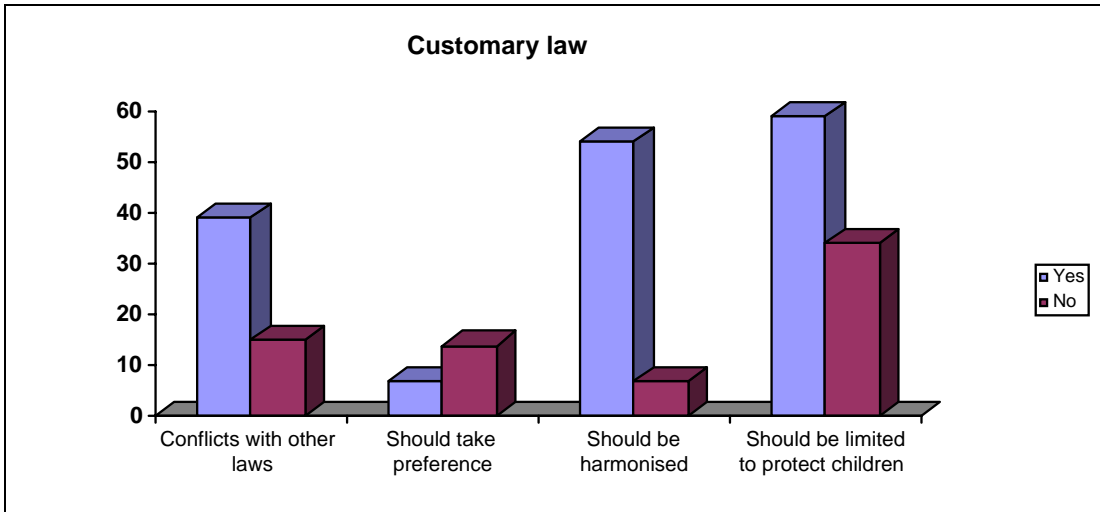
This issue was flagged by many participants during the consultative process. Expectations of participants at the Xai Xai workshop specifically mentioned that community practice must be consistent with children's rights as stated in the CRC.⁶² The Beira workshop participants made specific suggestions on how customary law issues should be addressed under the new law, for example by training community leaders on the law.⁶³

⁶⁰ Lloyd, Amanda, "The African Charter on the Rights and Welfare of Children and the Reality for Africa's Children: An Evaluation of the ACRWC through a Cultural Perspective", unpublished LLM dissertation, University for the West of England, 200, p. 16.

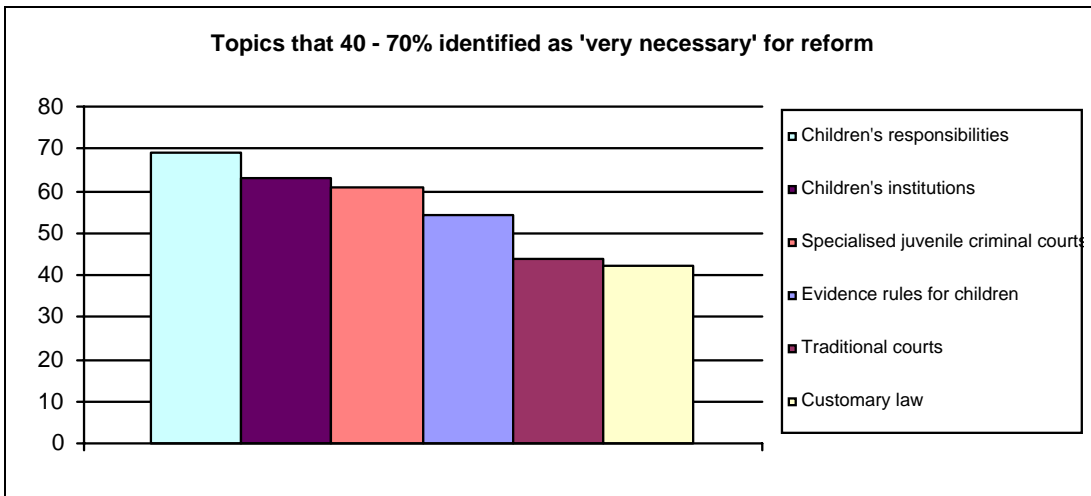
⁶¹ Lloyd, *ibid*, p. 17.

⁶² Appendix 2 of the Report on the Consultative Process dated 31 October 2003.

⁶³ Appendix 6 of the Report on the Consultative Process dated 31 October 2003.



Most respondents felt that customary law was in conflict with other laws. When asked whether customary law should take preference, respondents appeared uncertain and only a few gave a firm answer, with the majority being of the opinion that customary law should not take preference over other laws. However, a large majority felt that customary law and other laws should be harmonised, with the majority also being of the opinion that customary law should be limited in order to protect children. This uncertainty was borne out by the question that required respondents to determine the need for law reform in relation to customary law. Only 40 - 70% of the respondents answered 'very necessary' for the following topics, which included customary law.



5.3 Specific recommendations

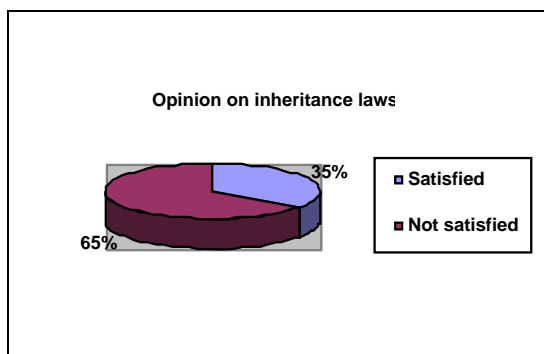
In trying to establish a happy medium between children's rights, customary law and culture, it is very useful to have regard to the African Charter on the Rights and Welfare of the Child. Article 21 of the Charter reinforces the concept of an obligation on States Parties to discourage "any custom, tradition, cultural or religious practice that is inconsistent" with the Charter (Article 1(3) of the Charter). Article 21 goes beyond this obligation "to discourage" and forces States "to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development" of the child. These can relate to customs and practices affecting the health or life of the child, and those practices discriminatory on the ground of sex or other status, such as inheritance laws. Even though no particular practice is mentioned it can include the practice of female genital mutilation. Another example of a practice falling under this provision is the killing of baby twins.⁶⁴

Recommendation

A provision be included in the new child law stating that customary laws shall be limited by law of general application in relation to children in so far as they constitute harmful social practices that negatively affect the dignity, health or life of the child and in so far as they are discriminatory on the grounds of sex or other status.

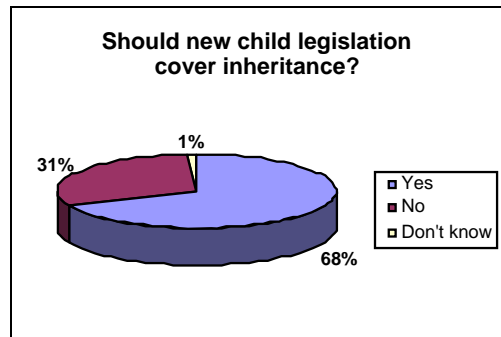
5.3.1 Inheritance laws

An issue in relation to customary laws that received special attention by most of the respondents in the consultative process was that of inheritance by children. Accordingly inheritance will be dealt with in this chapter. However, it must be noted that certain issues will be raised that go beyond the link with customary law.



A large majority of respondents said they were not satisfied with the present inheritance laws, particularly as they relate to orphans. Orphans cannot inherit intestate unless they have birth certificates. Getting a birth certificate as an orphan is in itself an ordeal as relatives of the deceased may have not registered his or her children in order to disinherit the child.

⁶⁴ F. Viljoen, *Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*, 31 CISLS (1998), p.220.



A large majority felt that inheritance should be dealt with in the child legislation process. Again, when asked what topics were in need of law reform, inheritance rated very high on the list. More than 90% of respondents said reform was 'very necessary' in relation to certain topics, inheritance being one of them.

An analysis of the Sacramento report reveals very little concrete laws that relate to inheritance of their parent's estates by children. There is a discussion that indicates the value placed on the right to a family as provided for directly by the Declaration on the Rights of the Mozambican Child and indirectly by the Constitution.⁶⁵ However, these do not translate into concrete provisions that would provide for the economic well being of OVCs. There are the provisions of Housing Laws and Civil Code that regulate the transmission of leases on the death of the tenant. Although a lease contract constitutes a legal right that can be transmitted upon death, it does not constitute a tangible asset of the deceased.⁶⁶ Noteworthy is the fact that the laws do not directly mention children per se, but rather speak of 'relatives' of the deceased.

The new proposed Family Law, in division 7, Articles 1941 to 1963 relate to the administration of the estate of a child and the child's right to inherit from his or her natural family and his or her foster family (article 1961). While the administration of the estate of the child has been covered adequately, it is noted that the new law is insufficient in defining and conferring in procedural terms how children can inherit intestate from their parents. This division of the law does not provide for specific procedures and responsibilities that will ensure that the child's inheritance rights are enforceable.⁶⁷ Then there are also the provisions of the SJAM (Statute on the Jurisdictional Assistance to Minors) that authorises the Children's Courts to manage the appointment and powers of a guardian appointed for a child.⁶⁸ This is important as there have to be procedures in law that provide for governance of children's assets until they reach the age of majority. These provisions can be retained, but should perhaps be revised in light of any new provisions that are enacted in the new law so as to ensure that every situation is catered for. In this regard, it would be helpful that the law make specific mention of the management of inherited estates of children and the need for trusts to be established in this regard.

⁶⁵ See pp. 32 and 35 of the Sacramento report (translated version).

⁶⁶ See p. 44 of the Sacramento report (translated version).

⁶⁷ Lei da Família, Divisão 7, 2003.

⁶⁸ See pp. 119, 120 and 131 of the Sacramento Report (translated version).

The Dean of the Faculty of Law at Eduardo Mondlane University has also noted the difficulties in relation to the customary law of inheritance. She noted that it is difficult to include customary law in written legislation, as questions of effectiveness are raised.⁶⁹

The issue in relation to inheritance is that when parents die, children often do not inherit as a result of customary law practices, or legal administrative barriers such as lack of birth certificates. This has huge consequences for the survival and development of orphans and contributes to the problem of protecting orphans in Mozambique. While realizing that this is a sensitive topic, it is nevertheless necessary for children's rights to be protected and enforced, and in this regard the rights relating to customary laws need to be limited. As the Dean of Law noted, although families would be alienated by children inheriting, it is more important to provide for children in legislation.⁷⁰

The concern relating to inheritance by children is to ensure that they are placed in a position whereby their survival and well being are ensured. When a child's parents are alive, they are responsible for the upbringing and well being of the child. If they are deceased, the inheritance of their estates by their children is meant to ensure that the child has sufficient means to survive. Therefore, the new law has to ensure that while the child has the right to inherit (as set out in the Family Law), this right is realised.

This can be achieved in a number of ways:

- The new children's law supercedes any customary law relating to inheritance
- The new children's law ensures that there are procedures in place in case parents die intestate, for their estates to be devolved upon their children
- The new children's law ensures that mechanisms are in place to ensure that estates are administered for the children until they reach majority
- Where parents die, having made a will, which left no portion of their estate to their children, there is a provision in the new children's law making it mandatory by operation of law that a certain percentage of the parent's estate devolve upon his or her children in order to ensure that they are adequately maintained until they reach majority
- A specific legal forum, such as the TDM or another appropriate state body, is tasked with overseeing the administration of the estates of deceased parents in relation to their children.

⁶⁹ See interview with Dean of Law, Appendix 22 of Report on Consultative Process dated 31 October 2003.

⁷⁰ See interview with Dean of Law, Appendix 22 of Report on Consultative Process dated 31 October 2003.

Recommendations:

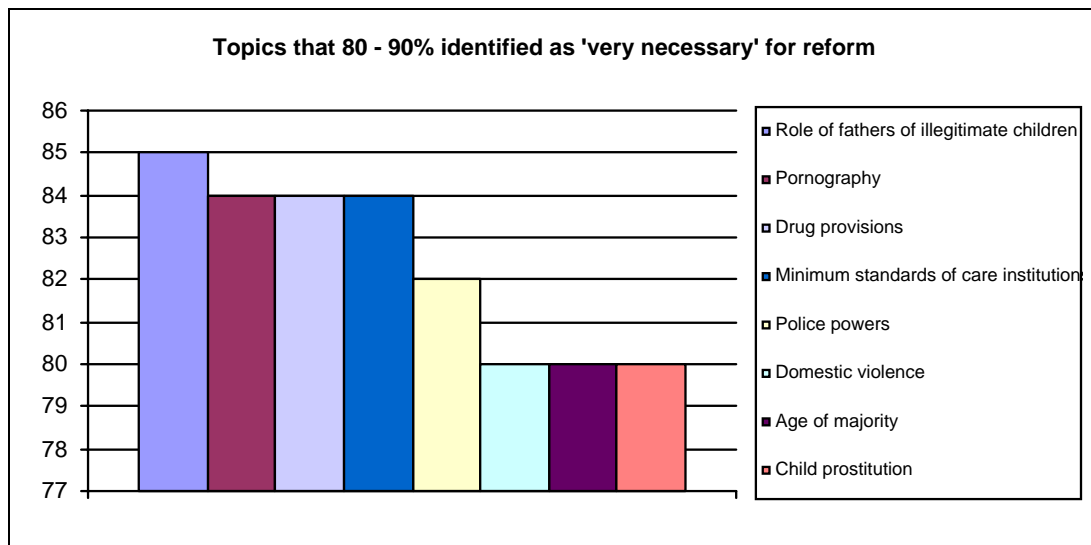
- That the provisions of Article 21 of the African Charter on the Rights and Welfare of the Child be adhered to and that children’s rights take precedence over discriminatory customary laws.
- That the new child legislation repeal customary laws relating to inheritance by children and allow children to inherit their parents’ estates.
- Further procedures be enacted to allow trusts to be set up to manage the children’s inheritance until they reach the age of majority.
- Some interim provision be enacted that circumvents the need for birth registration to allow children to inherit until proper birth registration systems are operative.
- That the inheritance law reform process be advised of the provisions enacted in the children’s law and refer the new inheritance law to this legislation in relation to children.

5.3.2 Age of majority

Article 122 of the Civil Code states :

“Children means persons of one or another sex until they reach the age of twenty-one years old.” ⁷¹

The age of majority was identified by between 80-90% of participants at the workshops as being in need of law reform.



Both the CRC⁷² and the ACRWC⁷³ set the upper age of childhood at 18 years of age. However, a seemingly simple determination of the age of majority is clouded by the application of culture and customary law.

⁷¹ Page 117 of Sacramento Report (translated version).

⁷² Article 1.

⁷³ Article 2.

Lloyd states as follows in this regard:

"It would seem that the definition of a child differs from one culture to another. In literate societies adulthood is usually ascribed when a person reaches a predetermined age. The transition from childhood is therefore fixed at an age when a person is presumed to be capable of conducting himself as an adult. In preliterate societies, such as Africa, the definition of childhood and the rights guaranteed by virtue of such status becomes a little more complicated. Age sets in Africa is a common way of denoting human beings' rights and duties, actual age is often difficult to deduce. Cessation of childhood is often established through initiation programmes, when one is thought to have acquired sufficient maturity. Each status carries with it various rights, duties and privileges." ⁷⁴

However, again one ought to regard universally accepted norms, especially to ensure consistency of practice in a very important area – the determination of childhood.

Recommendation

In Mozambique the age of majority be set at 18 years of age.

55 Lloyd, *ibid*, p. 29.

6. SEXUAL ABUSE, CHILD PROSTITUTION AND COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN

6.1 Local context and law

Dr. Sacramento notes that the right to protection against sexual abuse is not dealt with in the Mozambican Constitution.⁷⁵ Current Mozambican law concentrates on penal sanctions for certain sexual offences, in general, and against children under certain specified ages.⁷⁶ There are numerous laws regulating access of children to public night entertainment areas.⁷⁷ These laws are of recent origin, dating back to 1998. As regards the specific issue which they cover, there is a welcome level of detail concerning child's access to public night entertainment places and the sale and hiring of video cassette films. The provisions can be regarded as being adequate overall. Concern was, however, expressed by interviewees that the provisions of this law are not properly implemented. This may, in part, be due to the fact that the provisions do not identify a lead agency which is legally bound to ensure enforcement.

As regard the array of other statutes dealing with aspects of commercial sexual exploitation, prostitution, trafficking for sexual purposes of girl-children and sexual abuse more generally, the general point can be made that they fall desperately short of the range of necessary legal provisions required in this area. For instance, the penal code does prohibit rape, rape (seduction) of a virgin, facilitation of prostitution by a parent, and procurement for the purposes of sexual intercourse. The Sacramento report regards these provisions as constituting sufficient regulation in the quest to protect children against sexual abuse by their parents.⁷⁸ However, the consultants do not agree that these provisions are adequate. Indeed, a number of interviewees noted that child prostitution remains unregulated, and it is obvious that the mentioned provisions refer only to a limited number of categories of sexual abuse. Also, the measures focus strongly on penal law, save that a parent may be deprived of parental power in relation to these contraventions.⁷⁹ This latter measure contained in the present Mozambican law is a strength of the law and should be retained. But the new Statute must set out clearly the linkage between how a parent's rights and responsibilities can be terminated in these circumstances, and the procedures for including the placement of the child in alternative care.

International experience has shown that in order to ensure the effective application of protective measures for child victims of sexual abuse and exploitation, very clear guidelines, protocols and responsibilities need to be assigned by law, and that mere criminal prohibitions do not suffice.

6.2 Perceptions of Mozambican stakeholders

During the consultative process, respondents were asked what areas of the law are problematic and need revision. Sexual abuse and exploitation was one of the areas identified as needing attention.

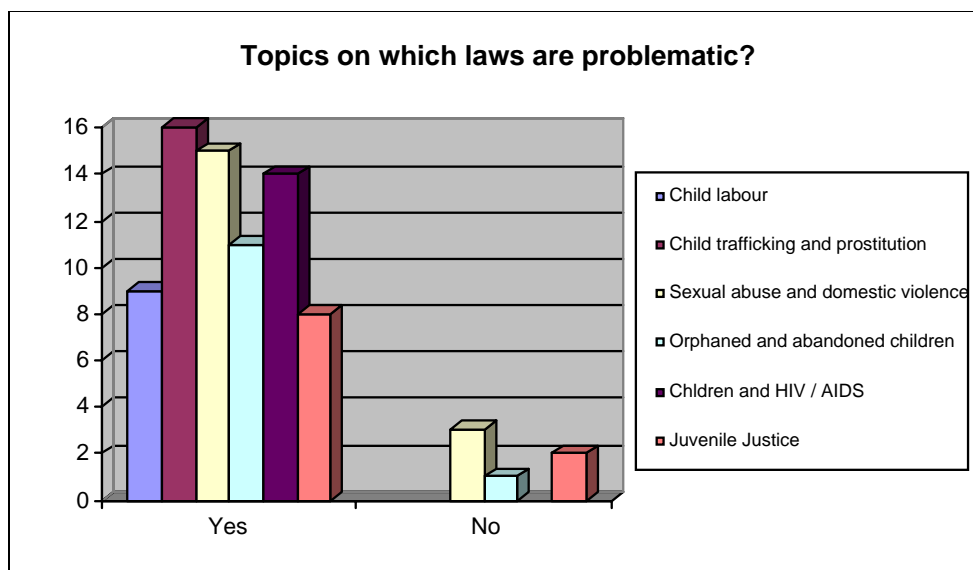
⁷⁵ Page 110 of the Sacramento report (translated version).

⁷⁶ See pp. 111-112 of the Sacramento Report (translated version).

⁷⁷ See pp. 113-115 of the Sacramento Report (translated version).

⁷⁸ See the Sacramento Report (translated version) at p. 112.

⁷⁹ Sacramento Report (translated version) pp. 113.



The children who were consulted felt that laws should be written to protect the child within the family, in other words, to prevent children from being abused by their parents or family members.⁸⁰ One child respondent stated:

“They have to invent a law against that, I do not think children have to have this because sexual abuse sometimes has its origin in the lack of education. The parents and the country don’t help the kids.”⁸¹

6.3 Specific recommendations

6.3.1 Definitions of sexual abuse and exploitation

The term “child abuse” is very wide and can cover almost all situations where some kind of harm is actively perpetrated against a child. Similarly, the term “sexual abuse” is very broad and can cover a wide range of actions.

Furthermore, as Article 19 and Article 34 of the CRC requires States to take all forms of action to protect children from sexual abuse, it is necessary to define the term in order to identify the nature of the offending action and to take the appropriate response.⁸²

⁸⁰ “Children’s Perspectives on Children’s Rights in Mozambique”, (Ehlers and Mathithi), Chapter 4.

⁸¹ “Children’s Perspectives on Children’s Rights in Mozambique”, (Ehlers and Mathithi), Chapter 4..

⁸² Article 19 (1) states: ‘State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.’

The issue of sexual abuse has been investigated by the South African Law Commission's Project Committee working on the Review of the Child Care Act.⁸³ As a result of its work, there is a proposed definition for sexual abuse that is very wide reaching and comprehensive.⁸⁴ It states as follows:

"Sexual abuse" in relation to a child, means sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted; encouraging, inducing or forcing a child to be used for the sexual gratification of another person; using a child in or deliberately exposing a child to sexual activities or pornography; or procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of the child."

Recommendation

It is suggested that a definition along the lines as set out above be included in the new children's law as this will cover most situations where children could be exposed to harmful sexual activities.

6.3.2 Reporting of sexual abuse and exploitation

It is widely accepted that children who are victims of sexual abuse are either related to or known to the perpetrator of the abuse. Often there is an imbalance of power and children are subjected to intimidation or threats or duress not to disclose the abuse.

The children consulted regarding sexual abuse felt that parents should do more to educate their children about sexual abuse. As one child stated:

"There are young men for example that say, I like you, kiss me a kiss, tomorrow they say, let's go to my house, lie down in my bed. This is not right and I think parents must talk to the children about this."⁸⁵

Accordingly, it is important to ensure that there are duties on certain people to report cases of abuse or exploitation. The question is whether to make reporting procedures mandatory for everyone. This may not be feasible as ordinary people who may be aware of abuse could also be known to the alleged perpetrator or a family member. If the allegations prove to be unfounded or false, this could lead to the breakdown of families and communities and the victimization of the reporting person. It may therefore be more expedient to make the general duty to report discretionary.

However, for certain professional persons who have a duty of care to children, the duty to report should be mandatory. Therefore medical professionals such as doctors, nurses, mental health care workers, social workers and teachers should have a duty to report cases of sexual abuse and exploitation.

Another issue relates to a national child protection register. A register of this nature would be administered by one specific government ministry, which would be responsible for keeping a database of persons convicted of a sexual offence against a child.

The idea behind the register is to identify persons who are unsuitable to work with children. Therefore, when applying for a job, such a person must disclose whether he has a conviction or has been found to have committed an act of sexual abuse against a child. In addition, an

⁸³ Project 110.

⁸⁴ Section 1 of the draft Children's Bill, published in *Government Gazette* No. 25346 of 13 August 2003.

⁸⁵ "Children's Perspectives on Children's Rights in Mozambique" (Ehlers and Mathithi), Chapter 4.

employer looking to employ someone who will work with or in close proximity to children has a duty to check the register to see whether the prospective employee is registered on the national register.

The procedure is confidential and does not generally disclose information. It is only disclosed to a particular person for a specific purpose.

Recommendations:

- There should be mandatory reporting of sexual abuse and exploitation by certain persons who have a duty of care towards children.
- General reporting of sexual abuse should be discretionary.
- A national child protection register should be provided for and specific regulations for the regulation thereof be enacted.

6.3.3 State officials and cases of sexual abuse or exploitation

There are a number of services that a child who has been physically or sexually abused comes into contact with. These include government and civil society services. As far as state involvement is concerned, a child will be exposed to police, health authorities, social welfare officials and department of justice officials. Further to this, a number of NGOs offer counseling and support services outside the formal justice system.

The effect of this is a range of services provided to abused children. However, it appears from individual interviews with police officials and civil society organizations in Mozambique that there is little, if any, co-ordination of these services and where they are available they are rarely accessible. There is no systematic handling of a particular child's case from initial reporting to the finalization of the case. It has been noted that there is a pressing need to create mechanisms of implementation for role-players in Mozambique, particularly in relation to the trafficking of children.⁸⁶ Furthermore, there seems to be a lack of co-ordination between the courts and the police in Mozambique and this calls for the establishment of co-operation initiatives.⁸⁷

Law reform is a wonderful concept, but relies on the role-players in the criminal justice system to be effective. The problems with the present system must not be allowed to perpetuate into whatever new system might develop otherwise the law reform process will potentially be for nothing.

In order to ensure that child victims of sexual abuse or exploitation are assisted, protected and properly dealt with by the welfare and criminal justice system, it is suggested that the roles and responsibilities of officials who deal with such victims be clearly set out in the legislation in order to ensure consistency of practice, transparency and non-discrimination.

Apart from roles and responsibilities, there are certain powers that legislation should provide for to facilitate the management of these types of cases. One of the most important powers is that of the police to search premises for information or evidence and to seize the information or evidence for the purpose of investigating or prosecuting a case.

⁸⁶ See minutes of meeting with Terre des Hommes on 26 September 2003, Appendix 20 of Report on Consultative Process, dated 31 October 2003.

⁸⁷ See interview with Dr. Cumbe dated 1 September 2003, interview with Carla Mendonca dated 20 August 2003 and interview at TDM dated 26 September 2003, Appendices 18, 17 and 21 of Report on Consultative Process, dated 31 October 2003.

Recommendations:

- A multi-disciplinary strategy be developed by the state for the police, prosecution, MMCAS and Ministry of Health
- Legislation include a provision requiring Judges and Presiding Officers to undergo sensitization training in relation to child victims of sexual abuse
- Legislation include provisions that set out the roles and responsibilities of the officials concerned. They are the police, health care workers (including doctors), and the criminal justice officials such as prosecutors and social workers

Some of these roles and responsibilities are:

- Duty to inform victims of the procedures to be followed
- Duty to inform victims of the progress of the case
- Duty to investigate
- Duty to advise victims about health issues, such as sexually transmitted diseases and treatments available
- Duty to interview the victim in an appropriate manner
- Duty to consult with other role-players in a particular case in order to ensure co-ordination of the approach to the case.

6.3.4 Court proceedings concerning sexual abuse and exploitation

It has been noted that in Mozambique, court personnel are not sensitive to child victims of sexual abuse.⁸⁸ There are a number of issues relating to court proceedings that can be used to protect child victims from secondary traumatisation.

The successful prosecution of a sexual or physical abuse case is dependent on the testimony of the victim, as the nature of the crime is against a person. However, with child victims, a number of obstacles present themselves when it comes to children giving evidence in court. These include the competency of the child to give evidence and assessment of the child's evidence.

The competency of a child to give evidence relates to whether the child has sufficient intelligence, sense and reason in order to understand the difference between truth and falsehood and the sense that it is wrong to lie. This is determined by the presiding officer after he or she, as well as the prosecution and defence, had an opportunity to question the child. It is submitted that the competency of a child would be better determined if the presiding officer have received training on child development issues, in order to capacitate them to make informed decisions in this regard.

Often children are found to be not credible, for example, because of inconsistencies in their oral evidence and their written statements. In the Sacramento report, Article 225 of the Penal Law deals with the questioning of accused children and this demonstrates the inadequacies of Mozambican law with regard to questioning children in court.⁸⁹ There are no references to the competence or questioning of child witnesses.

⁸⁸ Interview with Dr. Cumbe dated 1 September 2003, Appendix 18 of Report on Consultative Process, dated 31 October 2003.

⁸⁹ Page 128 of the Sacramento report (translated version).

A primary problem identified by studies has been the method of questioning the child. It has been noted that if child interviewing specialists are trained in child development, the result is improved fact finding and reduced trauma to the child.⁹⁰ Questioning a child victim should be aimed at avoiding biased responses, encouraging spontaneous free-recall reports, avoiding specific and leading questions and using age-appropriate language. Police officers and prosecutors should be trained and sensitised in interviewing techniques and should collaborate to form a clear strategy for the handling of a particular victim. Legislation should make provision for this type of training for purposes of implementation.

Another concern is about the use of intermediaries in cases of child abuse and exploitation. Children who have to testify before their attackers are traumatized and it would be preferable if procedures were introduced in order to ensure that intermediaries are appointed for when a child gives evidence in this type of case. The intermediary will relay the question posed to the child in child-friendly terms. Provisions must be enacted regarding the circumstances when an intermediary is appointed and who is qualified to be appointed to act as an intermediary. The latter would be someone who has experience working with children and who has some training in relation to child development issues. They could be psychologists, social workers or retired teachers.

6.3.5 Criminal measures

Sexual abuse and exploitation of children can be dealt with in two ways. The one way is by means of a welfare intervention using the TDM, as discussed in chapter 4 of this report. The welfare intervention is aimed at protecting the child, especially from abuse within the family or by a caregiver. It deals with issues such as removing the child from the custody of the person who is placing the child at risk and then ordering alternative care such as a foster placement if necessary.

The second manner of dealing with the sexual abuse and exploitation of children is through the penal law. Mozambique's penal legislation deals with a number of criminal offences that the state enforces through the criminal courts, as has been described above. However, if one has regard to the chart contained in section 6.2 above, it is clear that a large majority of respondents felt that there are gaps in the present laws in relation to child abuse and exploitation. It also clear from the Sacramento report that the scope of the present Penal Law does not extend to cover certain burgeoning sexual crimes against children.⁹¹

In reviewing laws relating to children and recommending law reform, criminal measures can be dealt with in the context of the present penal laws. It is recognized that criminal sanctions relating to sexual offences exist. However, these laws need to be revisited to ensure the proper protection of children against sexual abuse and exploitation.

It is recommended that the criminal code be amended in so far as it does not adequately deal with the scope of criminal offences against children. There are a number of actions against children that need to be criminalized in order to bring Mozambique in line with initiatives to combat child sexual abuse.⁹²

⁹⁰ Warren, A.R and McGough L.S " Research on Children's Suggestibility" in Bottoms, B.L and Goodman, G.S. (eds) *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, Sage Publications 1996, pp. 12-39.

⁹¹ See pp. 110 – 115 of Sacramento Report (translated version).

⁹² The reader is referred back to the discussion of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in Chapter 4 for some concrete suggestions in this regard.

6.3.5.1 Penetrative acts other than rape or defilement

A sexual penetrative act can extend beyond that of one person's genital organs penetrating the genital organs of another without their consent. While the criminal law can often accommodate these types of offences, it is submitted that in order to deal with sexual offences effectively and provide adequate protection for children, certain types of penetrative actions should be specifically criminalized. These are:

- Acts whereby a person unlawfully and intentionally causes the penetration of any object, including any part of the body of an animal or a part of the body of that person (not his or her genital organs), into the genital organs or anus of another person.
- Acts whereby a person unlawfully and intentionally causes the penetration of his or her genital organs or the genital organs of an animal into the mouth of another person.

6.3.5.2 Sexual acts committed within view of certain children

It is submitted that certain people commit sexual acts or cause sexual acts to be committed in view of children in order to heighten their own sexual awareness or for their own sexual gratification. This type of conduct needs to be criminally sanctioned, as it is often a precursor to other serious types of criminal offences.

This type of criminal sanction however, is not aimed at the situation where children witness sexual intercourse in the household in which they live as a result of cramped living conditions and restricted housing conditions. This offence is aimed at persons who deliberately and intentionally commit sexual acts in view of children for the purposes mentioned above.

6.3.5.3 Promotion of sexual offences with a child

Again, in order to curb the proliferation of sexual abuse and exploitation and the various ways in which this can occur, it is submitted that persons who promote sexual offences with a child should be liable for criminal prosecution. This type of offence would involve the following:

- The manufacture or distribution of an article that promotes or is intended to promote a sexual offence with a child.
- Supplying or displaying to a child an article that is intended to be used in the performance of a sexual act with the intention to encourage or enable that child to perform such sexual act.

6.3.5.4 Child prostitution

Although this is criminalized to the extent that parents are prohibited from facilitating the entry of their child into prostitution,⁹³ it would appear from the consultative process that further legislation is required. Numerous participants mentioned that adults can use child prostitutes with impunity, and the findings of the child participation process confirmed that children freely engage in child prostitution, which is not perceived as a crime. Perpetrators are not prosecuted. There is consequently a dire need for the drafters of child legislation to ensure the criminalisation of child prostitution, in a manner which is persuasive and clear.

⁹³ See pp. 111 of the Sacramento report (translated version).

Accordingly it is recommended that it should be an offence for a person to intentionally, for financial or other reward, favor or compensation, commit the following acts in relation to a child:⁹⁴

- Indecent or penetrative acts
- Invite, persuade or induce a child to allow him or her or any other person to commit an indecent or penetrative act with the child
- Make the child available or offer the child to commit an indecent act or penetrative act with any person
- Supplies, recruits, transports, harbours or receives a child for the purpose of the commission of indecent or penetrative acts with the child and any person
- Allows an indecent or penetrative act to be committed with a child of whom he or she is the primary care-giver or parent or guardian of
- Owns, leases, rents, manages or occupies any property used for the purposes of the commission of indecent or penetrative acts between a child and any person
- Detains a child under threat or deception for the purposes of the commission of indecent or penetrative acts
- Participates in, is involved in, promotes or encourages the commission of indecent or penetrative acts between a child and any person.

6.3.5.5 Pornography

Article 34 of the UN Convention on the Rights of the Child states as follows:

“States parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes States parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(c) the exploitative use of children in pornographic performances and materials.”

This confirms the obvious link between sexual abuse and exploitation and child pornography. Furthermore, child pornography has become a focal point of international discourse on violence against children as is evidenced by the following quote:

“Children, the most vulnerable members of society, and who possess little power in our country, require a credible and cogent protective mechanism that will insulate them from harmful practices. ... Pornography is one of those insidious and surreptitious perversions, which can exploit and abuse our developing nations’ children during times of massive social transformation, with its concomitant social uncertainty and economic insecurity. Severe deleterious effects are visited on children used to produce pornography and those exposed to such pornography. The majority of child pornography disseminated is in fact exchanged between paedophiles and child molesters.”⁹⁵

With the increasing availability of pornographic materials especially via the internet, it is necessary to enact specific laws prohibiting child pornography.

⁹⁴ Based on section 11(1) of the draft South African Sexual Offences Bill.

⁹⁵ *Child Pornography, an International Perspective* at 7, EPCAT, May 1996, Stockholm.

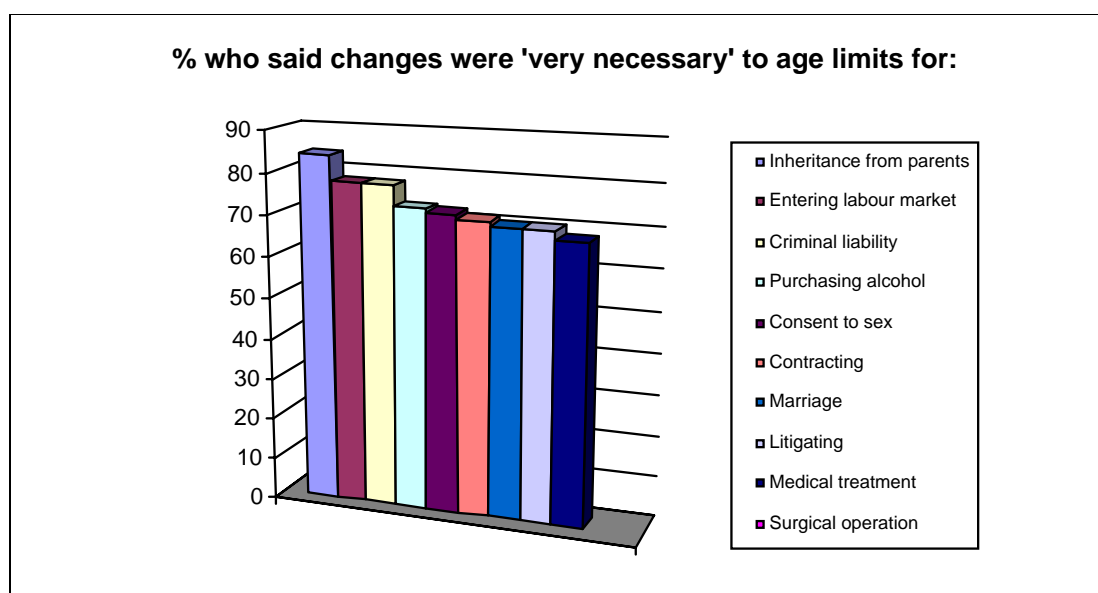
The offence of child pornography needs to be defined and a suggested definition should cover:

- Children under the age of 18 years participating in sexual conduct or a lewd display of nudity, that involves genital organs in a state of arousal or stimulation, masturbation, sexual intercourse including penetrative acts, orally or with an object, fondling or touching
- Creation, production, importation or possession of child pornography publications containing visual presentations, simulated or real, of child pornography
- Films containing scene(s), simulated or real of child pornography.

There can be some exceptions to this prohibition, such as for bona fide scientific or documentary purposes. However, if it is a case of bona fide research, permission must be obtained in advance for the research by written application to a relevant authority.

6.3.6 Age of consent for sexual acts

A large number of respondents in the consultative process said there was a need to legislate the age of consent for sexual acts.



“Age of consent” provisions essentially criminalize **consensual** sexual acts with a child below a set age. The purpose of such provisions is to protect children from sexual abuse and exploitation by adults. At the same time, such provisions try to determine the age at which children should ideally start engaging in sexual behaviour. For the majority of countries, the age of consent is 16 years of age. Where the age of consent is not 16, more countries have chosen 14 or 15 as the appropriate age than 17 or 18 years of age. Since consensual acts are criminalized, certain age of consent provisions have included defences or limitations to address situations where the provisions might unfairly criminalize someone.

One defense relates to the situation where the sexual act was in fact not one where a child was exploited by an adult. This defense could be available to an accused of the same age or maturity as the 'victim'.

The age of consent appears to be an issue for individual countries to decide on, as there is no guidance in international documents. However, a comparative study emphasizes the need to be mindful of the fact that consensual sexual acts between children are a reality and it is problematic to criminalise such action.

Recommendations:

- The age of consent be set at 16 years of age
- Any person over 16 years of age and engaging in sexual acts with children younger than 16 years is guilty of an offence
- Children below 16 years and within three years of each other that engage in sexual acts are not guilty of an offence
- Mozambique must enact new legislation to combat crimes not currently dealt with in the Mozambican Criminal Code.

6.3.7 Child trafficking

From a review of the Sacramento report, it is clear that Mozambique has no specific anti-trafficking legislation. However, Mozambique has ratified the UN Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography and is therefore obliged to ensure the rights and responsibilities contained therein are incorporated in domestic law. The details of this issue are discussed in more detail in Chapter 4 of this report and the legal drafters are referred thereto. The reason for this is that while trafficking in children is often linked to the commercial sexual exploitation of children, trafficking is a far wider type offence that encompasses trafficking of children for exploitative labour practices and for the removal of body parts.

However, it is recommended that the legal drafters incorporate the provisions of the Optional Protocol, as set out in Chapter 4 above, in the new law. In addition, it is recommended that Mozambique ratify, if it has not already done so, the UN Protocol to Prevent, Suppress and punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Trans-national Organised crime, 2000. Furthermore, Mozambique should conclude bilateral or multilateral agreements with the major countries that are not parties to the Protocol from where children are being trafficked to Mozambique, or to which Mozambican children are being trafficked to.

7. CHILDREN IN TROUBLE WITH THE LAW

7.1 Introduction and international standards

International law gives substantial guidance to countries seeking to reform their legislation and policies concerning children in trouble with the law. The chief instruments are the CRC (Articles 37 and 40), the Beijing Rules for the Administration of Juvenile Justice (1985), the JDL (1990), and the Riyadh Guidelines for the Prevention of Juvenile Delinquency. Other relevant instruments include the International Covenant on Civil and Political rights (1966), the Convention Against Torture (1984), and the 1955 Standard Minimum Rules concerning the treatment of prisoners.

The key aims of a juvenile justice system are established by reference to article 40 of the CRC, which is principally to ensure that the child is reintegrated into society and is able to assume a constructive role in society. Additionally, this must be achieved in a manner which promotes the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which takes into account the child's age.⁹⁶ These aims militate against a system that is solely punitive or retributive,⁹⁷ and do not permit a system in which a lack of respect for children's human rights is allowed to continue. At present the Mozambican criminal justice system as far as it pertains to children accused of committing crimes, sorely lacks a child rights centered approach as required by international instruments.⁹⁸

Recommendation:

The drafters should set out (in an 'objects clause' or in a preamble) what the key aim of the legislation relating to children in trouble with the law is intended to be. The relevant provision would be applicable to all role-players dealing with the child in conflict with the law, e.g. the police, the social services and the judiciary.

7.2. Local context

Minors under the age of 21 years are significantly over-represented in prison statistics, constituting 30% of the prisoner population overall.⁹⁹ **The main shortcomings and gaps inherent in the present juvenile justice system in Mozambique are summarized below:**¹⁰⁰

- The 1971 legislation (the SJAM, decree 417/71) providing for civil jurisdiction and the application of measures of protection, assistance or education by civil courts and Juvenile courts, is widely inapplicable in the country.
- The SJAM referred to above is in any event of dubious compliance with children's rights standards. For instance, in terms of the provision of article 16 of the statute, the Juvenile court is granted the power to determine measures for children under 16 who are beggars, vagrants, prostitutes or promiscuous. Also, they may become sub-

⁹⁶ Article 40 (1).

⁹⁷ See further 7.5 below for recommendations regarding the inclusion of restorative justice principles to guide the interpretation and application of this proposed legislation.

⁹⁸ As evidenced by an overview of the provisions contained in the Sacramento report (translated version).

⁹⁹ Report on Children in Conflict with the Law commissioned by Save The Children, Norway (2003).

¹⁰⁰ Report on Children in Conflict with the Law commissioned by Save the Children, Norway, (2003) and pp. 120-129 of the Sacramento Report (translated version).

ject to the above measures if through their condition, their behaviour or their tendencies they reveal serious difficulty in adapting to normal social life.

Both classes mentioned here offend against the rights of the child not to be subjected to punishment for status offences, i.e. acts that would not be considered offences for adults. Also, the principle that measures should not be imposed unless there is proper proof of wrongdoing seems compromised by the second ground for imposition of measures (serious difficulty in adapting to normal social life).

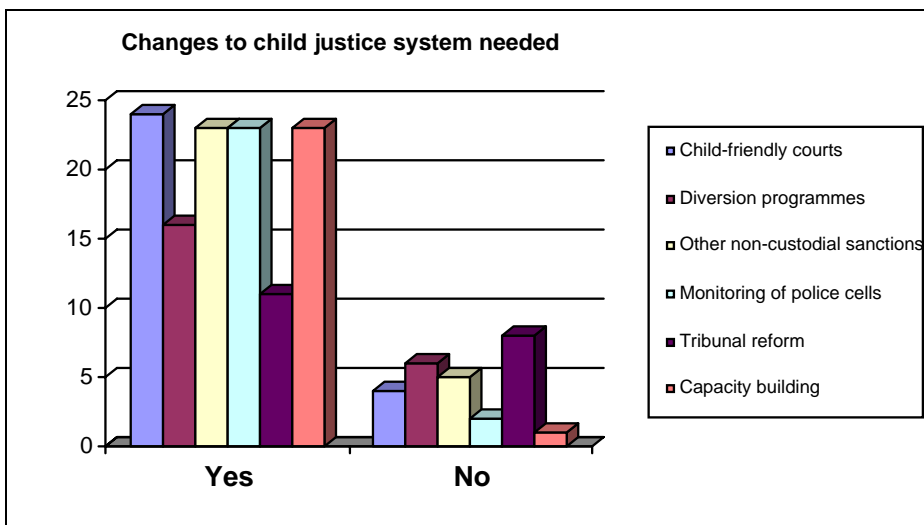
- There are no institutions or programs for children aged below 16 years (which is the minimum age of criminal liability at present)
- Children aged above 16 years are not dealt with in a separate system and frequent recourse is imprisonment
- The TDM, which has supposed jurisdiction over children in conflict with the law below the age of 16 has limited powers and scope to deal in any meaningful way with such children who are brought before it; the perception exists that children younger than 16 years who commit offences are not to be held responsible or accountable for their deeds in any way
- No diversion system appears to have been established as yet, either for younger children or for those aged 16 and 17 years
- Children's rights in detention in police custody and in prison are frequently violated. For example, children may not be brought to appear in court within the prescribed time period.¹⁰¹ Children below the minimum age of criminal capacity have been found in prisons and other forms of detention
- Children are kept in prisons for lengthy periods without being brought before a court by the police
- Children are arrested for petty offences, such as failing to be in possession of personal identification documents (see the children's participation report compiled as an addendum to this document)
- There is no system or mechanism for separating non-serious matters from serious cases, so as to minimize time spent in custody or awaiting trial
- There is a lack of co-ordination amongst the various agencies and non-governmental organizations dealing with children in conflict with the law
- The Committee on the Rights of the Child has expressed concern that children aged 16 and 17 years do not benefit from protective provisions in the juvenile justice system¹⁰²
- The Committee was also concerned about the lack of coordination of the activities of role payers in the juvenile justice system.

¹⁰¹ 'Report on Children in Conflict with the Law', commissioned by Save The Children, Norway (2003) p. 35, showing that 44.5 percent of the children in the sample were detained illegally for more than 48 hours.

¹⁰² Paragraph 72 (b), Committee on the Rights of the Child, 29th session, *Concluding Observations of the Committee on the Rights of the Child: Mozambique*, CRC/C/15/Add.172, 3 April 2002.

7.3 Perceptions of Mozambican stakeholders

From the consultative process the responses below emerged. The majority of respondents felt that the system dealing with children need to be changed, rather than that the age of capacity be changed. Respondents indicated their approval or disapproval for the following kinds of changes:



Most popular changes approved of were the establishment of child-friendly courts, the development of non-custodial sanctions generally, the monitoring of police cells to ensure children are not detained arbitrarily or with adults, and capacity building of judges and police in respect of juvenile justice. Least popular was reform of the TDM.

Recommendation:

The 1971 SJAM, decree 417/71, in any event suffering from a lack of implementation, should not be the starting point for legislative reform in this area. It should be repealed and replaced with new legislative provisions. It is clear that the Statute lacks a child rights focus, and contains provisions that directly contravene children's rights. However, the focus of the Decree on civil jurisdiction and non-penal responses to offending does accord with the broad thrust of what will be proposed further below.

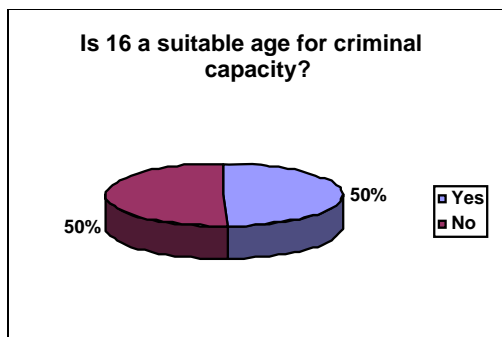
7.4 Specific recommendations

7.4.1 The Minimum Age of Criminal Capacity

The requirement set at international law is that states parties ratifying the CRC must review the minimum age of criminal capacity, and to ensure that a fixed age is established below which children shall be presumed not to have the capacity to infringe penal law (article 40(3)(a)). The Beijing Rules specify further that the age should not be set too low, bearing in mind the child's evolving capacities and development. Although no international instrument specifies a fixed minimum age, the Committee on the Rights of the Child has criticized countries¹⁰³ where the minimum age has been set at below 12 years.

¹⁰³ E.g., South Africa and the United Kingdom.

Mozambique currently provides in the Penal Code that the minimum age of criminal responsibility is at 16 years. In global terms, this is very high indeed. The age of 16 was inherited from colonial Portuguese law, and is mirrored in other Lusophone countries.



During the consultative process and upon analysis of the questionnaires, it appeared that opinion was almost evenly split on whether 16 was a suitable age of criminal capacity. Respondents also differed on whether the age was too young or too old, and some suggested additional requirements.

As world expert Nigel Cantwell has said, the real issue is not where a country sets the minimum age, but what will happen to children in conflict with the law below that minimum age.¹⁰⁴ Countries with an unusually high age of criminal responsibility may resort to apparently non-penal measures (such as lengthy civil referrals to institutions where children are nevertheless deprived of their liberty, as is the case proposed in the SJAM), which pose a greater threat to children's rights than would the normal criminal process.

On balance, there appears to be support for the present minimum age of criminal responsibility prevailing in Mozambique, although there were some notable dissenting voices. It would be difficult, too, from a child rights perspective to advocate for a lower age than that operating at present, as such a suggestion could be seen by the world community and the Committee on the Rights of the Child as a retrogressive measure in conflict with Mozambique's status as a ratifying country to the CRC.

What has emerged from the consultative process, rather, is the need for alternative measures to deal with children below the minimum age who are in conflict with the law. However, it must be clarified that under international law, the prohibition on **penal responsibility** for those young people below the minimum age of responsibility also entails that they may not legally be **arrested** nor **detained** in custody of any sort, pending the imposition of any alternative measures.¹⁰⁵

¹⁰⁴ N Cantwell, *Innocenti Digest* Juvenile Justice (1996).

¹⁰⁵ Van Bueren, G. *The International Law on the Rights of the Child* (1995) Kluwer Publishers, The Netherlands.

Recommendations:

Legislation should specify that the minimum age of criminal responsibility is 16 years, and that children aged below this are presumed to be incapable of committing offences. Further, a provision should explain that a child who lacks criminal capacity by operation of the law (*ex lege*) may not be arrested, detained in police custody or imprisoned. The duty of the police to implement this provision should be clearly articulated.

As regards children aged below 16 years who commit offences, the evidence from interviewees and people consulted was that this is indeed a growing problem. References were made to cases of defilement (rape) involving young offenders, against whom no steps could be taken.¹⁰⁶ However, as serious as this example is, it is notable that the majority of children (of all ages) in trouble with the law do not appear to have committed serious offences, although information on this is anecdotal.¹⁰⁷

What is clear is that in relation to children below the minimum age of criminal responsibility, screening and sifting has to take place. The aims of this screening must be to separate children for whom no intervention is required from those for whom an intervention would be beneficial. Here it must be pointed out, too, that Mozambique as a country with limited resources must use the available resources carefully to target the most needy cases where the most impact can be made. Instances where measures are not normally necessary or desirable in this context might include where children are accused of being involved in informal selling, begging, petty theft, failure to produce identity documents and the like.

Recommendation:

Children in conflict with the law who are below the minimum age of criminal responsibility should be screened as soon as possible after the matter has come to the attention of the authorities. Only in serious cases should further action (as described below) be taken. Serious cases would be where:

- The child has caused grievous bodily harm to another person
- The child is involved in repetitive offending, and previous instances have been recorded where no action was taken
- The child has been alleged to have been involved in a sexual offence

7.4.2 Nature of possible further action where children are below the minimum age of criminal responsibility

7.4.2.1 Introduction and principles

As they lack penal accountability, the range of possible measures where children are alleged to have committed a serious offence and are in need of intervention should be limited to the imposition of a range of civil measures. Further, diversion of children away from institutions should be applied to the maximum extent in view of the international law presumption

¹⁰⁶ Meeting with Dr Cumbe dated 1 September 2003, Appendix 18 of the Report on the Consultative Process, dated 31 October 2003

¹⁰⁷ The Save the Children Report on Children in Trouble with the Law (2003) (note 3 above) does not actually profile offences committed by children in the sample, although social background is provided (on p 45. mention is made at this point of children charged with robbery, who constituted 69% of the sample).

against institutionalization.¹⁰⁸ The following recommendations and proposals are therefore premised on these key principles (non-penal jurisdiction and institutionalization as a last resort).

It must be noted, further, that although a key gap identified by participants at the workshops and by stakeholders was the lack of juvenile institutions aimed at children in conflict with the law, plans are underway to renovate and alter an existing unused women's facility to achieve this goal. The suggestions here are therefore predicated on the assumption that Mozambique will in future have an institution aimed at the re-education and reintegration of young offenders.¹⁰⁹

Recommendation:

It is recommended that the following responses should be available, and described in legislation, where children under the age of 16 years are alleged to have committed an offence:

- Return to the person in whose care the child was without further measures being taken
- A police warning
- Return to the person in whose care the child was under the supervision of a social worker or childcare worker¹¹⁰ for a period not exceeding 6 months
- Placement in a suitable family or in a private or official education establishment¹¹¹
- Referral to a family group conference, mediation, or community conflict resolution process¹¹²
- Referral after screening for a hearing in the TDM

7.4.2.2 Screening of children aged under 16 where police decide that further measures may be warranted

The legislation should provide further for a screening process to take place after it has come to the notice of the authorities that a child aged under 16 has allegedly committed an offence. This screening process involves an assessment, conducted by a social worker of the child's personal circumstances and the circumstances surrounding the offence. However, this screening should be compulsory only where the police have decided that further measures are necessary and warranted. Put differently, the police may decide that no further action is necessary, or may choose only to warn the child, in which cases resources should not be expended further on social welfare action.

¹⁰⁸ See for example, article 37 (2) of CRC and the Committee on the Rights of the Child's General Comment no. 3 (HIV/Aids and the rights of the Child) dated March 2003.

¹⁰⁹ This institution is evidently not only intended to provide services to children below the minimum age of responsibility, but it will also provide an alternative to prison for children aged 16 and 17 years (input by the UNDP programme officer responsible for this project at the Maputo workshop held on 21 October 2003).

¹¹⁰ A definition of a social worker or childcare worker should be provided for. It should be an expansive definition, including not only state employees, but also persons working for non-governmental organisations dealing with children's well being. The definition should not be restricted to persons with professional social work qualifications, but should include those without professional qualifications, but with lay experience in working with troubled children.

¹¹¹ This accords with the present legislation (the Decree): see MCR, p 115. Note, though, that the component of compulsory residence in an official educational institution may only be ordered by a court (the TDM).

¹¹² See further in this regard below.

Recommendations:

Legislation should spell out the duties of the police upon encountering a child aged below 16 alleged to be in conflict with the law to determine whether any further measures should be instituted, and if not, to decide on no further measures or to impose a police warning. If however, the police feel that further measures may be warranted, they must notify a social worker or child care worker forthwith to attend to the child for the purposes of screening.

- Legislation should require the social worker or childcare worker to attend to the child as soon as possible upon receipt of a communication that a child under the age of 16 has been alleged to be in conflict with the law. A child may not be kept in detention whilst awaiting the screening by a social worker or childcare worker, in accordance with the precepts of international law.

The proposed screening process should be elaborated and described in the proposed legislation. **Screening should be conducted with due regard to:**

- The best interests of the child
- The child's right to privacy
- Non-discrimination
- The aim of reintegration of a child into the family and community

The aims of screening should be given legislative recognition. The screening should be aimed at:

- Conducting a preliminary investigation, in other words, an interview with the child, into the circumstances under which the child was alleged to have come into conflict with the law
- Getting information about the child's family and ecological circumstances
- Determining whether the imposition of further measures can assist the child to deal with social, education, health, psychological, or any other problems which may have contributed to the child's alleged delinquency
- Providing a report that briefly outlines the cause of action recommended and the reasons for this recommendation.

The person conducting the screening should be empowered by law to investigate the above matters, and thereafter to make one of the following recommendations:

- That no further action should be taken
- That the child should be returned to the person in whose care the child was under the supervision of that (or a specified other) social worker or childcare worker¹¹³ for a period not exceeding 6 months
- That the child should be placed in a suitable family or in a private education establishment or referred to a non-residential diversion program¹¹⁴
- Referral to a family group conference, mediation, or community conflict resolution process¹¹⁵
- Referral after screening for a delinquency hearing in the TDM.

¹¹³ A definition of a social worker or childcare worker should be provided for. It should be an expansive definition, including not only state employees, but also persons working for non-governmental organizations dealing with children's well being. The definition should not be restricted to persons with professional social work qualifications, but should include those without professional qualifications, but with lay experience in working with troubled children.

¹¹⁴ This accords with the present legislation (the Decree): see MCR, p 115.

¹¹⁵ See further in this regard below, and the discussion at chapter 11 of this Report.

7.4.2.3 Hearings of children in conflict with the law under 16 years in the TDM

Diversion (which is the referral of a child away from formal court processes) and filtering out minor cases should be achieved by the procedures for police decision-making and social background screening prior to a child younger than 16, alleged to be in conflict with the law, being brought before any judicial authority. However, in more serious cases (involving repeat offending or grievous bodily harm to the person of another) a hearing in a court may be warranted. This court, it is recommended, should be the TDM, which enjoys civil jurisdiction. Hence, one recommendation that can emanate from the screening process described above could be referral of the matter for a delinquency hearing in the TDM. This recommendation accords with the views of the majority of responses received during the consultative process undertaken as a background to this report.¹¹⁶

7.4.2.4 Authority and powers of the TDM

Although the TDM has jurisdiction over children under 16 years of age,¹¹⁷ interviews with stakeholders revealed that the existing powers of the TDM are not sufficiently elaborated in law.¹¹⁸ The judicial officer in charge should be granted wide powers to make a variety of dispositions, in accordance with article 40(4) of the CRC.

Article 40(4) provides that 'a variety of dispositions such as care, guidance and supervision orders, counseling, probation, foster care, education and vocational training programs, and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well being and proportionate both to the circumstances and the offence.'

Accordingly, it is recommended that the powers of the TDM be significantly extended and elaborated in law. Since the powers contemplated apply to both children aged below the minimum age of criminal accountability and those aged 16 years or older, these powers will be discussed below. However, it must be stressed that no child should be admitted to any state institution (even as an educational measure) without an order of court authorizing this. This recommendation is based on the rule that no child should be deprived of his or her liberty unlawfully or arbitrarily (article 37(b) of CRC), and on the view of the Committee on the Rights of the Child that children detained in educational or welfare institutions are regarded as having been deprived of their liberty.

7.4.2.5 Restorative Justice Approaches

Restorative justice involves a balancing of rights and responsibilities and the purpose of restorative justice is to identify responsibilities, meet needs and promote healing.¹¹⁹ In keeping with juvenile justice developments worldwide, and pertinent to African custom and experience, restorative justice approaches dealing with children in conflict with the law are commonly featured in emerging child justice systems.¹²⁰ This includes granting legislative

¹¹⁶ See the Report of the Consultative Process, dated 31 October 2003.

¹¹⁷ See pp. 126 of the Sacramento report (translated version).

¹¹⁸ See interview with the judicial officer heading the TDM, Maputo, conducted on 26 September 2003, Appendix 21 of Report on Consultative Process, dated 31 October 2003.

¹¹⁹ Skelton, A. "Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control", in Davel, C.J. (ed) *Children's Rights in Transitional Society*, 1999, p. 93

¹²⁰ See for example the New Zealand Children Young Persons and Their Families Act, 1989, the Canadian juvenile justice legislation of 2002, and South Africa's Child Justice Bill 49/2002. It is noteworthy that family group conferencing has been successfully used in both child justice and child protection (child welfare) proceedings in Ireland and New Zealand.

recognition to restorative justice principles and practices. Restorative justice as a theory of conflict resolution entails accepting that the commission of an offence causes a breach in relationships, and that it creates a duty upon the offender to 'put the wrong right' to the person affected by the harm, to his or her family and to the broader community. It views a victim as central to the process of restoration, rather than merely being a witness for the state in a criminal prosecution. It further depends on the notion that offenders are more willing to accept accountability when confronted with a restorative process taking place before persons significant to his or her life. This in turn heightens the possibility of true reintegration. Mozambican law at present contains no reference to the use of restorative justice measures in the management of child offenders. This is not in keeping with Article 40 of the CRC, which encourages the use of diversion in juvenile justice systems.

Recommendations:

Restorative justice principles should be provided at the commencement of the legislation to underpin the application and interpretation of the legislation. **These principles include:**

- The objective that offenders accept accountability for the harm caused to the victim
- The goal that actions taken in terms of the legislation must seek to ensure reparation, restitution or symbolic restitution to the victim
- The aim that where possible and appropriate, victims and families are involved in seeking solutions to offending.

In addition, specific provision should empower stakeholders to recommend and implement restorative justice processes, such as victim-offender mediation and family group conferences. These can usefully be provided both for children below the minimum age of criminal responsibility, and as a diversion option for children above the minimum age. Further, the legislation should spell out the mechanisms for referral to such as process (who should take the lead in contacting victims and families for the purposes of conducting the restorative process, by when it should be convened, and so forth).¹²¹

Legislation should preferably not detail the possible outcomes of a restorative process, as this would run counter to the idea that restorative justice outcomes are intended to promote an individualized response to the child and to the offence. However, it is important to ensure that outcomes that are contrary to children's rights are not agreed to.¹²² Community involvement in determining the resolution of disputes should not involve mob justice. Therefore it is recommended that the legislation prohibit certain practices, to ensure that the good in restorative justice is not subverted.

¹²¹ See the provisions of South Africa's Child Justice Bill 49 of 2002 for an example of this type of clause.

¹²² The classic textbook examples here are the Canberra incident where a child was forced to wear a T-shirt in public adorned with the words "I am a thief." Another well known occurrence took place in the North West Province of South Africa, where a child accused of shoplifting was painted silver.

It is further recommended that the following prohibitions be legislated for, in the interests of protecting children's rights in restorative processes:

- Any form of physical punishment as an element of a restorative outcome should be outlawed
- Public humiliation, exploitation and activities which are harmful or hazardous to a child's well-being may not form part of a restorative process outcome
- Any community service imposed as an element of a restorative justice outcome must be appropriate to the age and maturity of the child and to the circumstances surrounding the commission of the offence
- Restorative outcomes may only be agreed to - the consent of the child is a pre-requisite.

7.4.2.6 Advocacy and training in restorative justice

It takes particular skill to successfully convene and mediate family group conferences and other forms of dispute resolution.¹²³ In traditional African culture and in customary law, these skills are held by leaders and elders, often after they have risen to those positions after many years of informal coaching. In order to further the development of skills in facilitating restorative justice processes, the consultants recommend that:

A specific training package on convening family group conferences be presented to interested stakeholders from MMCAS and the non-governmental sector, concentrating on the larger urban centers, in order to provide a pool of suitable qualified experts.¹²⁴ Traditional and community leaders be identified and recruited (by means of workshops) to form the core of a pool of potential facilitators of restorative justice processes for the purposes of implementation of this aspect of the proposed legislation.

7.4.3 Child justice and children above the minimum age of criminal responsibility

7.4.3.1 Determining the application of the proposed provisions

The provisions of article 40(3) of the CRC require States to establish separate 'laws, institutions, procedures and authorities' specifically applicable to children charged with offending. Further, the CRC binds this to persons aged under 18 years, unless under local law a child has attained majority earlier. Two comments are derived from the above.

First, since children in Mozambique do not attain majority earlier, the provisions of proposed legislation should be applicable to persons below the age of 18 years. This would accord with the Committee on the Rights of the Child's response to the MCR that steps be taken to make the protections available to children in conflict with the law available to persons of 16 and 17 years of age.¹²⁵

¹²³ See Gallinetti, Redpath and Sloth- Nielsen: 'Race, Class and Restorative Justice: Glass ceiling, Achilles heel or crowning glory?' (forthcoming, South African Journal on Criminal Justice, 2004).

¹²⁴ The Restorative Justice Centre, an NGO based in Pretoria provides such training. Individual consultants can also be recommended for this.

¹²⁵ Paragraph 72, Committee on the Rights of the Child, 29th session, *Concluding Observations of the Committee on the Rights of the Child: Mozambique*, CRC/C/15/Add.172, 3 April 2002.

Recommendations:

The provisions suggested hereunder concerning children above the minimum age of criminal responsibility should be applicable to those between 16 and 18 years of age. If beneficial arrangements in law or policy currently apply to those over 18 years but aged below 21,¹²⁶ these would remain unaffected by this proposal.

Second, the cited provisions require separation of children from youths and adults in conflict with the law. It has been said that the import of article 40(3) is to require states to create a separate system for those aged below 18 years.¹²⁷ This is indeed the thrust of what is proposed further below.

7.4.3.2 Diversionary measures for children aged 16 and 17 years

A separate system for children in trouble with the law is predicated in the introduction of the possibility of diversion for children above the minimum age to criminal responsibility. Diversion in lieu of prosecution involves a child above the minimum age of criminal responsibility foregoing his or her right to plead not guilty and have his innocence proven in a court of law. For this reason, diversion can take place only with the informed consent of the child.

The diversion options suggested for 16 and 17 year olds here could well to an extent be the same sorts of outcomes as the referral options proposed for children below the minimum age of criminal responsibility – i.e. referral to non-residential diversion programs, referral to an educational institution,¹²⁸ convening of a restorative justice process such as a family group conference, placement under the custody of a suitable person, placement under supervision and guidance of a social worker or child care worker, performance of community service for the benefit of the community, restitution to the victim, referral for specialized counseling and so forth.¹²⁹

However, referral for diversion appears to depend significantly on the necessary screening taking place to identify suitable candidates for diversion. As mentioned earlier, the appropriate mechanism for screening needs to be concretized in legislation, which should place this duty upon the social worker or childcare worker to perform as soon as possible, but before the child appears in court.¹³⁰

Recommendation:

It is recommended that all children, including those above the minimum age of criminal responsibility, should be screened by a social worker or a childcare worker as soon as possible after apprehension, but before the first appearance in court. Legislation should spell out the aims of screening, namely principally to indicate whether the matter warrants further measures, and if so, whether diversion or prosecution is justified. The screening officer's conclusions and recommendations should be set out in a report, to be furnished to the Attorney General's office.¹³¹ That Office should then decide whether court prosecution is warranted, whether no further measures need be taken, or whether referral for diversion should occur.

¹²⁶ Currently the age of majority in Mozambique.

¹²⁷ J Sloth Nielsen 'The role of International Law in South Africa's Juvenile Justice Reform Process' LLD thesis, University of the Western Cape 2001.

¹²⁸ See, however, further below for specific restrictions concerning deprivation of liberty in juvenile educational or vocational institutions, even where this is used as a diversionary measure.

¹²⁹ See for example the detailed chapter on Diversion in the South African Child Justice Bill 49/2002, which spells out a variety of existing and proposed new diversion orders, many of which can be implemented in the absence of specially skilled staff (e.g. within communities) and vast new resources.

¹³⁰ See further section 7.4.2. above.

¹³¹ In regard to children above the minimum age of criminal responsibility.

This decision should be taken speedily, before the charges are put to the child in court. The law should specify the time frames within which such decision must be made.

7.4.3.3 Effects of diversion

Optimally, diversion ensures that a child does not suffer the stigmatization inherent about appearing in court, nor does the child acquire a criminal record. This should be evident from the legislative provisions.

Recommendation

Legislation should clarify that a child who is diverted does not get a criminal record. Further, only when a child willfully and materially fails to fulfill any diversion conditions should the possibility exist that the matter be re-opened for prosecution.

7.4.3.4 Keeping of diversion records

All service providers involved in the delivery of diversion services, including programs, probation and supervision, arrangements for family group conferences, supervision of the performance of community service, and so forth, should be required by law to keep adequate records. **The records should contain:**

- The name and personal and family details of the diverted child
- An estimation of the age of the child, based on documentary proof where available
- The nature of the diversion agreed to
- The offence that the child allegedly committed
- The date on which diversion was successfully completed

7.4.3.5 Advocacy and training on diversion

A dire need for training on the implementation of appropriate diversion programs in Mozambique exists. As in Zambia and Namibia, experience suggests that this can be achieved by inter-country collaboration with South Africa, and more specifically with the diversion service provider NICRO. A team of Mozambican delegates should be identified and either trained locally by an invited NICRO diversion worker, or sent to South Africa to undergo such training. The NICRO Youth Empowerment Scheme (YES) has been successfully transplanted elsewhere in Africa and should be adapted (and translated) for use in the country. Ideally, the trainees should include stakeholders from non-governmental organizations that might have the capacity to present the YES program, and staff (professional or other) of MMCAS. It would in addition be beneficial if a representative from the judiciary and the TDM were present, to improve judicial understanding of the nature of diversion. Penal Reform International, or delegates involved in the delivery of community service orders in Malawi, could be approached to transfer skills on this form of diversion.

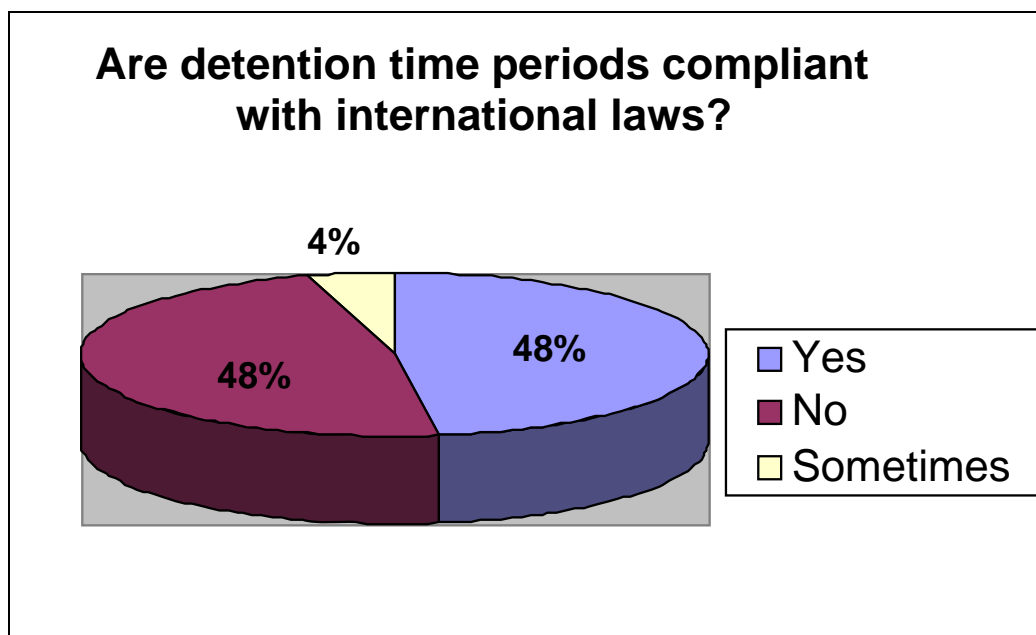
Recommendation:

Training to deliver diversion services should be organized for Mozambican delegates as a matter of urgency prior to and during the drafting of legislation.

7.4.4 Protection of children in police custody (including release provisions)

7.4.4.1 General introduction

This must be a key objective of the law reform process, as is born out by the recent study on children in trouble with the law conducted in Mozambique.¹³² It is also required by international instruments, which demand the humane treatment of children in police custody, the observance of a range of rights, and the use of detention as a last resort, and for the shortest appropriate period of time. The following emerged from an analysis of the results of the workshops conducted for the purposes of this study:

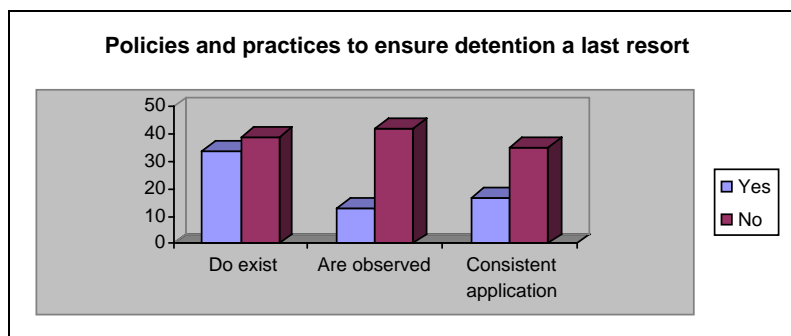


Opinion was evenly split on whether the time periods for which children were held in detention were compliant with international law. But what did the children say? In the consultation with children, it was established that the length of time that the child respondents had been detained for ranged between 2 weeks to 45 weeks- the longest period of time being in respect of a child who was accused of not having an identity document.¹³³

The majority of respondents however felt that there was a lack of policies and practices to ensure detention of children was a last resort and for the shortest possible detention periods. An even larger majority felt that whatever policies and practices existed including the MMCAS policy that advocate for the non-institutionalisation of children were not observed. A majority also felt that they were not consistently applied. It is therefore recommended that a dedicated chapter or section of the proposed legislation focus on this area.

¹³² See the Save the Children Norway study at note 3 above.

¹³³ Report on Children's Perspectives of Children's Rights in Mozambique, Chapter 9.



The Committee on the Rights of the Child recommended reducing the number of penal offences under the criminal code for which children can be arrested and prosecuted. The consultants agree with this recommendation, although they are of the view that this might proceed beyond the scope of this legislative reform process, and extend to criminal law reform. At minimum, however, the new act could spell out specific offences for which a child may not be arrested. Such a list should include prostitution, begging, and being without identification documents,¹³⁴ together with further offences identified by stakeholders.

7.4.4.2 Specific protection of children's rights during arrest and detention in police custody

In the consultation with children in conflict with the law it became clear that they have different experiences of arrest at the hands of the police.¹³⁵ Some reported no use of force, while others spoke of the use of excessive force, including assaults and being placed in shackles. Another reported problem was that children were put in cells with adults.

Human rights protection of children commences at arrest, but arrest should be used as a last resort. This entails the use of alternatives where an arrest is not necessary— such as accompanying a child to his or her home where arrangements can be made with caregivers for the child to be brought to court or for screening. Where an arrest has to be effected, it should be done with the minimum use of force, protection of the child's right to dignity and bodily integrity, and with due regard to the best interests of the child. Cases involving arrested children should be processed as speedily as possible, and the details of their particulars recorded separately from adults in police cell registers. **Whilst in detention in police custody, children should be guaranteed the rights to:**

- Adequate medical care
- Sufficient food and water
- Adequate warmth and protection from the elements
- Access to families and legal representatives
- Be separated from adults over the age of 18 years¹³⁶
- Appearance before a court within 48 hours of arrest unless after screening and decision making by the Attorney General's staff it is decided that no further measures are needed, or that the matter should be diverted.

¹³⁴ See Report entitled "Children's Perspectives on Children's Rights in Mozambique" (Ehlers and Mathiti, 2003), Chapter 9.

¹³⁵ "Children's Perspectives on Children's Rights in Mozambique" (Ehlers and Mathithi), Chapter 9.

¹³⁶ Boys should be separated from girls.

Regarding release from police custody prior to screening, or appearance in Court, the maximum opportunity should be made available to secure release from custody and to give effect to the abovementioned 'shortest period of time' principle. **Chiefly, the kinds of mechanisms to secure early release that are found elsewhere in African juvenile justice systems¹³⁷ include:**

- Release on warning into the care of a parent, family member or other caregiver
- Release on police bond (with or without the payment of any sum of money)
- Release under the supervision of a suitable person, such as a social worker or child-care worker
- Unsupervised release of a child¹³⁸

In addition, drawing on the existing SJAM, the following possibilities can be added:

Attended liberty

A deduction from income or salary in lieu of bail

Recommendation

It is recommended that a range of alternatives to incarceration in police custody be provided for in legislation, drawing on the examples enumerated above.

7.4.4.3 Duty of police to notify parents and care-givers as well as person responsible for screening

Although, as elsewhere on the African continent, most of the children in Mozambique who are in conflict with the law are in reality without adult caregivers (they are street children, orphans, have migrated from rural areas, and so forth), it is nevertheless incumbent upon the police, as the first contact with the authorities, to notify parents, families or other care-givers promptly of the arrest and detention of a child.¹³⁹ In addition, to expedite screening and possible diversion of the matter at the earliest opportunity, the police should be required to contact a screening officer and to afford him or her access to the child forthwith.

Recommendation

The duty should be placed upon the police to notify parents, families or other caregivers as soon as possible after arrest of a child. The law should also provide that the responsibility lies with the police to contact a screening officer forthwith after the arrest of a child. If the police concerned willfully neglect to fulfill this legal injunction, provision should be made in the proposed legislation that this inaction could be regarded as constituting an internal disciplinary infraction in terms of police internal rules and regulations.

7.4.5 Screening and referral: role of the TDM in relation to children above minimum age of criminal responsibility

As with the position of children below the minimum age of criminal responsibility, it is proposed that the non-penal and diversion measures be a possible outcome even where children are above the minimum age of criminal responsibility. The 'sifting' of cases which warrant non-penal and diversion measures, as opposed to those which merit a criminal trial should be effected by means of the mandatory screening of cases, in relation to children be-

¹³⁷ Where elaborate systems of money bail are not appropriate due to prevailing poverty.

¹³⁸ This is premised on the belief that many 16 and 17 year olds are leading independent lives, largely without parental supervision.

¹³⁹ See Beijing Rules.

low the minimum age of criminal responsibility. Essentially it is envisaged that a similar background investigation take place, resulting in a report with recommendations as to whether diversionary measures are warranted. The essential difference as regards children above the minimum age of criminal responsibility is that the decision as to whether the diversion recommendations of the screening official should be accepted will lie with the Attorney-General's office.¹⁴⁰ Should this office not agree to diversion, the matter would be referred to a criminal court for prosecution and trial.

Referral to any specialized institution for the education and vocational training aimed at reintegration of a child should not occur without the due process of a court hearing. As international law recognizes, a residential placement is tantamount to deprivation of liberty, even where it may be thought that such referral is in the child's best interests.

Recommendations:

It is recommended that no placement in a residential institution for children in conflict with the law be effected without a court order. Where such placement is recommended as an alternative to criminal prosecution, granting of such an order should fall within the jurisdiction of the TDM. The duration for which such order is valid should be time limited, and it is initially recommended that a period of one year should serve as that period. The order could be subject to an extension of a further period of one year, depending on receipt of an adequate report from facility staff justifying the need for an extension.¹⁴¹

Legislation must ensure that the power to divert children to community service, supervision, and counseling is specifically accorded the judicial officer presiding at the TDM.

As with referrals to any juvenile institution, diversion orders of the TDM should be subjected to maximum time periods. This is to ensure proportionality in the handling of children's cases – diversions should not be imposed that are in effect harsher than any sentence they might have received if convicted.

Legislation should therefore specify the maximum number of hours for which community service diversion orders may be imposed, the maximum length of time under which a child may require supervision and guidance, and the maximum periods relevant to all other diversion orders proposed.

7.4.6 Role of criminal courts

It did not appear from the consultative process that there was clear support for non-penal jurisdiction to be established in relation to all cases involving children in conflict with the law. In other words, some residual criminal jurisdiction would have to be retained in the proposed new legislative enactment. At one point, it was suggested that the criminal jurisdiction in question could also be exercised by the TDM, in view of the exclusive jurisdiction that this forum is intended to have in relation to children.

¹⁴⁰ Where children are below the minimum age of criminal responsibility, the Attorney General's office would not be involved, and the matter would proceed along the lines recommended in the screening report.

¹⁴¹ Beijing Rule 28.1 provides that conditional release from an institution shall be used by the appropriate authority to the greatest extent possible and shall be granted at the earliest possible time.

However, a contrary consideration is that there is also a move towards establishing an integrated family court,¹⁴² by merging the functions of the Civil Court (dealing with divorce and maintenance issues) with the adoption, child protection, custody and other functions of the TDM. This is a more likely scenario, in the opinion of the consultants, than a scenario that confers criminal jurisdiction to what is presently and exclusively a non-penal court.¹⁴³

Recommendations:

It is recommended that penal jurisdiction be maintained in the criminal court section where children aged 16 and 17 years cannot be diverted. However, trials of children must take place separately from those of adults, and the child's right to privacy during court proceedings must be fully respected.

Consideration should be given to the establishment of **one-stop child justice centers** in the provincial capital cities, modeled on South African best practice (which has been recognized internationally). A key component of the one-stop child justice center concept is the provision of a dedicated and separate criminal court for child offenders, coupled with social work services and short term detention facilities.

Advocacy and training initiatives (as recommended elsewhere in this section) should preferably include a site visit by members of the judiciary, police and social work departments to one of the established one-stop centers in South Africa to assess the suitability of replicating such an initiative.

7.4.7 Legal representation

International instruments in the juvenile justice sphere stress the need for children who face charges in criminal courts to be afforded legal representation. Legal services to all the people in need are in general very limited and expensive, let alone for children in Mozambique (especially outside the capital Maputo). To make the requirement that legal representation be mandatory in child criminal cases may not be a feasible proposition. The consultants are of the view that unless legal services of non-governmental organizations, or of state paid defense lawyers are indeed accessible to all parts of the country, it may be a fruitless exercise to draft legislative provisions to give effect to article 40(b)(ii)¹⁴⁴ of the CRC and related instruments.

Recommendation

Unless access to free legal services can be guaranteed across the country, legislation should provide for the right of the child facing criminal charges to have access to legal defense services, if need be at own expense, where these are reasonably available.

¹⁴² See interview with Dr Benvinda Levi, President of the Civil Court of Maputo, conducted on 3 September 2003, Appendix 19 of report on Consultative Process, dated 31 October 2003.

¹⁴³ Penal jurisdiction may have implications beyond the purely legal – e.g. holding cells may have to be established at the relevant facility, police guarding facilities for detained persons set up and so forth. These are not evident at the building currently used by the TDM, and it is questionable whether it would be desirable to introduce the kind of penal atmosphere police guards and holding cells would entail in a setting designed to promote the best interests of traumatised children, women and families.

¹⁴⁴ Article 40(b)(ii) of the CRC requires the state to ensure that the child has "legal and other appropriate assistance in the preparation and presentation of his or her defence".

7.4.8 Sentencing

According to the Sacramento Report, there are limited options as far as sentencing of child offenders is concerned.¹⁴⁵ Sentencing of child offenders is an area of prime concern in international law, which contains several discrete rules relevant to juvenile sentencing. These include:

- A prohibition on the use of corporal punishment as a sentence¹⁴⁶
- A prohibition on life imprisonment without the use of parole
- The requirement that deprivation of liberty be used as a last resort
- The requirement that deprivation of liberty be used for the shortest period of time possible
- The requirement that there be a right to have any decision and measures imposed in consequence of it reviewed by a higher, competent, independent and impartial authority or judicial authority¹⁴⁷
- The requirement that a variety of dispositions be available as alternatives to incarceration¹⁴⁸

The challenge facing reformers in the area of child justice lies in formulating a range of viable alternatives to imprisonment, to ensure that deprivation of liberty is in fact used as a last resort. However, it is encouraging to note that the same options that can be used as diversionary options may also serve as alternative sentences, albeit that they are imposed as the sanction of the criminal court, rather than on the recommendation of a screening officer or as a result of a delinquency hearing in the TDM.

Recommendation:

It is recommended that the range of sentencing options be vastly expanded with the addition of the kinds of referrals to non-custodial options that have been recommended as diversion options (e.g. community service orders, referrals to life skills programs, restitution and payment of compensation, and placement under supervision and guidance. It should be made possible for a sentencing officer to remand the matter to a later date, and to make an order that a restorative justice process be convened. On the return date, the sentence can be guided by the outcomes of the restorative justice process.¹⁴⁹

On the assumption that a dedicated juvenile re-education facility is finalized in the country (as stated above), it seems clear that the alternative of referral to this facility for convicted children should be possible. One route is for a referral to be a sentence, but the result would be that sentenced and unsentenced children would be mixing in one facility, which is undesirable under international standards, as these require separation of sentenced from unsentenced persons. To eliminate this difficulty, it may be possible for any criminal court that is of the view that referral to the facility is warranted to refer the matter to the TDM for the imposition of an order referring the child under civil law, as is the case with diverted children and children below the minimum age of criminal responsibility. This solution may, however, be seen to be overly technical and unnecessary.

¹⁴⁵ Pages 125 – 129 of the translated version of the report.

¹⁴⁶ Article 37(a) of CRC read with a long line of judicial interpretations of the meaning of cruel inhuman and degrading treatment or punishment.

¹⁴⁷ Article 40(2)(v) of CRC.

¹⁴⁸ Article 40(4) of CRC.

¹⁴⁹ See the provisions of the South African Child Justice Bill to this effect.

7.4.9 Limitations on sentences involving incarceration in prison

The SJAM provides for upper limits of sentences for juveniles under the ages respectively of 18 years and 21 years, and these limits are substantially less than the maximum sentences applicable to adults. For example, the maximum prison sentence is set at 8 years. This is a strength of the present system and this desirable situation should be retained.

7.4.10 Provision concerning deprivation of liberty after imposition of sentence

International best practice requires monitoring the conditions of juvenile detention.¹⁵⁰ Proposals concerning monitoring are dealt with fully in the next section, under the section on independent monitoring of children's rights.

¹⁵⁰ See the indicators – especially indicator number 9 - developed at the Unicef special seminar on juvenile justice held in New York from 11-13 November 2003, described in vol. 5 (4) Article 40 (forthcoming).

8. EDUCATION

Local context

It is clear from the Sacramento Report that there are numerous provisions in the laws of Mozambique pertaining to the right to education. These encompass both constitutional rights, rights in the education laws and national policies.¹⁵¹ The main objectives of the Mozambican educational system are to ensure the eradication of illiteracy, the granting of basic education to all citizens through the progressive introduction of compulsory education and access to professional training.¹⁵²

However, despite the laudatory aims of the system, the practicalities thereof are an intricately woven set of laws regulating subsidies, scholarships and fee exemptions for certain specified categories of persons. There are no provisions that allow for free basic primary education for all children. There is the School Social Action Fund¹⁵³ that allows access of economically needy children to education, but to be eligible for these funds the children have to meet various criteria and this does not in itself meet the requirements of the principle of free basic education.

Article 28 of the CRC states, *inter alia*, that States must recognize the child's rights to education by making primary education compulsory and available for free to all, and it encourages regular attendance at school.

The ACRWC recognizes, in Article 11(1), the right of every child to education generally. Article 11(2) contains the aims and directive principles for education, Article 11(3) enshrines the special aspects of this right, Article 11(4) relates to the rights of parents to choose schools for their children other than State schools, Article 11(5) provides guarantees for the administration of school or parental discipline, Article 11(6) includes special safeguards for pregnant school girls, and Article 11(7) provides for a guarantee of the freedom to establish private schools.

Having stated that Mozambican law has a substantial focus on education, it is noteworthy that while plans are in place to ensure scholarships, fee exemptions, a School Social Action Fund and access to school books, it appears that these efforts do not reach the majority of children. A 1995 survey undertaken by the Government of Mozambique and UNICEF shows the net enrolment rate of 6 to 11 year old children in primary school was 52%, while the percentage of 6 year old children in grade one was 22%.¹⁵⁴ In addition it is clear from the consultation with children, that one of the main causes for children to enter the labour market is the inability to attend school – usually due to the lack of financial means to pay for school fees.¹⁵⁵

Furthermore, if one has regard to the children who were consulted as part of the study, the majority of them, although of school going age, do not attend school.¹⁵⁶ It is patently clear from the consultation that children themselves have identified the importance of education

¹⁵¹ Pages 45 – 59 of the Sacramento Report (translated version).

¹⁵² Article 3 of Law No. 6/92 of 6 May, see pp. 49 and 50 of Sacramento Report (translated version).

¹⁵³ See pp. 52-53 of the Sacramento Report (translated version).

¹⁵⁴ *Multiple Indicator Cluster Survey Mozambique – 1995*, Government of Mozambique and United Nations Children Fund, page 23.

¹⁵⁵ "Children's Perspectives on Children's Rights in Mozambique", (Ehlers and Mathithi), Chapter 6.

¹⁵⁶ See report on Children's Perspectives on Children's Rights in Mozambique (Ehlers and Mathithi), Chapter 6.

and the need to complete their schooling in order to achieve their goals, the reality at grass-roots level is that many children are not in school as a direct result of economic circumstances and their inability to access state resources and support.¹⁵⁷

Therefore, it appears that the present Mozambican laws pertaining to education do not actually deliver to children their basic needs and rights in this regard. It would therefore be necessary to review these laws with a view to providing explicitly for free education at a primary level and making education accessible through the law.

Recommendations

Like health in relation to children, inclusion of core minimum requirements for the State in providing for the education of all children is required. These would include at the very least:

- free primary education
- compulsory primary education
- financial assistance to enable children to continue with their education after primary level
- protection of dignity and bodily integrity of the child by prohibiting corporal punishment in the schools and training teachers in alternative forms of discipline
- legislative and policy provisions protecting the girl child from any discrimination in access to education

However, it is clear that while Mozambique has already enacted numerous provisions regarding education rights, these are not being realised. It is therefore recommended that the laws be revised to provide for the above mentioned core minimum rights, and to provide for positive duties and responsibilities on parents and State officials to ensure that these rights are enforced and become a reality for Mozambican children.

This is necessary for vulnerable children in particular, namely, orphaned and abandoned children, children infected with or affected by HIV/AIDS and children living on the street. What is required is a provision ensuring that particular State officials of an appropriate Ministry ensure school attendance. Obviously, a number of children do not attend school on account of poverty and therefore the legal drafters must investigate a system of social security grants to ensure that children are free to attend school.¹⁵⁸ These social security grants would be over and above the provision for free, basic primary education as the grants would provide the economic relief necessary to feed and clothe the child in order for them to attend school instead of having to earn an income to provide for food and clothing.

¹⁵⁷ See "Concluding Comments" in "Children's Perspectives on Children's Rights in Mozambique" (Ehlers and Mathtithi).

¹⁵⁸ See Chapters 6 and 7 of Report on 'Children's Perspectives on Children's Rights in Mozambique' (Ehlers and Mathtithi).

9. HEALTH

9.1 Local context

The Sacramento Report sets out the situation in Mozambique regarding the right to health.¹⁵⁹ Not only does the Constitution provide for the rights of citizens in relation to medical and health care¹⁶⁰, but a number of laws contain provisions ensuring free medical treatment in certain circumstances.¹⁶¹ These include provisions enshrining free preventive health care, free in and out patient diagnostic examinations, free access to treatment when prescribed consequent to a consultation, and free basic medicines for out patient treatment. Further analysis shows that there are a range of costs involved in the national health system, and numerous laws¹⁶² that exempt certain categories of patients, including children aged under 18 years, and children accommodated in institutions from payment of certain costs for specific health services. These appear to have been well articulated in considerable detail.

It is clear that there are sustained efforts by Government to ensure that Mozambicans have an adequate system of health. However, it has been noted by the Committee on the Rights of the Child that Mozambican State institutions in the health sector are severely under-resourced and lack material and human resources.¹⁶³ In addition, the Committee has urged Mozambique to improve access for all children to primary health care and undertake specific measures in order to reduce infant, under 5 and maternal mortality rates.¹⁶⁴

In addition there is the statement of one child participant to the consultation with children that indicates the difficulties in accessing adequate health care:

“ When I am sick I go to hospital but the problem sometimes occur with the purchase of medicines because they are very expensive and it is not easy for my grandpa to pay.”¹⁶⁵

This is again illustrative of the fact that there is no co-ordinating body to monitor the realisation of rights provided to children in Mozambique.

However, apart from the minimum core health rights, there are a number of issues that relate to the health of children that bear investigation when deciding on legal drafting for the care and protection of children. Although the formal health sector is responsible for regulating health laws and policy, certain matters would be well placed in children’s legislation.

¹⁵⁹ Page 17 – 25 of the Sacramento Report.

¹⁶⁰ Articles 54 and 94.

¹⁶¹ Act No. 2/77 and Law No. 4/87.

¹⁶² Detailed in the Sacramento report on pages 20 – 26 of the translated version.

¹⁶³ Paragraph 17, Committee on the Rights of the Child, 29th session, *Concluding Observations of the Committee on the Rights of the Child: Mozambique*, CRC/C/15/Add.172, 3 April 2002.

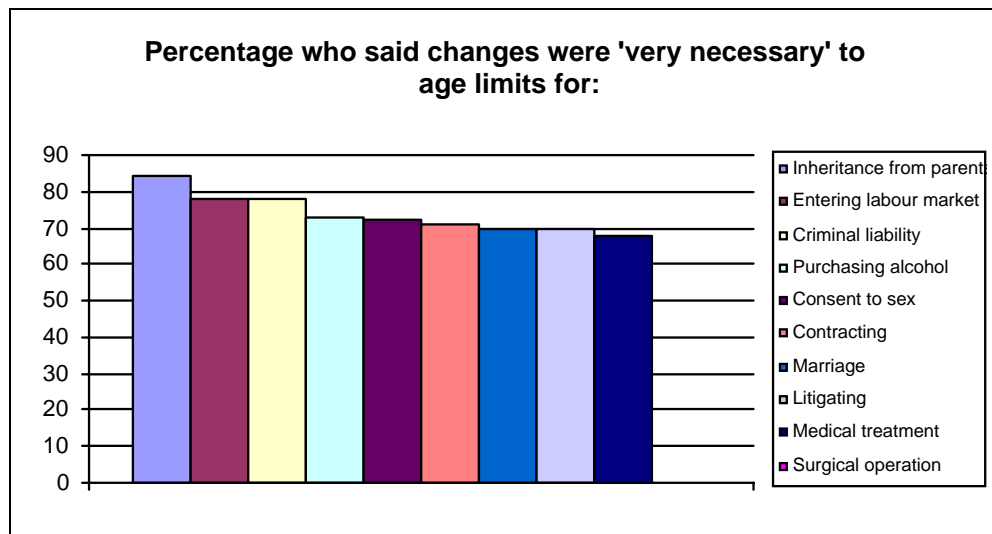
¹⁶⁴ CRC, op cit, paragraph 47.

¹⁶⁵ “Children’s Perspectives on Children’s Rights in Mozambique”, (Ehlers and Mathithi), Chapter 5.

9.2 Specific Recommendations

9.2.1 Consent to medical treatment and surgical operations

The issue of age limits for consent to medical treatment or operations was considered by respondents at the consultative workshops. The responses were as follow:



It is necessary to set an age limit for consent in these circumstances and to allow for consistency of practice. The CRC at no stage imposes any age at which children may fully enjoy all their accorded rights or an age at which their wishes have prior consideration over those of their parents. Instead, a wide margin of discretion is afforded the child by way of Article 12, with the balancing factors being the age and maturity of the child.

There are two restrictions to Article 12 in question, namely, the rights are only extended to children who are capable of forming their own views and those views are only given due weight according to the age and maturity of the child in question. Lücker-Babel states that the capacity of a child to form his or her own views does not mean that the child must be fully developed to do so, as the second limitation then applies - requiring a decision-making body to only give weight to those views in accordance with the age and maturity of the child.¹⁶⁶

Instead of limiting the right by setting out a specific age and thereby also limiting the number of children who can participate, the CRC has adopted a flexible and inclusive approach.

Once the question of whether a child has the capacity to form an opinion has been determined, the question shifts to the weight to be given to that opinion. The two determining factors are the age (an objective determinant) and maturity (a subjective determinant) of the child.

¹⁶⁶ Lücker-Babel, M-F. "The right of the child to express views and to be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child", *The International Journal of Children's Rights*, Vol.3, Nos. 3-4, 1995, p. 397.

In addition, it is argued that the more serious the consequences of the decision are, the more the child's opinion needs to be considered having regard to the nature of the problem and the degree of interest it represents to the child.

However, the requirement of capacity to form an opinion can be in itself problematic if one looks at its practical implications. In a legal setting, Courts are often required to examine the legal competence of a child. In a seminal decision the House of Lords, in *Gillick v West Norfolk and Wisbech Area Health Authority*, by realising a child's legal competence may be dependant on individual capacity as opposed to age, decided the matter by applying a test of maturity rather than age to hold that a child of sufficient understanding could consent to medical treatment despite being under a particular statutory age of consent. In deciding the matter, Lord Scarman stated that uncertainty in assessing whether or not a child was competent was the price that has to be paid to keep the law in line with social experience.

However, it would be useful to set a determinate age for consent. At this stage it is suggested that 12 as an average age be used.

Recommendations:

Consent to medical treatment and operations can be given in the following circumstances:

- Where consent is given by the child if he or she is of sufficient age and maturity. It is suggested that a suitable average age in this regard would be 12 years, but this is only a suggestion.
- If the child is below that age and cannot understand the consequences or nature of the test, then his or her parent or caregiver may give consent.
- If there is no parent or caregiver, then the superintendent of a hospital may consent or the TDM.
- The TDM may also give consent if consent is unreasonably withheld by the parent, caregiver or superintendent of the hospital.
- It should be noted that some religious practices exclude the possibility of medical treatment or operations and it is recommended that consent may not be withheld by reason only of religious or other beliefs.

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9.2.2 HIV testing

On a continent rife with the HIV/AIDS pandemic, HIV testing is a phenomenon that is now inescapable. However, due to the vulnerability of children, certain procedures should be enacted to protect their rights in this regard. In fact, the Committee on the Rights of the Child has recommended that Mozambique integrate respect for the rights of the child into the development and implementation of its HIV/AIDS policies and strategies on behalf of children infected with and affected by HIV/AIDS.¹⁶⁷

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The first issue has to do with consent. It is submitted that the starting point should be that no child be tested for HIV unless it is in his or her best interest and consent has been given. Consent can be given by the child if he or she is of sufficient age and maturity. It is suggested that a suitable average age in this regard would be 12 years, but this is only a suggestion. If the child is below that age and cannot understand the consequences or nature of the test, then his or her parent or caregiver may give consent. If there is no parent or caregiver, then the superintendent of a hospital may consent or the TDM. The TDM may

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¹⁶⁷ Paragraph 53, Committee on the Rights of the Child, 29th session, *Concluding Observations of the Committee on the Rights of the Child: Mozambique*, CRC/C/15/Add.172, 3 April 2002.

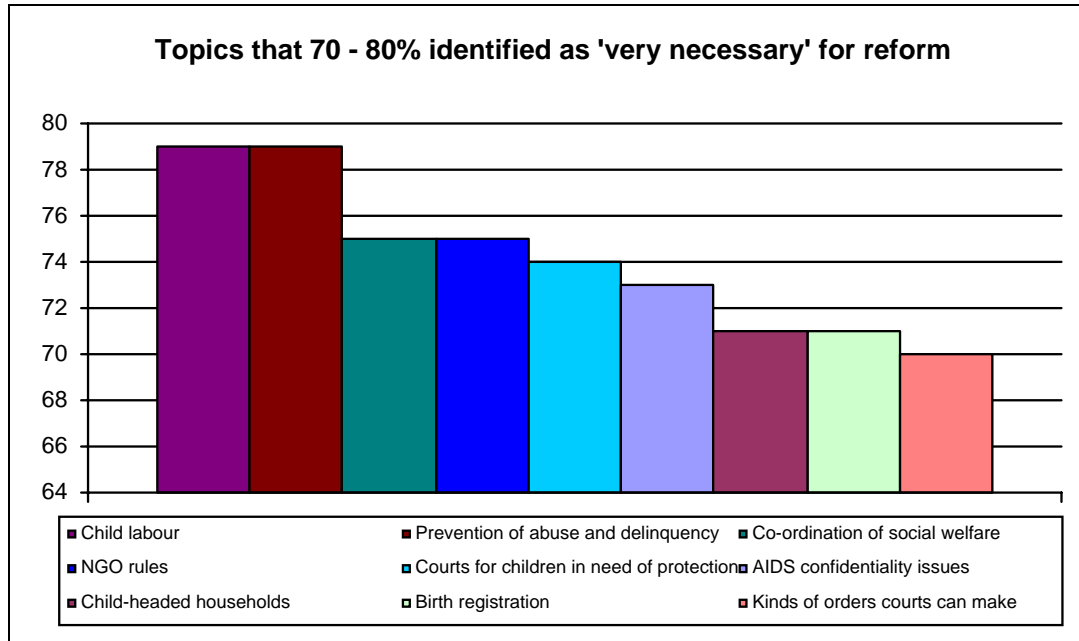
also give consent if consent is unreasonably withheld by the parent, caregiver or superintendent of the hospital.

The second issue is that such a test can only occur if counselling of the child or parent or caregiver, by an appropriately trained person, has been carried out.

9.2.3 Confidentiality of information on the HIV/Aids status of children

Between 70% and 80% of respondents said reform was 'very necessary' on the following topics, of which Aids confidentiality was one:

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It is recommended that there should be a general prohibition of the disclosure of the HIV/AIDS status of a child. However, certain exceptions can be legislated for:

- Where it is within the scope of the powers and duties of a person in terms of the new child law
- Where it is in terms of a court order
- Where consent is given by the child if he or she is of sufficient age and maturity. It is suggested that a suitable average age in this regard would be 12 years.
- If the child is below that age and cannot understand the consequences or nature of the test, then his or her parent or caregiver may give consent.
- If there is no parent or caregiver, then the superintendent of a hospital may consent or the TDM.
- The TDM may also give consent if consent is unreasonably withheld by the parent, caregiver or superintendent of the hospital.
- Where the disclosure of the HIV/AIDS status of a child would reasonably be considered to be in the best interests of that child.

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9.2.4 Access to contraceptives

On account of particular moral attitudes that prevail in society, it is anticipated that this provision might be somewhat controversial.

It has been noted that the lack of family planning counselling and services causes irreparable physical and social damage to adolescents, particularly girls, and the implications of teenage pregnancies are very negative in physical, emotional and socio-economic terms.¹⁶⁸ Packer states that concern for adolescent reproductive and sexual health education, particularly with regard to teenage pregnancy was raised in both the Cairo Programme of Action and the Beijing Platform for Action. It is clear then that there is a definite danger for children who are not afforded contraceptive information or services. This danger is considerably increased if one considers the implications of unprotected sexual intercourse in light of HIV/AIDS – an issue that was not considered by Packer in this context. However, this was borne out by the findings of the consultation with children as the girl children interviewed in the child prostitution focus group largely did not use contraceptives.

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Recommendation

There should be an elaboration on the present law relating to the use of contraceptives to ensure that condoms are freely available to children /who require such contraceptives.

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There should be an elaboration on the present law relating to the use of contraceptives to ensure that condoms are freely available to children /who require such contraceptives (... [1])

¹⁶⁸ Packer, C.A.A. *The Right to Reproductive Choice : A Study in International Law*, Institute for Human Rights Åbo Akademi University, 1996, p. 83. See too General Comment No. 3 on HIV/Aids and the Rights of the Child, issued by the UN Committee on the Rights of the Child.

10. ORPHANS AND THE IMPACT OF HIV/AIDS

10.1 Local context

Child orphanhood refers to loss through the death of a child's parent or adoptive parent (either one or both parents). Orphanhood can occur due to a variety of tragic events, including the death of a caregiver as a result of HIV/AIDS or related opportunistic infections. Increasingly, children whose parents are still alive, but who are terminally ill and unable to provide parental care, are regarded as vulnerable children.

Mozambique faces a growing problem of OVCs due to the high incidence of HIV/AIDS in the country. Mozambique's adult prevalence rate was estimated in 2002 as 13% for the age group 15 - 49 years.¹⁶⁹ The country's fertility rate is 5.9%, and the average life expectancy projection for 2010 was revised down from 50.3 to 36.5 years in 2002, allowing for the impact of HIV/AIDS. The illiteracy rate is estimated to be 50%, of which 71% are women. As the UNAIDS fact sheet on Mozambique points out, HIV/AIDS remains one of the greatest threats to the development of the country.¹⁷⁰ Access to prevention, care and treatment is still very limited. The prevalence of stigma frequently hinders actions taken in response to the pandemic. There is evidently a higher zero-prevalence along development corridors in Mozambique, and it has been suggested that this phenomenon will continue unless cross-border and multi-country prevention and care activities are intensified.¹⁷¹

OVCs and children growing up in child headed households face special threats to the fulfillment of their rights, including the right to adequate nutrition (the right to food), to adequate health care including preventive and curative care, to housing and shelter, to education and so forth. They also face higher risks of becoming involved in child prostitution, child labour, delinquency and in becoming street children. 'Property grabbing' by families and communities, renders OVCs vulnerable to dispossession and eviction. Children may suffer the psychological trauma of observing a parent's terminal illness, of dealing with death, as well as an absence of adult guidance and mentoring.¹⁷² The focus group discussion with OVCs held during the consultative process bears this out. Some of the children stated as follows:¹⁷³

'My parents died and after that I was taken to Centro Primeiro. de Maio. I don't know where my family is now. From that centre I was transferred to Centro da Liberdade. There I live with other girls and do some housekeeping (cleaning, washing dishes etc.). After this work we do school homework.'

¹⁶⁹ www.unaids.org (accessed 5 March 2004).

¹⁷⁰ UNAIDS hailed the adoption of a National Strategic Plan for 2001-2003 as an important first step in underlining the government's commitment to respond to HIV/AIDS. It records further that the National AIDS Council, led by the Prime Minister, has been established to ensure a multisectoral approach and greater partnership with civil society and other stakeholders. Efforts have concentrated on the creation of a policy and institutional framework for the implementation of the NSP. The UN agency is, however, of the view that Mozambique's capacity to respond effectively to the epidemic is hindered by the lack of adequate human, technical and institutional capacities, as well as underfunding of the NSP.

¹⁷¹ www.who.int/emc-hiv/fact-sheets/mozambique (accessed 5 March 2004).

¹⁷² Sloth Nielsen, p. 114 (2003)

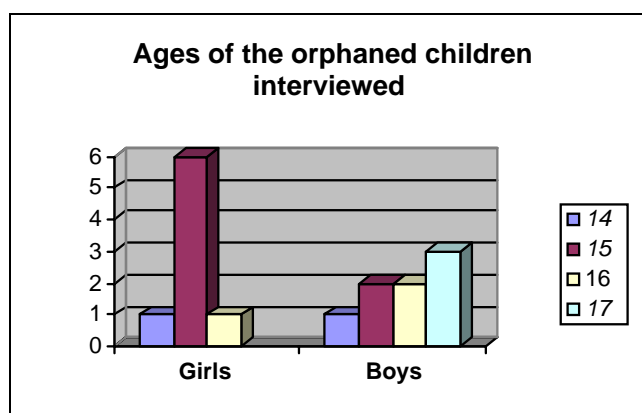
¹⁷³ 'Children's Perspectives on Children's Rights in Mozambique', (Ehlers and Mathithi), Chapter 5.

'Any person that met my mother and lived with her knows the tenderness that I used to receive from my mother. But suddenly I found myself without her and that is quite difficult, the experience of being orphan, not pleasant at all. I wish other people could take good care of the orphans because it is difficult not to have mother.'

Persons consulted during the legal review process indicated that the problem of children orphaned by AIDS was an increasing one, and that the capacity of the extended families and the community to absorb children orphaned by HIV/ AIDS was diminishing.

At present, Mozambique does not have any legislation which specifically and directly addresses OVCs and HIV/AIDS related issues as they affect children. The Sacramento report (translated version) reveals some laws that impact on OVCs, but these were not drafted with a strategy aimed at protecting OVCs. For example, there are some references to the right to a family contained in the Constitution and the Declaration on the Rights of the Mozambican Child, as well as some measures for the appointment and duties of guardians for orphaned and abandoned children, but these do not constitute adequate legislative provisions to ensure that the state actively assumes the responsibility for OVCs and takes definite steps to ensure for their alternative care and protection. The absence of pertinent legal provisions concerning OVCs can therefore be regarded as a major gap.

Consultation with orphans formed a crucial part of the child participation study that was part of this exercise. However, to protect children's rights to confidentiality, the cause of parental death was not raised. However, it was noted by the researchers that it was confirmed that two of the children in the group had indeed lost their parents due to HIV/AIDS.¹⁷⁴ Of note further is that these children did not appear to know the cause of their parents' death.



The girls in this class tended to be younger than the boys. Most of the girls were fifteen, while the largest group of boys were seventeen years old.

Of some concern during the child participation process conducted was that children appeared not to have participated in the decision as to what would happen to them when their caregiver died. "In almost all cases decisions were made regarding the future care of the child on their behalf without too much consultation and explanation."¹⁷⁵

¹⁷⁴ "Children's Perspectives on Children's Rights in Mozambique", (Ehlers and Mathiti), Chapter 5.

¹⁷⁵ "Children's Perspectives on Children's Rights in Mozambique", (Ehlers and Mathiti), Chapter 5.

Recommendation

Legislation should provide for orphaned children's right to participate, in accordance with their evolving age and maturity, in decisions concerning their future placement.

The legal drafters must bear in mind that while OVCs and children infected or affected by HIV/AIDS are in special need of protection, care must be taken to ensure that the law does not inherently discriminate against them purely because of their status. Put differently, legislative protections that protect all children (including OVCs and children infected or affected by HIV/AIDS) should ideally be of a general nature and not single out children because of their special status as HIV/AIDS orphans. A key example relates to inheritance under customary law, dealt with in Chapter 5, as a matter of general application. Therefore, this report must be interpreted in its entirety, bearing in mind that many general issues, such as health and education, are also of relevance to OVCs. The remainder of this chapter, however, deals with specific instances of law that are directly applicable to OVCs and children infected or affected by HIV/AIDS.

10.2 Specific recommendations

10.2.1 Addressing the plight of OVCs through legislation

The Committee on the Rights of the Child recently issued a General Comment on HIV/AIDS and the Rights of the Child,¹⁷⁶ detailing the responses to HIV/AIDS that States should adopt. As an overall strategy, the General Comment stresses that prevention, care, treatment and support reinforce each other. They provide a continuum within an effective response to HIV/AIDS. Education and children's access to information about sexuality and HIV/AIDS are seen as crucial. State Parties are encouraged to provide child-friendly health services and to make sure there is access to voluntary counselling and HIV testing. They must also offer knowledge of HIV status to children and adolescents and provide confidential sexual and reproductive health services (including free or low cost contraception). Finally, they must provide care and treatment, if needed, for HIV-related health problems, such as tuberculosis and opportunistic infections.

Recommendations:

Legislation should provide comprehensively for children's access to voluntary counselling and HIV testing, as well as for access to reproductive health services. Because access to sexual and reproductive health services can clash with cultural and religious precepts concerning adolescent sexuality, the drafters may wish to set a specific minimum age (e.g. 12 or 14 years) at which children may obtain contraceptive and preventive services without parental consent.

As it is necessary to protect children's rights, mandatory (compulsory) HIV testing is prohibited in international law. The General Comment requires States Parties to make sure that children are protected against mandatory HIV testing. As the child's capacities evolve, based on factors such as age and maturity, this will determine whether consent to HIV testing should be obtained directly from the child, or from a parent or guardian. However, in all cases confidentiality of the results must be protected. Information on the HIV status of children may not be disclosed in health and social welfare settings, or even to parents without the child's consent.¹⁷⁷

¹⁷⁶ General Comment No. 3 (2003).

¹⁷⁷ Refer to Chapter 9 (Health) for further discussions in this regard.

Legislation should spell out that HIV/AIDS tests are confidential, and prohibit mandatory testing, including testing upon admission to any institution. Mozambican law should protect the confidentiality of results. The question as to who should consent to testing and to any treatment (e.g. use of anti-retrovirals) should be specified. Where no parent or caregiver is available to consent, and where the child has not reached an age or stage of development where he or she can give informed consent him or herself, provision should be made for alternatives. The head of any childcare institution could be mandated to provide such consent, or the adult person in whose care the child is, or the head of a hospital or treatment centre. All decisions should be based on the child's best interests, however.

Concerning policy considerations that are specific to child-headed households, the General Comment underlines the need for legal, economic and social protection of affected children. The focus should be on access to education, access to shelter, access to state benefits such as social grants, and access to health care services, as well as fair inheritance rights.¹⁷⁸ Acquiring proof of identity has very important implications for children, because it relates to securing their recognition as a person before the law.¹⁷⁹

The philosophy of the Committee is that orphans are best protected and cared for when siblings can stay together, in the care of relatives or family members, or the extended family. If the extended family has been destroyed by HIV/AIDS, the state must then provide, as far as possible, family-type alternative care, such as foster care. Institutional care should play only an interim role in caring for children orphaned by HIV/AIDS, and only when family or community based care is not available or feasible. The General Comment reminds State Parties that there must be limits on the length of time that children spend in institutions. The main goal must be to eventually reintegrate them into communities.¹⁸⁰

A range of care situations may be provided. These may range from informal community care (e.g. by grandmothers) to foster care, which is more formalized and court mandated, to institutional care. The choice might depend on the age (and care needs) of the child (infants and toddlers require more direct adult intervention than do adolescents), available resources in particular communities, the availability of alternative family members to take on the parenting role, and so forth. Both the CRC and ACRWC spell out clearly the child's right to family life, however, and a child should not be left in a legal limbo, with no substitute guardian or responsible adult designated to ensure fulfillment of other rights (such as the right to education, and the right to registration of birth).

The obligation of the state to ensure that the child enjoys adequate care arrangements (i.e. the child's right to family care or to alternative care when orphaned) should form part of the law. A range of possible care situations should be provided for, with the emphasis on community based care options wherever feasible. The drafters should consider placing limits on institutional care, or setting time frames for periodic review, so as to give effect to the principle that reintegration into the community is the main goal of institutional care of OVCs.

¹⁷⁸ See Chapter 5 further in this regard.

¹⁷⁹ The General Comment draws attention to this, also because proof of identity helps to protect other rights, including inheritance rights and the right to education.

¹⁸⁰ The General Comment acknowledges formally that child-headed households exist. States Parties are encouraged to provide financial and other support to them. As a matter of policy, though, the General Comment says that communities are the frontline of response to HIV/Aids. States strategies must be designed to support them in deciding how they can best provide support to the orphans living in their communities.

10.2.2 Child-headed households

The lack of community based and kinship based alternatives have lead to a growth in OVC numbers who face the reality of growing up in a child-headed household. Children under the care of older siblings face special risks and threats to the fulfillment of their rights, as no adult guardian are present to ensure access to education, health care and so forth. The need exists, therefore, for provisions recognising the legal autonomy of child headed households, and requiring the state to fulfill a subsidiary role in supporting those children. Due to their legal incapacity, the appointment by the state of a substitute guardian who can be both a mentor and assistant to the children living in a child-headed household should be mandatory.

Recommendation:

The law should recognise child-headed households as households where the primary care-giver is a person below the age of 18 years. The purposes of such legal recognition would be to ensure that the household is linked to some form of mentoring or adult supervision, where no formal fostering or adoption is contemplated. In addition, legislation should provide for procedures by which orphans are linked to substitute guardians or adult care-givers who bear legal responsibility for assisting them to enjoy their rights more generally. This should be effected in an expansive way, making provision for a range of possible care situations.

The availability of some form of social security (a grant) to aid communities, foster parents, prospective adoptive parents and institutions to care for OVCs would be highly desirable in the Mozambican context. This possibility should be debated locally and form the focus of lobbying and advocacy efforts. It is acknowledged, though, that overall poverty levels in Mozambique may scuttle this partial solution to the crisis facing OVCs.

10.2.3 Duty to register child birth and maintenance of birth registration records

A child's identity is the avenue through which his or her biological existence is given legal recognition. In the words of Van Bueren, "an identity transforms the biological entity into a legal being and confirms the existence of a specific legal personality capable of bearing rights and duties."¹⁸¹ The child's family relations, name and nationality are inextricably linked to the child's identity.¹⁸² The child's right to immediate registration upon birth imposes an obligation on states to keep and maintain birth registration records.

The Code of Civil Registry requires the birth of every child to be registered within 30 days of birth at the birth registration offices.¹⁸³ Although provisions exist in Mozambique regarding registration of birth, it is clear from respondents at the provincial workshops and from UNICEF activities around birth registration during 2003 that the laws are not well known nor well implemented. The birth registration system is inaccessible due to the cost thereof, distances that have to be travelled to effect registration and beaurocratic constraints, such as the requirement that only black pens can be used to issue a birth certificate.

¹⁸¹ Van Bueren, G. *The International Law on the Rights of the Child*, p. 117

¹⁸² See, the CRC, Article 7 (1), the ICCPR Article 24 (2) and the ACRWC, Article 6 (1), (2) & (3).

¹⁸³ See pp. 35 of the Sacramento report (translated version).

The right of the child to a name and immediate registration upon birth must therefore not only be given legal protection through domestic laws but also be put into practice through the government's duty to put in place and maintain birth registration records. This is especially important to ensure ongoing protection for children who may become orphaned.

Recommendation:

The participants during the consultative process identified a need for more widely known legislative provisions requiring parents to register births in the proposed children's law, despite existing legal provisions. The proposed legislation should compel agencies dealing with children to become implementers of the drive to register every child's birth.

10.2.4 HIV/AIDS and Non- discrimination

Central to addressing the stigma and discrimination that may be experienced by OVCs is the need to provide clearly in law that no child may be discriminated against or excluded from any institution (including any residential institution and educational institution) on account of his or her HIV/AIDS status or that of his or her parents or care-givers. In addition, an obligation should be placed by legislation on those in a position of authority over children (teachers, school principals, heads of residential institutions and so forth) to protect the confidentiality of any HIV/AIDS disclosure or information that has become available which is related to any child within their sphere of jurisdiction. The child's right to confidentiality regarding his or her HIV/AIDS status could also form part of the envisaged statute, although this might carry less weight than a prohibition upon adults disclosing that information.

Recommendation:

The law should state clearly that a child may not be discriminated against on account of his or her HIV/AIDS status or that of his or her parent or care-giver.

11. TRIBUNAL DE MINORES

11.1 Local Context

Articles 1 and 2 of the SJAM state that the protection of children is the responsibility of the ordinary courts and where the courts are split into criminal and civil jurisdiction, the civil courts will deal with children's matters. In addition, the Minister for Overseas can establish children's courts of specialized competence in districts where their establishment is justified. Accordingly, Article 6 of Decree 40/93 established a children's court in Maputo City.¹⁸⁴

Dr. Sacramento notes that it is important to consider the provisions enshrined in Articles 59 and 60 of Law No. 10/92 which states that 1st class district judicial courts are competent to deal with family matters while 2nd class district judicial courts are competent to investigate and decide on jurisdictional processes of children.¹⁸⁵

Therefore it would appear that there is only a specialized children's court in Maputo City at present and while the ordinary courts in the provinces deal with children's matters, this is in addition to all the other matters that the ordinary courts have jurisdiction over. Furthermore, Dr. Levi has noted that the split jurisdiction between the TDM and ordinary courts in Maputo City has been problematic in respect of overlaps between the jurisdictions of the two courts.¹⁸⁶ For instance, whereas the TDM can request proof of earnings in maintenance matters, in uncontested divorce matters (dealt with by the ordinary civil court in Maputo City) the presiding officer is not entitled to request proof of income to determine whether adequate financial provision for the children has been made.

Apart from issues relating to jurisdiction, there are a number of provisions in current Mozambican law that govern the powers and functions of the TDM. These include the following:

- determination of measures for children under the age of 16 years who engage in certain acts¹⁸⁷
- orders that can be made by the children's court¹⁸⁸
- appoint guardians and ancillary matters relating thereto¹⁸⁹
- regulate parental power and the instances where the total or partial prohibition of parental power can be made¹⁹⁰
- emancipation of children¹⁹¹
- maintenance¹⁹²
- maternity or paternity investigations¹⁹³

¹⁸⁴ See Sacramento report page 135 (translated version).

¹⁸⁵ See Sacramento report page 135-136 (translated version).

¹⁸⁶ See interview with Dr Levi dated 3 September 2003, Appendix 19 of Report on Consultative Process dated 31 October 2003.

¹⁸⁷ See p. 132 of Sacramento report (translated version).

¹⁸⁸ See pp. 132-133 of Sacramento report (translated version).

¹⁸⁹ See p. 133 of Sacramento report (translated version).

¹⁹⁰ See pp. 37 and 133 of Sacramento report (translated version).

¹⁹¹ See p. 133 of Sacramento report (translated version).

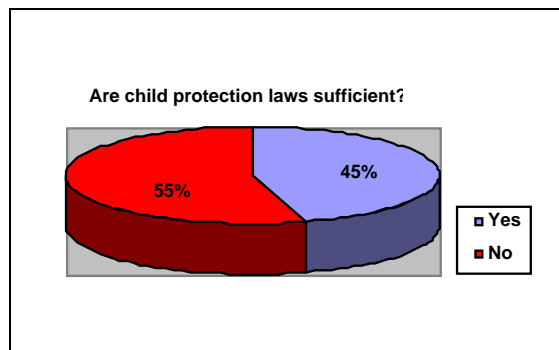
¹⁹² See p. 133 of Sacramento report (translated version).

¹⁹³ See p. 134 of Sacramento report (translated version).

However, there are a range of functions, orders and powers that the children's court, which is the designated forum to deal with various children's matters, needs in order to perform in a manner that complies with its purpose and at present does not have.

11.2 Perceptions of Mozambican stakeholders

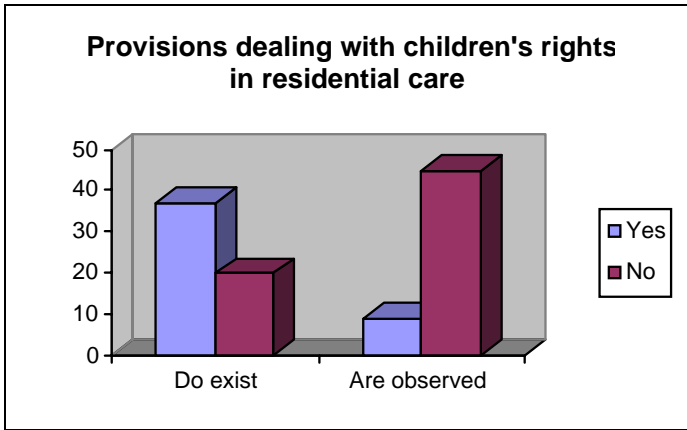
A large number of responses by participants to the consultative study involved issues that relate to the procedural and substantive aspects of a children's court. These ranged from issues such as adoption to residential care of children and focused specifically on whether the present laws in Mozambique were sufficient to meet child rights standards. Concern was especially raised regarding procedural provisions in the laws being inadequate to provide proper protection to children.



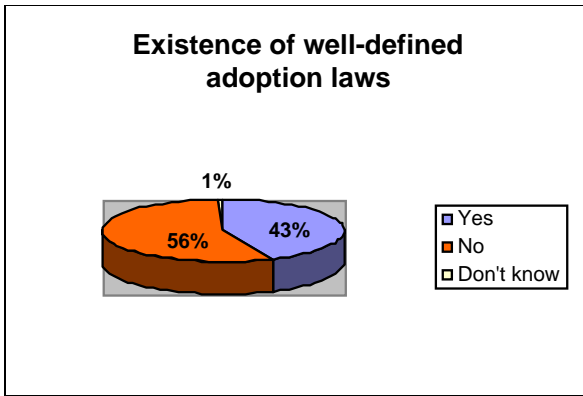
During the consultative workshops the majority of respondents said that current laws, designed to protect children from abuse and neglect, were not sufficient. It appears that the only provisions in current law which set out factors determining whether the children's court can exercise its power relate to the partial or total prohibition of parental power¹⁹⁴ and then the factors enumerated in the law are based on a parental fault approach and not a child rights approach focussing on a child's needs.

As both Mozambican law and international child rights law recognise the child's right to a family being of paramount importance, it is therefore imperative that when a child is removed from his or her family and placed in residential care that the child's rights are protected both in the law and through the implementation thereof. In the consultative study there was some division over whether provisions existed for dealing with children's rights in institutional care, but a larger majority of respondents felt even if they existed, they were not properly observed.

¹⁹⁴ See pp. 37 of Sacramento report (translated version).

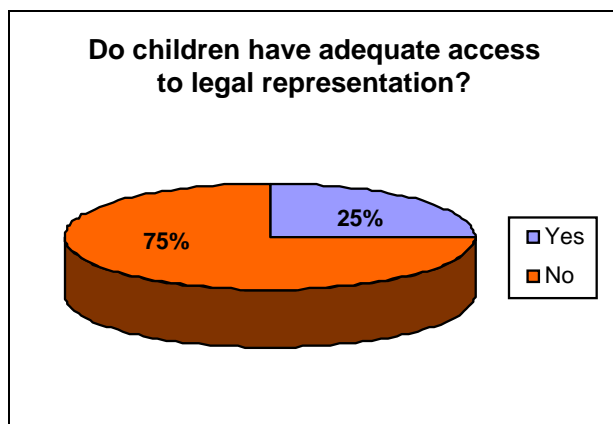


Another issue that traditionally falls to be determined by a public law forum dealing with children's issues is adoption. Most of the respondents in the consultative process said that Mozambique did not have well defined laws and procedures on intra- and inter-country adoptions.



While the substantive law of inter-country adoptions is dealt with in Annexure A to this report, the procedures relating to adoption fall within the ambit of the jurisdiction of the TDM.

Finally, one of the issues that is central to a children's rights approach to legislation, namely child participation, was examined in the consultative workshops. A large majority of respondents felt that children did not have adequate access to legal representation.



Accordingly, these issues and others, identified as being lacking or not adequately dealt with by present Mozambican law, are examined hereunder and specific recommendations are made to ensure that the new child law has adequate provisions for the process of the children's courts in Mozambique.

11.3 Specific recommendations

11.3.1 Extension of jurisdiction

The Tribunal de Menores (TDM), as a legal forum, is a good vehicle for the delivery of children's rights and the enforcement of the new proposed children's legislation. It is a dedicated court dealing with a range of issues relating to children and provides an existing structure on which to expand the services available to children.

There is a definite obligation imposed by international instruments to view children as individuals with special needs. In addition it is imperative that any court dealing with children should have a procedure that is less formal and adversarial than in a standard court setting, should be child-friendly and encourage greater participation by the child and family. In addition, in order to ensure consistency of practice and the integrity of a national legal system, services should be accessible in all areas of a specific country. In Mozambique, or Maputo, the TDM operates as a separate children's court with specialised personnel and administrative support. While it is acknowledged that Maputo is where the greatest concentration of the population is situated, it is of concern that the effectiveness of this forum does not extend throughout the country.¹⁹⁵ Dr. Levi noted that the case load in the provinces might not warrant the split of jurisdiction between the ordinary courts and a TDM, but endorsed the fact that specialisation was needed and that provincial judges should receive training on children's laws and procedures. Furthermore, participants of the Nampula workshop specifically stated in their expectations that there is a need to create children's courts at a national level that deal exclusively with children and their issues.¹⁹⁶

¹⁹⁵ See interview with Dr. Levi dated 3 September 2003, Appendix 19 of the Report on Consultative Process, dated 31 October 2003.

¹⁹⁶ Appendix 7 of the Report on the Consultative Process dated 31 October 2003.

The establishment of a children's court with specialised competence is of particular significance in relation to the issue of access to justice. Children should be entitled to access a forum that is dedicated to public law issues as well as some private law matters, which is widely available geographically as well as being inexpensive. It is futile if a law exists that promotes children's rights and ensures their protection, while it cannot be given proper effect due to the unavailability of an effective forum, which adequately deals with matters. It is also futile to have a court system that is prohibitively expensive and that citizens cannot access.

In the consultation process undertaken in the project, two issues emerged with regard to the TDM. Firstly, a number of participants (specifically those within the justice system) expressed the view that judges in the provinces are rendering services to children in the normal course of their work and have built up a range of experience in this work. Whilst this is a valid point, it should be borne in mind that when specialisation is at issue, it does not only extend to experience in dealing with certain legal matters. The specialisation that is discussed here is far more wide reaching. It encompasses the establishment of specialised forums, with trained personnel acting in terms of a specific piece of legislation and having specific powers and functions relating to children. It is also of importance that a specialised forum for children be seen to exist apart from the standard court system.

Secondly, the majority of participants (extending far wider than officials working in the justice system) were of the opinion that the TDM should be extended to all regions in the country. This is in keeping with the idea that in order to reform child law, structures and procedures that implement these laws should also be revised.

Recommendation

That the Tribunal de Menores, as a children's court with specialised competence, be established in all court districts and zones within Mozambique and that each court have specialised staff and support personnel to ensure that the powers and functions of the TDM are realised in an accessible manner for children.

11.3.2 Composition of the TDM and the role of a lay panel

The composition of the TDM at present involves a judge and support personnel.¹⁹⁷ It is of the utmost importance that the presiding officer of the TDM be a legally trained presiding officer as this ensures that the laws will be applied and interpreted correctly.

However, what is also important in the appointment of presiding officers is that they have appropriate experience and training in issues relating to the proposed child law and other issues relating to children. Preferably, if a suitably experienced judge cannot be appointed, then whoever is appointed should receive additional training before taking up the post. **The type of experience, alternatively training, should include the following:**

- Child law, both domestic and international
- Child developmental and psychological issues
- Sensitivity to dysfunctional family situations
- Ability to communicate with children

¹⁹⁷ Interview at Maputo City TDM dated 26 September 2003, Appendix 21 of the Report on Consultative Process, dated 31 October 2003.

Apart from the presiding officer, the composition of the TDM should also include the possibility of a lay panel being made use of in particular situations. The lay panel would intervene in a matter where there is a possibility that the matter can be mediated in order to settle the matter before it proceeds to court. However, before a lay panel is appointed in a particular matter, the court must have a responsibility to ensure that it is suitable for that case. This will depend on factors such as the power relationship within the family, the ability of the child to participate in the forum and the nature of allegations in the matter.

In addition, this lay panel should comprise of experts in various areas. The ideal candidates to serve on such a panel include child psychologists, social workers or other social service professionals. The panel can ensure a less formal court atmosphere, greater community participation and an increased degree of specialisation in the court. It should be noted, however, that regulations to the child law need to be enacted in order to ensure that the persons that serve on the lay panel undertake to disclose any personal interest in the case. Consequently, measures for them to recuse themselves from proceedings and procedures to ensure that proceedings remain confidential need to be included in the legislation.

Recommendations:

- That the presiding officer appointed to each TDM be legally trained and have experience or further training as set out above
- That procedures be enacted for the appointment of a lay panel in certain circumstances, and include provisions relating to:
 - Who may be appointed to serve on a lay panel
 - Conflict of interests or personal interest in a particular case
 - Confidentiality
 - When a panel should be appointed
 - The purpose of a lay panel
 - The weight given to decisions taken by the panel and whether they decide on fact alone or fact and law

11.3.3 Powers and Functions of the TDM

It is very important to ensure that the court has sufficient powers and functions in order to fulfill its purpose. The main function of the TDM is to conduct hearings on behalf of children who appear to be in need of care (whether for welfare or criminal matters) and then decide on orders that determine the correct placements for the child or intervene to protect their rights. The new law should have provisions setting out what type of matters the court is able to adjudicate on.

For example, an analysis of the Sacramento report reveals that the only provisions in current law setting out detailed guidelines on when the court can exercise its powers relate to provisions involving the partial or total prohibition of parental powers.¹⁹⁸

Furthermore, in order to ensure accessibility, the TDM should have powers that extend beyond those that the present Maputo City TDM has so as to ensure that only one forum deals with children's matters, instead of having ordinary courts deal with some matters and the TDM with others. In addition, the TDM may also have other important functions to ensure a holistic approach to each individual child. For example, the court should have the power to monitor a particular case after finalisation by setting a date for recalling the child. The court

¹⁹⁸ See p. 37 of Sacramento report (translated version).

has the power to listen to a child after the finalisation of the case should his or her rights be abused by any role-player or official, for example after having being placed in a particular setting. The court should also have the powers that ordinarily all courts have, for example, the power to sanction persons for non-compliance with any of the orders made by the court.

It is recommended that the new legislation set out the functions and powers of the TDM very clearly in order to avoid confusion and in order to ensure proper interpretation of the law.

Recommendations:

The TDM be given the power to adjudicate on the following types of matters, amongst others:

- Protection of well being of a child
- Care of or contact with a child
- Paternity of a child
- Parental rights and responsibilities and family matters
- Support of a child
- Neglect and abuse of a child
- Temporary safe-care orders
- Adoption orders including inter-country adoption
- Matters involving care facilities for children
- Abduction or removal of a child from Mozambique
- Children who come into conflict with the law under the age of 16 years
- Guardianship

The TDM should be able to conduct an enquiry into the non-compliance of an order made by the court, convict the offending party and hand down a sanction in accordance with the existing criminal law applying thereto.

11.3.4 Duty of TDM to apply International Law

Mozambique has ratified the United Nations Convention on the Rights of the Child and is therefore bound to ensure that the Mozambican child is able to access the rights contained therein. In addition, if Mozambique becomes a signatory and ratifies other treaties then the rights and principles contained therein have to be translated into domestic law.

One of the articles in the Convention on the Rights of the Child that has particular relevance to the TDM and its work is Article 9:

9.1 State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

9.2 In any proceedings pursuant to paragraph 1 of the present Article, all interested parties shall be given an opportunity to participate in proceedings and make their views known.

9.3 State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

With this in mind, the new law for children should contain a list of principles, based on international commitments, to guide decisionmakers in the implementation of its provisions. One of the key principles that guide presiding officers when making decisions relating to children is the best interest of the child principle.¹⁹⁹ It has been generally accepted that this principle is of "paramount" importance in all matters concerning the child.

However, it has been noted that the best interests of the child principle is problematic as it is, *inter alia*.²⁰⁰

- Indeterminate
- Different professionals have different views on what the concept encompasses
- There are various ways in which the principle can be interpreted and this is determined by the social, cultural and historical context.

Despite these problems, the best interest principle serves as a guiding principle encompassing all issues pertaining to children and should be contained in the objectives clause or preamble to the new legislation as an overarching interpretative tool. In addition, it is useful to include in the legislation certain of the rights of children as contained in international law. Again, this is to ensure that when applying the law, presiding officers are obliged to give effect to these rights because they are contained in the laws of the country and not just international law. An example of this would be the right that children should not be deprived of their liberty except as a measure of last resort and for the shortest possible period of time.²⁰¹ This will help ensure that when a presiding officer is considering placing a child in an institution, he or she has no other option available to him or her and that he or she should then impose the detention for the shortest possible period of time.

Another right that should inform any piece of legislation dealing with court procedures is the right of a child to participate in any decision affecting his or her life.²⁰² This should be a guiding principle for any judicial officer adjudicating a matter involving a child. Most procedures should in any event have a provision calling for the child's right to participate in the proceedings, but this right needs to be emphasised as one of the guiding principles in the interpretation of the new proposed law.

This should not be seen as merely restating international law, but focuses the attention of presiding officers on the fact that they must give effect to the principles when applying the new law.

¹⁹⁹ Found in article 3(1) of the CRC, article 4 of the ACRWC and articles 16 (1)(d) and (f) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

²⁰⁰ South African Law Commission, *Report on the Review of the Child Care Act*, Project 110, December 2002, p. 14.

²⁰¹ Article 37 of the UN Convention of the Rights of the Child.

²⁰² Article 12 of the UN Convention on the Rights of the Child.

Recommendation

A new law includes provisions that will serve as guiding principles and should, among others, include the following:

- The best interest of the child principle
- The right of the child not to be detained except as a measure of last resort and then only for the shortest possible period of time
- The right of the child to be protected from harmful cultural practices
- The principle of subsidiarity in adoption and placement orders
- The right of the child to a family environment and to remain with his or her parents unless contrary to the best interest of the child
- The right of a child to participate in all decisions affecting him or her
- Non-institutionalisation of children

11.3.5 Definitions

In order to determine the powers and orders that the TDM can make in relation to a particular matter, it is important that there be a definitional provision to determine whether the court is able to intervene in a specific case relating to a child. The two most important definitional sections relate to how one defines:

- A child in need of welfare interventions
- A child involved in conflict with the law under the age of 16 years

As far as a child in need of welfare interventions is concerned, there are a number of factors that can determine whether the law relates to a particular child and whether the TDM can exercise jurisdiction over the case. It is not only important to ensure that there are laws that protect children in need of care, but it is as imperative to ensure that children who are in need of care are recognised as such in order for the protection laws to be invoked. The law should precisely define certain situations that will be used as criteria to determine if a child is in need of welfare intervention. Children in need of welfare interventions should be supported by the State.

Some suggestions on what factors determine whether a child is in need of a welfare intervention are the following:

- If the child is abandoned, orphaned or without visible means of support
- Displays uncontrollable behaviour
- Lives or works on the street or begs for a living
- Is addicted to a drug/s and is without means to obtain treatment for this
- Has been exploited or lives in circumstances that expose the child to exploitation
- Lives in or is exposed to circumstances which may seriously harm the child's physical, mental or social well-being
- May be at risk if returned to the custody of a parent, guardian or care-giver of the child as there may be reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child
- Is in a state of physical or mental neglect
- Is being maltreated, abused, deliberately neglected by someone who has parental responsibilities over the child or under whose control the child is.

As far as jurisdiction of the TDM is concerned with children in conflict with the law under the age of 16, it is suggested that the definitional provision clearly set out the manner in which the scope of the TDM's powers extends to them. The purpose of such a provision is to ensure that, for these children, the TDM is mandated to intervene to protect their rights and ensure that appropriate action is taken (or not, if this is the case in a particular matter, to satisfy the interests of the community). This is not criminal jurisdiction because children under the age of 16 lack criminal capacity and so this is not a criminal intervention but a welfare intervention.

An appropriate provision would state that the jurisdiction of the TDM applies to a person who is alleged to have committed an offence and who, at the time of the alleged commission of the offence, was under the age of 16 years.

Recommendation

The law, separate from the normal definition section, has a provision that sets out the scope of the jurisdiction of the TDM as far as it relates to children in need of welfare intervention, and children in conflict with the law under the age of 16 years.

11.3.6 Range of orders for children that require welfare intervention

The orders that the TDM should be mandated to make, need to complement the powers and functions ascribed to the court by the new law. The orders are the implementing mechanism through which the powers of the court can be realised. They need to be comprehensive and mindful of the types of situations that the court will be faced with and mindful of the local context in Mozambique.

Of particular importance is the fact that circumstances change and therefore the TDM needs to have the power to vary its orders so that the court can take new or additional information into account where good cause is shown.

The orders the TDM should be able to make can be grouped into themes:²⁰³

Placement orders:

These types of orders can encompass the following:

- Placement in alternative care, such as in foster care. Foster caregivers can either be family members or persons known to the child, or where this option is not available, persons unknown to the child but willing to take the child into their care
- Placement in a state or private children's home
- Confirmation of the status of a child-headed household and placement of that household under the supervision of a designated person in the community in which the child/children reside
- Adoption orders including inter-country adoption orders

²⁰³ See Chapter 7 of this report for the orders that the TDM can make in relation to delinquents and diversion orders.

Protection orders:

- An order that a child remains in or be returned to the care of a person, subject to certain conditions imposed by the court
- An order giving consent to medical treatment or an operation to be performed on a child
- An order instructing a parent or caregiver to undergo treatment or counselling
- An order instructing a hospital to retain a child, who is reasonably suspected of having been subject to abuse, maltreatment or deliberate neglect, in their care
- An order that a child be removed to or from a children's home – either state or private
- An order limiting access to a particular child
- An order prohibiting a person from having contact with a child
- An order relating to the legal status, age of majority and property interests of a child.

General orders:

- Ordering an investigation to be carried out for the purpose of assisting the court with the performance of its functions
- Ordering a person to make a contribution to the support of a child
- An order that a previous order is suspended, varied, withdrawn or replaced
- An order imposing or varying time periods
- The granting of interdicts or alternative relief
- Ordering a person to monitor a court order imposed by the TDM
- Any other order, which the court is empowered to make in terms of the legislation.

Legislation must provide for time periods to be set for the orders mentioned above. It is suggested that the TDM be given a discretion in setting the duration of a particular order and that this discretion be informed by the guiding principles as set out in section 4.4 above as well as the facts of each particular matter. These time periods should be flexible and that is the reason for allowing the court to make an order varying the time periods of an order already handed down.

Temporary placement orders:

- A very important order that the court should be empowered to make is one that places a child in temporary safe care, pending the finalisation of a matter. The circumstances of a particular case may require the child to be removed from his or her caregiver pending an investigation, the enquiry and final placement. In deciding on temporary safe care, the court must take the facts of each situation into account such as the wishes of the child, the allegations in the case and the type of safe care available in the district/region.

The concept of temporary safe care should be defined in new legislation to ensure that it accords with certain prescribed standards. Ideally, the definition should cover the fact that the temporary safe care be a children's home (private or state) or a private home, that meets certain requirements set down in law, where the child can be kept pending the finalization of the matter, but it cannot be a prison or police cell. Like a final order, this temporary order can be varied, revised or rescinded.

When drafting the provisions regarding placement options for a child, Article 20 of the Convention on the Rights of the Child must guide the process:

20.1 A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

20.2 State Parties shall in accordance with their national laws ensure alternative care for such a child.

20.3 Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

The principles contained in this Article are very important guiding principles for placement of children and it is recommended that specific provisions be enacted to give effect to them. For instance, the children's law should contain a clause that institutional placement for a child should be a matter of last resort, where foster placement or adoption is not possible. Again, monitoring of placement orders is very important as this will ensure that children deprived of their families are afforded special protection as required by the Convention.

In fact one of the results of the consultative workshops was a call for ensuring that the rights of children who are placed in residential care are not violated. Therefore, apart from other monitoring mechanisms that will be discussed and recommended in this report, it is emphasised that the TDM should play a role in overseeing the implementation of its orders – especially those that result in children being placed in children's homes or other institutions. The TDM, having heard the circumstances of a particular case, is well placed to identify children at risk who are being referred to institutions. In addition, it is recommended that mechanisms be available in the new law to allow children who have been placed in residential care to approach the TDM with complaints relating to their care in the institution.

11.3.7 Adoption

The proposed Family Law provides that authorisation for an adoption must be issued by a competent court.²⁰⁴ Accordingly, as the court competent to deal with matters pertaining to children, one of the orders the TDM should be empowered to make is an adoption order. The purpose of adoption is to provide a stable home and family environment to a child that he or she would not otherwise enjoy.

The effect of an adoption is that the child assumes the identity of his or her adoptive family and legally all ties with his or her previous family are severed. All parental rights and responsibilities are conferred on the adoptive parents and the child assumes the surname of the adoptive parents. However, it is acknowledged that Mozambique has a special procedure to allow for the identity of the previous family to be retained by the child for cultural and traditional reasons. This is a unique procedure and one that is helpful and creates a balance between the need to respect traditional law and the need to ensure that a child grows up in a stable family environment.

²⁰⁴ Nova Lei artigo 1964, 2003.

However, because of the permanent nature of an adoption order, it is necessary to ensure that there are proper **procedures and safeguards** in place. Title 5, Chapters 1 and 2 of the proposed Family Law deal with adoption. The provisions of this law are quite extensive and appear to cover a wide range of issues that need to be regulated in relation to adoption.

These include:

- Who can be adopted
- Who can adopt
- Consent to adoption
- Withdrawal of consent
- The right of the child (over 7 years) to be heard in a court of law on the adoption
- Monitoring the integration of a child into his or her adoptive family
- Inheritance rights of adopted children
- Review of adoption orders

It has been noted that the law does not provide for an investigation into the criminal records of a prospective adoptive parent and that Articles 59 and 60 of the Family Law are too broadly formulated with the result that they are ineffective and raise legal uncertainty in relation to adoption procedures and the guaranteed rights of an adopted child.²⁰⁵

Therefore, there are still a number of issues that need to be legislated on and these include procedures for:

- Investigating the background of the prospective adoptive parents
- Notice of the proposed adoption
- Application proceedings for the adoption
- Adoption registers

Having regard to the findings of the study that Mozambican laws are fragmented in relation to children, it is imperative that the proposed Family Law be harmonised with the new child law and integrated into the comprehensive children's code in so far as the provisions regarding children are concerned.

11.3.8 Legal representation

Participants in the consultative process were of the opinion that children are not able to access proper legal representation services. This is of great concern as Article 12(2) of the CRC requires children to be heard in judicial or administrative forums and legal representation is perhaps the most effective way in which a child's voice can be heard.

Article 12 states as follows:

12.1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

²⁰⁵ Lei da Familia, op cit, 2003.

There are two aspects to the right contained in Article 12, namely the child's right to express his or her views and the child's right to be heard. Article 12(1) is of a far more general application than Article 12(2), which focuses on the right of the child to be heard, in person or duly represented, in specific proceedings affecting himself or herself.

There are a number of issues relating to the right to legal representation. The first is one that relates to access. Any party to a matter before the TDM should be entitled to a legal representative. He or she should be able to appoint a representative at their own expense and of their own choice. If they do not choose to do so, they may also apply to be represented by a legal representative paid for by the state.

Secondly, as far as children are concerned they should be entitled to legal representation at own expense or the court may order legal representation at state expense. However, often children are not able to access representation in these ways due to financial factors or ignorance as to how to obtain representation at state expense. It therefore should fall to the court to assist the child in this regard.

However, it is acknowledged that numerous persons consulted with felt that Mozambique does not have the capacity to provide for legal representation at state expense to children in these circumstances.

11.3.9 Minimum standards for children in institutional care in the welfare system

Although this is not a topic that falls squarely under the scope of the TDM, in so far as it is recommended that the TDM play a monitoring role in relation to children in respect of whom orders have been issued, minimum standards of care in institutions should be incorporated in the new legislation for two purposes:

- a minimum set of core standards are legislated on to ensure adequate protection of children in children's homes and orphanages
- guidelines are available for the TDM against which they can monitor whether or not the rights of a child, who has been placed in institutional care by the court, are being violated.

The international minimum standards for children deprived of their liberty primarily relate to children who are in residential care as a result of their coming into conflict with the law. However, the minimum standards extend beyond the scope of the child justice sector, as children who are in residential care in terms of the welfare system are also entitled to care that is governed by minimum standards.²⁰⁶

Some of the important minimum standards contained in the JDL include:

- Detention must have regard to particular needs, status and requirements of juveniles according to their age, personality, sex and type of offence as well as mental and physical health to provide the type of care best suited to individual needs of the juvenile for the protection of his or her physical, mental and moral integrity and well-being.
- Every juvenile shall receive adequate medical care, both preventative and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated.
- The family or guardian of the juvenile or other person designated by the juvenile has the right to be immediately informed of the health of the juvenile on request and of important changes to the juvenile's state of health, including his or her death.

²⁰⁶ For instance the JDL (1990).

- Disciplinary methods that constitute cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement, reduction of diet, denial of contact with family members, use of labour, collective sanctioning and more than one sanction for the same offence.

It is of the utmost importance for those working with children in institutional care to respect and apply these minimum standards in the treatment and care of children. It is recognized that children in institutional care are vulnerable and extremely susceptible to abuse. Care workers have assumed a responsibility to deliver services to these children irrespective of behavioural problems. Children who are at risk can most certainly be challenging, but they have been removed from a family environment for whatever reason and are therefore especially in need of care and protection according to the guidelines as enumerated above.

Furthermore, one of the ways to ensure that these minimum standards are upheld by the children's homes and orphanages that they are resident in, is to require a registration procedure for these institutions. A necessary consequence of registration is that regular inspections of the institutions occur in order to ensure quality and compliance with procedures. If an institution does not comply with the rules and procedures for registration and minimum standards, provisions need to be enacted to provide for the de-registration of such a home.

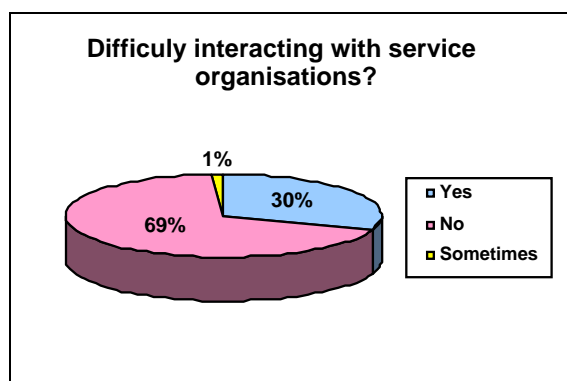
12. COORDINATION OF SERVICES

12.1 Local context

The lack of co-ordination amongst government departments and role players in Mozambique with respect to children's services has been highlighted throughout this document. The expectations of the respondents at the zonal workshops clearly indicate the high premium placed on the need for coordinated action amongst the government departments and ministries.²⁰⁷ This echoes the sentiments of the Committee on the Rights of the Child, which has noted that there is no single body with responsibility for the development of child rights policies, plans and programming and that the CRC's implementation is insufficiently coordinated between the various ministries and other relevant organs, both at national and local level.²⁰⁸

12.2 Perceptions of Mozambican stakeholders

In individual interviews, it has been pointed out that the key ministry involved with children's and women's action in fact fulfills the role of co-ordinating social policy and action, rather than co-ordinating services delivery.²⁰⁹ The absence of co-ordination is particularly acute in the juvenile justice sector, according to many respondents. Some indication of the level of concern about this issue can be discerned from the following quantitative results.

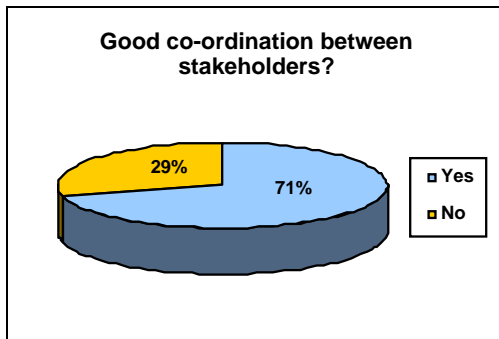


The majority of respondents said they did not have difficulty interacting with service organisations such as government departments, communities, and civil society organisations. However, more than a quarter did experience problems.

²⁰⁷ See Report on Consultative Process dated 31 October 2003, in particular Appendices 2, 6, 7 and 8.

²⁰⁸ Paragraph 13, Committee on the Rights of the Child, 29th session, *Concluding Observations of the Committee on the Rights of the Child: Mozambique*, CRC/C/15/Add.172, 3 April 2002.

²⁰⁹ See interviews with Dr. Sales, Appendices 15 and 16 of report on Consultative Process, dated 31 October 2003.



The above graph shows that while the majority felt that there was good co-ordination among stakeholders in respect of children, a significant proportion of respondents disagree.

In any event, international developments suggest that provision for co-ordination and monitoring structures is required as a response to the challenges of implementation of the CRC. **The Committee on the Rights of the Child has released a General Comment**²¹⁰ interpreting the nature of States Parties obligations as regards the general measures they are required to take to implement the CRC domestically, and the comment explains in considerable detail the kind of co-ordinating and monitoring mechanisms that are required. These include:

- Proper government co-ordination at central government level, provincial level and between central and provincial government levels (par 37)
- The desirability of inter-ministerial or inter-departmental committees to serve the co-ordination function (par 38)
- The possibility of a high level unit close to the prime minister or presidency (par 39)
- The need to co-operate with NGOs in promoting, protecting and monitoring children's rights (paragraphs 58 and 59)
- The need for human rights institutions which are independent of government and serve a complementary function. In this regard General Comment no. 2 (The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, adopted on 4 October 2002) gives comprehensive guidance as to the main elements, operation and requirements for the establishment of independent human rights institutions.

12.3 Specific recommendations

At present Mozambique does not have a national human rights commission responsible for monitoring all human rights issues. In the absence of such a national body, alternative recommendations designed to give effect to international norms have been proposed.

At the meeting with the steering committee on 23 October 2003, two complimentary proposals were discussed.²¹¹ These appear to have been well received, and are therefore repeated here as the central recommendations of the consultants.

²¹⁰ General No. 5 General Measure of implementation for the Convention on the Rights of the Child CRC/GC/2003/5, adopted on 3 October 2003.

²¹¹ See the PowerPoint presentation entitled Report on the Workshops (Xai Xai, Nampula and Beira) dated 23 October 2003, contained in Report on Consultative Process, dated 31 October 2003.

Recommendations:

Establish National Co-ordinating Committee

An intersectoral national co-ordinating committee comprising representatives from all relevant government departments should be defined and established in the proposed legislation. A selected number of national NGOs should be approached to serve on this committee. The legislation should specify how often the committee should meet and what its functions and duties in relation to co-ordination and implementation of children's rights are. These duties must include data collection for the purposes of ensuring progressive realisation of the rights contained in the CRC and in the proposed new children's law.

As discussed earlier with the steering committee, it is recommended that operation of this committee would be enhanced by identifying two discrete sub-committees, one with responsibility for child protection and welfare generally, and the other focussing more narrowly on juvenile justice. Some departments would participate in one but not the other (e.g. prisons would form part only of the juvenile justice committee, while agriculture (concerning child labour) would sit on the child protection and welfare sub-committee). It was further recommended that the national committee be replicated in each province, to ensure provincial implementation of co-ordinated child services.

Establish Office of the Commissioner for Children

As regard an independent monitoring function, the proposal was put to the steering committee that an Office of the Commissioner for Children be established by Act of Parliament, reporting directly to Parliament. This Office would have to be granted independence from government in order to fulfill its monitoring function. Useful legislative examples can be taken from comparative initiatives to establish independent Human Rights Commissions, such as in Uganda and South Africa.

The Office should be mandated specifically to employ an inspectorate to fulfill the role of oversight over conditions of detention of children in juvenile institutions. In addition, the Office can serve as a focal point for child participation, for receipt and resolution of complaints about child rights violations, and as a forum for advocacy and public education about children's rights and about this law reform initiative.

The consultants support the establishment of an Office of the Commissioner for Children should by means of legislative provisions in the proposed new children's law. Legislation should spell out the powers of such office to equip it with a broad oversight role. A specific delegation of functions concerning the regular inspection of all facilities where children are deprived of their liberty should form part of this aspect of the statute.

13. CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

13.1 Summary of findings and overall conclusions

The process undertaken towards the finalization of this legal review has revealed that there is great support for the drafting of a comprehensive child statute in Mozambique. The well-being of children is a matter of significant concern to Mozambicans, as is evidenced by the Declaration on the Rights of the Mozambican Child and the inclusion of provisions concerning children in the Mozambican constitution. Mozambique's commitment to children has further been signified through the ratification of numerous international and regional treaties aimed at protecting and promoting their rights, most of which still require incorporation into domestic law. Thus, although there are existing legal provisions covering a range of civil and penal issues, these generally precede the child rights approach required by the CRC, ACRWC, and other documents. The need for child-centred approaches in law and in the implementation of laws was a signal feature that emerged from the child participation exercise that formed part of this study.

A further motivation for the drafting of new legislation is the evident problems experienced in Mozambique with regards to the co-ordination of services to children, and the absence of legal provisions requiring the state to bear responsibility for implementation of certain key rights. A core recommendation in this regard is to be found in Chapter 11, which proposes the creation of monitoring structures specifically to overcome this hurdle. In addition, numerous recommendations throughout this report suggest direct obligations to be placed on key government role players to ensure the fulfillment of children's rights in particular contexts, such as child victims of sexual abuse.

The inaccessibility and lack of awareness of current legislative provisions can be significantly improved through the adoption of a new, clearly drafted law detailing and linking all aspects of child well-being and child protection. This new law should be widely propagated and explained to various stakeholders, and within government and communities. International agencies and NGOs can play a valuable role in ensuring dissemination of information on legislation pertaining to children throughout the country. Specialization in dealing with matters where children are involved – in courts, in police stations, and in residential institutions where children are to be found – can be significantly addressed with legislation that incorporates clear, minimum, rights-based standards with respect to how children are to be treated.

There was a broad consensus that the Government of Mozambique commences a drafting process that will result in a comprehensive revision of the law to create a single body of child legislation.

13.2 Recommendations

13.2.1 Problem areas and incorporation of international treaties

- The scope of the law reform process should be informed by the outcomes of the consultative workshops with the prime focus of the law including the areas most favoured by respondents to the study
- The new legislation must provide for the rights of children, the obligations on parents and the duty on the state to provide for the alternative care of children

- New legislation must provide for the manner in which international treaties and issues, ratified by Mozambique, are incorporated into domestic law, especially in relation to the sale of children, child prostitution, child pornography, the establishment of the minimum age of employment, the worst forms of child labour and the protection of refugee and undocumented children.

13.2.2 Customary Law and Inheritance

- A provision should be included in the new law that states that customary laws in relation to children are upheld except in so far as they constitute harmful social practices affecting the health or life of the child and are discriminatory on the grounds of sex or other status
- Customary laws relating to inheritance by orphan children be repealed and children be allowed to inherit their parent's estates
- Procedures be included in the new law to manage orphan children's inheritance
- The age of majority be set at 18 years.

13.2.3 Sexual Abuse and Exploitation of Children

- The new law provide for a concrete definition of sexual abuse and exploitation
- Procedures be enacted relating to the reporting of sexual abuse
- The establishment of a national child protection register
- Each Ministry must develop a multi-disciplinary strategy for the management of child sexual abuse
- The law must provide for training in relation to child victims of sexual abuse
- Legislation must include specific roles and responsibilities of the relevant government officials in the management of child sexual abuse
- Training in relation to interviewing child victims and the competence of child victims must be provided for
- Provision must be made for the appointment of intermediaries to assist child victims during court appearances
- The criminal code must be amended to provide for a whole new range of offences that relate to child sexual abuse such as penetrative acts other than rape and defilement, sexual acts committed within view of certain children, the promotion of sexual offences with a child, child prostitution and child pornography
- The minimum age of consent for sexual acts be set at 16 years.

13.2.4 Children in trouble with the law

- An objectives clause or preamble to the new law should set out what the key aim of the legislation relating to children in trouble with the law is intended to be
- The SJAM should be repealed and replaced with new legislative provisions that allow for a child rights approach to the management of child offenders
- Legislation should specify that the minimum age of criminal capacity is 16 years and that children aged below this are presumed to be incapable of committing offences. The provision should explain that a child that lacks criminal capacity by operation of law may not be arrested, detained in police custody or imprisoned and the duty of the police to implement this provision should be clearly articulated
- Children in conflict with the law who are under the minimum age of criminal responsibility must be assessed/screened to determine whether they are in need of an in-

tervention or not. The law must set out the factors that may determine whether further action may be taken in relation to such a child

- The law should describe alternative measures to be taken in relation to children in conflict with the law under the age of 16, such as return to a care-giver, a police warning or referral to a family group conference
- Procedures should be enacted that deal with the situation where the police decide that further measures are necessary for children in conflict with the law under the age of 16 years. These procedures should include an assessment, conducted by a social worker, of the child's personal circumstances and the circumstances surrounding the offence
- The law must set out what recommendations can be made by the social worker who has assessed a child in conflict with the law under the age of 16 in respect of whom further action should be taken and these can include return to a care-giver, referral to a non-residential diversion programme or referral to a family group conference
- Children in conflict with the law under the age of 16 years in respect of whom further action may be taken may appear before the TDM for a hearing
- The power of the TDM be extended and elaborated on in the new law to allow it to deal with children under the age of 16 who are accused of committing an offence, and the law must provide that these children may only be placed in an institution if so ordered by the TDM
- Restorative justice principles must underpin the application and interpretation of the legislation
- Restorative justice processes may not contain elements, such as physical punishment or public humiliation and harmful activities, that infringe children's rights
- Advocacy and training must occur to ensure widespread knowledge and access to restorative justice processes
- A separate criminal justice system must be established for children in conflict with the law aged 16 and 17 years
- Children aged 16 and 17 years must be screened/assessed as soon as possible after arrest in order to determine whether the child should be diverted or prosecuted and procedures relating to this must be enacted
- Children who have been diverted do not obtain a criminal record
- Diversion records and procedures relating thereto must be legislated for
- A range of alternatives to incarceration in police custody be provided for in the legislation
- The law must provide for a duty to be placed on the police to inform a child's parents or care-givers of the child's detention, as soon as possible after the arrest of the child
- No child may be placed in a residential facility for children in conflict with the law without a court order and where such placement is recommended as an alternative to criminal prosecution, the court having jurisdiction for such an order is the TDM
- Penal jurisdiction be maintained in the criminal courts where children aged 16 and 17 cannot be diverted and are prosecuted
- Trials of children must take place separately from those of adult accused
- The range of sentencing options be expanded through the addition of various non-custodial options, as sentence options, that have been recommended as diversion options
- The present law limiting sentences involving imprisonment should be retained.

13.2.5 Education

- The new legislation must provide for core minimum requirements for the state to comply with in order to ensure the right to education is realised, such as the provision of free primary education
- A system of social assistance grants must be provided to enable children to attend school
- Provisions must be enacted to ensure harmful and discriminatory practices are prohibited in the education system.

13.2.6 Health

- The age of consent for medical treatment and surgical operations must be set at 12 years and if a child is below that age consent must be obtained from a parent, caregiver or hospital superintendent
- There be a general prohibition on HIV testing with certain exceptions
- There be a general prohibition on the disclosure of the HIV/Aids status of a child with certain exceptions
- The new law elaborates on the present situation relating to the use of and access to contraceptives by a child over the age of 12 years.

13.2.7 Child orphans and abandoned children

- Legislation should provide a definition of orphanhood
- The new law should provide for economic and social protection of OVCs through access to health, education, and social security grants
- The state must provide for family-type alternative care for OVCs, which range from informal community care to foster care
- Child-headed household must be given legal recognition to ensure that the household is linked to some form of mentoring or adult supervision
- The new law must ensure that there are sufficient provisions to realise maximum birth registrations, such as duties placed on parents and service providers to register children.

13.2.8 Tribunal de Minores

- A children's court with specialised competence, as exists with the Maputo City TDM, be established in all court districts and zones within Mozambique with specialised staff
- The presiding officer of the TDM have specified training and experience
- Procedures are enacted that provide for the appointment of a lay panel and stipulate its functions and powers
- Provisions be enacted setting out the range of powers and functions of the TDM necessary to allow the TDM to adjudicate on all matters necessary for the welfare and well-being of children
- Provisions ensuring that various guiding international principles and rights are clearly incorporated in national legislation
- The new law stipulates the scope of jurisdiction of the TDM in relation to children in need of welfare interventions as well as children in conflict with the law under the age of 16 years

- Legislation must contain specific provisions enumerating the wide range of orders that the TDM can make, especially in relation to placement, protection and other ancillary matters
- Legislation must provide for procedures relating to adoption that give effect to children's rights and ensure that they are protected in the adoption process. This includes the need to provide for international adoptions as these have a direct bearing on the problem of child trafficking
- The new law stipulates that the TDM has a monitoring role in relation to the minimum standards of care of children placed in institutions by orders of the TDM.

13.2.9 Coordination of Services

- An intersectoral national co-ordinating committee comprising representatives from all relevant government departments and national NGOs should be established
- The new law must set out what the functions, management and purpose of the committee are
- Two sub-committees be established, one with responsibility for child protection and the other focussing on juvenile justice
- The national committee must be replicated in each province to ensure provincial implementation of co-ordinated child services
- An Office of the Commissioner for Children should be established to ensure there is an independent body with oversight powers monitoring the implementation of children's rights in the country.

These recommendations are elaborated on more fully in the body of the report and must be read in conjunction therewith.

Appendix 'A'

Optional Protocol to the CRC on the involvement of children in armed conflict

Legislation/provisions should be made:

- Outlawing the deployment/maintaining of persons who have not attained the age of 18 years in armed conflict
- Specifying that persons who have not attained the age of 18 years shall not be compulsorily recruited into the armed forces
- Criminalizing such compulsory recruitment with the penal consequences falling on the recruiters as individuals/groups, from government or otherwise

For example, the Kenyan Children's Act No.8 of 2001 in its section 20 thus "Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child [including the right to protection from armed conflict (section 10(2))] such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine". A similar provision is to be found in section 15 of the Children's Act (560) of 1998 of the Republic of Ghana.

- Providing (in line with the Rome Statute of the International Criminal Court) as 'a war crime', the conscription or enlisting of children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts
- Providing that in the process of voluntary recruitment of children aged between 15 and 18 years and for such recruits, the general principles of the CRC, namely non-discrimination, best interests of the child, right to life, survival and development of the child, and respect for the views of the child shall be applicable at all stages, on and after recruitment
- Defining "direct participation" in armed conflict
- Providing that reliable documents verifying age (such as birth certificate and affidavit) shall be requisite prior to acceptance into compulsory military service
- Declaring the minimum age at which persons are compulsorily recruited into the armed forces which age must not be below 18
- Providing for the process and the conditions contingent upon which the age of conscription can be lowered in exceptional circumstances, for example during a state of emergency and specifying this age
- Declaring the minimum age set for voluntary recruitment into the armed forces which age must be above that of 15 years (Article 38(3) CRC & Article 3(1) Optional Protocol)
- Setting out the requirement that in the recruitment of persons who have attained the minimum age of voluntary recruitment but who are still under the age of 18 years, priority is given to those who are oldest (Article 38 (3) CRC & Article 3(1) Optional Protocol)

Providing in the case of those who are voluntarily recruited:

- A detailed procedure used for such recruitment at all stages from the expression of the child's intention to volunteer until the physical integration into the armed forces
- For the requirement of medical examination before recruitment
- For reliable documentation for example birth certificate and affidavit in the verification of age

- That information is made available to both the potential recruit and his/her parents allowing them to exercise free will and enlightening them on the duties involved in military service
- The effective minimum service period and conditions for early discharge
- The conditions for the use of military justice or discipline to under 18-years recruits
- For the keeping a register detailing data on such recruitment and data on the number of such recruits under military justice and discipline (and the forms thereof)
- Providing for measures of special protection adopted for persons who are recruited and are under the age of 18 years
- Providing for the minimum age of entry into schools operated by or under the control of the armed forces
- Providing that human rights and humanitarian principles shall be included in such military schools' curricula
- Providing that the military school discipline shall be administered in a manner consistent with the child's human dignity and providing for effective complaints mechanisms to afford redress
- Providing for the keeping of a register detailing data on children (age, numbers, time spent in hostilities etc) who have been recruited and used in hostilities by armed groups
- Prohibiting and criminalizing the recruitment and use in hostilities of children under the age of 18 years by non government armed groups
- Providing for the right of children who are victims of armed conflict (as defined in the legislation) to physical and psychosocial rehabilitation and social reintegration

An example is to be found in section 10 (3) of the Kenyan Children's Act, which provides that, "it shall be the responsibility of the Government to provide protection, rehabilitation care, recovery and re-integration into normal social life for any child who may become a victim of armed conflict or natural disaster".

- Providing for a monitoring body in relation to the above provisions (probably operating under the auspices of an overall coordinating body in charge of implementing children's rights. This may take the form of an inter-ministerial or inter-departmental body) (Article 6(1) Optional Protocol & Paragraphs 37-39 General Comment No. 5 (2003) of the Committee on the Rights of the Child (CROC) on "General Measures of Implementation for the CRC")²¹²
- Saving the application of more conducive national legislative or human rights treaty provisions on any of the above issues (Thus for example the higher standard of protection afforded by the African Charter on the Rights and Welfare of the Child, Article 22(2))

The Optional Protocol on children and armed conflict is now ratified by 52 state parties and has been in force since 12 February 2002. Mozambique has not as of yet ratified the Optional Protocol and should therefore consider doing so.

²¹² See further in this regard part 8 below.

The Hague Convention on the Protection of Children and Co-operation in respect of Inter-Country Adoption

Legislation/provisions should be made (from the perspective of both a sending country ('states of origin' in the Convention's terminology and receiving state):

- Defining inter-country adoptions (in line with article 2 of the Convention)
- Designate a Central Authority for the State to discharge the duties which are imposed by the Convention (Articles 15-21)
- Laying down the conditions upon which some 'bodies' may be accredited and operate under the delegated authority of the Central Authority as adoption agencies for inter-country adoptions.

Under the proposed South African Children's Draft Bill (of August 2003) now in circulation for public comment and expected to be introduced in Parliament later in 2004, the Director General (Head of the Department) of the Ministry for Social Development is designated under Section 256 as the Central Authority for the Republic of South Africa for the purposes of the Hague Convention. The Director may delegate this authority to officers with the rank of Director or higher (Section 257). Some of the Central Authority's more specific functions may be delegated to 'accredited bodies' such as approved adoption agencies. The Draft Bill is available on line at < <http://www.socdev.gov.za/Legislation/2003/Children's%20Bill/b70-03.pdf>

- Providing for the adoptability of the child in relation to age and status of the child (in particular, the issue of legitimacy of the child should not be an obstacle to adoption). In principle, any child should be adoptable provided that the adoption is in the child's best interests and the other provisions of adoption legislation are complied with
- Providing that before consideration of inter-country adoption, due regard must be had to possibilities for placement of the child within the State (of origin)
- Providing for the best interests of the child as being paramount in an inter-country adoption
- Providing for the *free giving of consent* (free of inducement by payment or compensation) in the required legal form and in writing of all persons, institutions or authorities whose consent is necessary for adoption. That this giving of consent shall only be after such persons have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin
- In the case of requirement of the child's mother's consent, providing that such consent is given only after the birth of the child
- Providing for instances where the consent (free of payment or compensation of any kind) of the child concerned is required for the adoption
- Providing for the views of the child to be taken into account and giving due consideration to the child's view (in light of the child's age and degree of maturity) after such a child has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption
- Criminalizing and providing penalties for persons, groups, agencies who breach the provisions as regards free consent and procedure in the process of adoption (Sale of children, child trafficking and prostitution as defined in Article 2 of the first Optional Protocol to the CRC should be included in the definition of such a crime).²¹³

²¹³ The Hague Convention does not deal explicitly with criminal matters although it is nevertheless designed to minimize such abuses within the process of inter-country adoption whether in the worst

- Providing (in line with ordinary provisions on adoption) for the keeping of adoption registers and the right to access of information of adults who, as children, were adopted in accordance with the Hague Convention
- Providing for the preparation of the Report under Article 15 of the Convention by the Central Authority or officer designated on the eligibility and suitability of an applicant to adopt and that this Report be transmitted to the Central Authority of the receiving State
- Providing for the jurisdiction of a competent court (probably a specialized court) to deal with applications for the inter-country adoption of both children from other countries or from the State to other countries
- Providing that in the consideration of such applications, the Convention's procedural requirements shall guide the decision
- Providing for the issuance of an adoption clearance certificate by the Central Authority after the order of the court for the adoption of a child
- Making provision on the legal evidential value of adoption clearance certificate or an order certified by competent authorities of overseas jurisdiction and that for purposes of law, such certificate/order attests to compliance with the law of the State/overseas jurisdiction
- Making provision for the legal recognition of adoption (through the Court/Central Authorities) in a convention country of a child habitually resident in that convention country by a person habitually resident in the State concerned on the condition that an adoption clearance certificate issued in that country is in force for the adoption. Similarly, providing for the legal recognition of an adoption in the State concerned of a child who is habitually resident in that State by a person habitually resident in another convention country
- Providing for the Central Authority's *locus standi* to apply to court for an order refusing to recognize an Article 27 adoption (where an inter-country adoption is granted under the sending/receiving state's law on the condition that it does not have the effect of terminating a pre-existing legal parent-child relationship) on grounds that it is manifestly contrary to public policy of the State taking into account the best interests of the child concerned
- Providing that upon the legal recognition of inter-country adoptions, the normal legal effects of adoptions apply
- Providing for the legal position and conditions governing adoptions from non-convention and non-prescribed countries and the legal recognition of the validity of such adoptions

forms of sale or traffic of children or the less dramatic form, but probably more common, form of inappropriate placement. (See W. Duncan "The Hague Convention: Some Issues of special relevance to sending countries" in Jaffe, E. D. (ed) (1995) *Intercountry Adoptions: Laws and Perspectives of "Sending" Countries* The Hague: Kluwer Law. P 218).

Chapter 17 (Sections 254-272) of the proposed South African legislation (the Draft Children's Bill) which domesticates the Hague Convention's provisions and includes most of the above provisions may be used as a comparative example in regard to inter-country adoptions. South Africa is one of the few African States that have ratified any of the Hague Conventions. Of all the 62 Hague Conference member States, it is the only African member state. The latest version of the Bill (August 2003) is available online at <http://www.socdev.gov.za/Legislation/2003/Children's%20Bill/b70-03.pdf>

The Hague Convention on International Child Abduction and the designation of a central authority

The Hague Child Abduction Convention applies in cases of international child custody disputes (disputes between parents/guardians of a child regarding their rights to custody and access where one parent/guardian, without the knowledge of the other parent/guardian, removes the child from the child's habitual residence where the other parent/guardian also resides ("legal abduction" or "kidnap"). In terms of domestic legislation, the Convention requires:

- That domestic legislation gives the Convention the full force of law within the state's jurisdiction
- As with the case of the Inter-Country Adoptions Convention, the establishment or designation of government offices to act as a Central Authority to administer the Convention's operations (Articles 9-21 of the Convention) and to give the Central Authority the broad powers of ensuring the prompt return of "abducted" children. Such provision should provide for the delegation of the Central Authority's powers to designated specified officers in appropriate cases.

Recommendations:

- For the specific powers and roles of the Central Authority, the legislation should refer to the Convention, in particular Article 7 and Articles 8-21 on the Convention's operations. One way of making such reference would be to add the full text of the Convention as a Schedule to the legislation concerned.
- Provision must be made conferring jurisdiction on competent courts to adjudicate on issues of international child abduction and provide a complementary role to the Central Authority.

Mozambique is not party to the Hague Conventions and should consider ratifying the Conventions as a matter of urgency so as to benefit from the standardized procedural and substantive conflict of law rules on inter-country adoptions and abductions. This would be in the advantage of Mozambican children who may undergo inter-country adoption in the sense that as a minimum, the Convention's safeguards would apply (particularly vis-à-vis other convention countries) rather than these children being left to the vagaries of the domestic law of another state. On the other hand, this applies for cases where Mozambique would be the receiving country in inter-country adoptions. Further, the area of international child abduction would also be dealt with. Ratification should be followed by domestication through legislative provisions to fill the current void in the country's legal framework.

Recommendation:

Mozambique should ratify the Hague Conventions on Inter-Country Adoption and International Abduction and make legislative provisions domesticating these treaties in the proposed new child law.

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Recommendation

There should be an elaboration on the present law relating to the use of contraceptives to ensure that condoms are freely available to children /who require such contraceptives,