



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

**Submission by JSMP to the Ministry of Justice on the
Draft Juvenile Justice laws**

Introduction

JSMP congratulates the Ministry of Justice (**MOJ**) for its initiative in drafting and progressing this important law. JSMP believes that a comprehensive juvenile justice policy, together with the associated legislation, is vital to ensuring the protection of the human rights of children and young people and to strengthening of the rule of law in Timor-Leste.

As the Committee on the Rights of the Child (**CROC**) has recognized, children differ from adults in their emotional and educational needs. These differences constitute the basis for their lesser culpability when they come into conflict with the law. They are also the reason for a separate juvenile justice system that treats children differently to adults.¹ JSMP believes that a successful juvenile justice system the traditional objectives of criminal justice (repression/retribution) must give way to the best interest of the child and the objectives of rehabilitation and restorative justice. This can be done while simultaneously giving sufficient attention to public safety.²

In the submission below, JSMP provides some general observations on the current drafts of the juvenile justice legislation and makes some recommendations for how the drafting process should move forward.

Limitations of this submission

JSMP is pleased that the MOJ is conducting a consultation process on the draft Juvenile Justice laws. It is very important that consultation occurs in relation to this law in order for those who will be affected by the law to have the chance to provide input and so that the law is appropriately tailored to the realities of the situation in Timor-Leste. However, JSMP wishes to highlight that because we received the draft laws only in Portuguese, our ability to provide detailed, specific comments has been limited and the comments below are of a general nature only.

JSMP believes that in order to have a genuine consultative process it is vital that the draft laws be produced in Tetun and not only Portuguese. Should the MOJ

¹ UN Committee on the Rights of the Child, *General Comment 10: Children's Rights in Juvenile Justice* (2007).

² UN Committee on the Rights of the Child, *General Comment 10: Children's Rights in Juvenile Justice* (2007).

produce Tetun copies of the draft laws in the future, JSMP would be more than happy to provide further, more detailed commentary.

The Draft Laws

This submission is based on the two draft Juvenile Justice Laws provided to JSMP by MOJ in April 2010. The two draft laws are titled:

1. *Aprova a Lei da Justica Juvenile*
2. *Aprova o Regime Penal Especial Para Jovens Adultos com Idade Entre 16 e os 21 Anos no Ambito do Distema de Justica Juvenile*

The first draft law, the '*Juvenile Justice Law*', concerns children who are between the ages of 12 and 16 and, by virtue of art. 20(1) of the Penal Code, are criminally unimputable. The second draft law the '*Special Penal Regime for Young Adults aged between 16 and 21 years*' is a much shorter law that provides special penalties for children and young adults between 16 and 21 years old. JSMP understands that in a previous draft both of these laws formed part of a single law.

Juvenile Justice Law

The Juvenile Justice Law concerns children (between 12 and 16 years old) who are criminally unimputable. It sets up a system of 'educational tutelary measures' which are purportedly designed to educate children and guarantee them rights and special protection when they are in conflict with the law. 'Educational tutelary measures' include penalties analogous to those included in the Penal Code such as: admonition, reparation to the victim, payment of economic benefits, undertaking community work, participation in training programs, and 'confinement in an educational centre'.

The law sets up a number of new entities which are given different functions. These include a 'Juvenile Justice System Coordination Centre', 'Multidisciplinary Technical Teams' and a new 'Family and Children's Court'. The law also proposes the establishment of 'Educational Centres' where children receive educational tutelary measures, including being held in detention.

Special Penal Regime for Young Adults

The Special Regime for Young Adults provides special penalties for both children who are criminally imputable (between 16 and 18 years old) as well as young adults (between 18 and 21 years old). The law is anticipated by art. 20(2) of the Penal Code, which provides that the law shall determine specific provisions concerning application and execution of criminal penalties for persons between 16 and 21 years old.

This law consists of 32 articles that provide for a set of alternate penalties where a person convicted of a crime is between the ages of 16 and 18. Most of the alternate penalties involve detention on a permanent or semi-permanent basis in specially established 'detention centres'. The legislation does not provide for the

establishment and regulation of these detention centres. There are also penalties such as community work and admonition, which appear similar to those included in the current Penal Code.

JSMP's Comments on the draft laws

Laws must be based on the human rights of children and young adults

JSMP is concerned that the current draft laws do not take an approach to Juvenile Justice based on human rights principles, as required by both the Constitution of Timor-Leste and international law. The formulation of a juvenile justice policy and the enactment of a Juvenile Justice law is essential in order for Timor-Leste to comply with its constitutional and international law obligations. The RDTL Constitution sets out the entitlement of children to special protection by the state and the obligation of the state to promote and encourage youth initiatives.³ The RDTL Constitution also provides that international laws ratified by Timor-Leste apply automatically in domestic law and, to the extent of any inconsistency, override domestic laws.⁴ This means that any juvenile justice law must be consistent with Timor-Leste's obligations under the *Convention on the Rights of the Child (CRC)*.

In JSMP's view, the draft laws need to focus on the human rights of children and young adults in conflict with the law and not on the rights of the state to impose 'penalties' or to 'reeducate'. While the Juvenile Justice Law makes some reference to international treaties, JSMP believes that both laws must explicitly state the human rights of children and young adults as contained in the *CRC* and other human rights documents. In particular, the laws must embody the principles contained in Article 37 on Torture and Deprivation of Liberty and Article 40 on the Administration of Juvenile Justice.

Article 37 states that no child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty. Both capital punishment and life imprisonment without the possibility of release are prohibited for offences committed by persons below 18 years. Any child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so. A child who is detained shall have legal and other assistance as well as contact with the family.

Article 40 states that a child in conflict with the law has the right to treatment which promotes the child's sense of dignity and worth, takes the child's age into account and aims at his or her reintegration into society. The child is entitled to basic guarantees as well as legal or other assistance for his or her defence. Judicial proceedings and institutional placements shall be avoided wherever possible.

³ RDTL Constitution, art 18 ad 19.

⁴ RDTL Constitution, art 9.

The draft laws should also follow the principles set out in the UN Standard Minimum Rules for the Administration of Juvenile Justice⁵ and the UN Rules for the Protection of Juveniles Deprived of their Liberty.⁶ They should take specific account of the Concluding Observations on Timor-Leste made by the UN Committee on the Rights of the Child in February 2008.

As will be explained further below, both juvenile justice laws concern the rights of children: the Juvenile Justice Law explicitly and the Special Regime because it affects persons between 16 and 18 years old. This means that in order to comply with the Constitution of Timor-Leste and international law, both laws should comply with the *CRC* in respect of persons under 18 years old.

Children's best interests

The guiding principle of juvenile justice legislation should be that the best interests of the child are a primary consideration in all decision-making regarding children. This principle is enshrined in article 2 of the *CRC* and is emphasized in the Committee's concluding observations on Timor Leste.⁷

While there is currently limited recognition in the Juvenile Justice Law that some measures should be guided by the superior interests of the child, this qualification is only included in a number of articles and does not appear to be an overarching principle. JSMP believes that this principle needs to be clearly stated as a guiding principle of all decisions made under both laws. JSMP also believes that the legislation should include guidelines for what specific considerations should be taken into account in determining the best interests of the law.

Children's right to be heard and to participation in decisions that affect them

JSMP recommends that the draft laws must include increased opportunities and support for children and young adults to participate in the juvenile justice process and for their views to be considered in the decisions that affect their lives. The child's views should be given due weight in accordance with the child's age and maturity. This is required by article 12 of the *CRC*, which emphasizes specifically the importance of a child's right to be heard in any judicial proceedings affecting the child.

In its Concluding Observations on Timor-Leste, the Committee commented that it was concerned:

(T)hat the concept of respect for the views of the child does not appear to be well understood, and that the views of the child are rarely sought in establishing what may be in the child's best interests when relevant decisions are being made, including in administrative and judicial proceedings.⁸

⁵ Adopted by General Assembly resolution 40/33 of 29 November 1985.

⁶ Adopted by General Assembly resolution 45/113 of 14 December 1990.

⁷ UN Committee on the Rights of the Child, *Concluding Observations: Timor Leste* (2008).

⁸ UN Committee on the Rights of the Child, *Concluding Observations: Timor Leste* (2008).

The draft laws should also recognize that children and young adults' right to be heard is connected to their right to receive information. Children and young adults must be provided with information that is in a language that they can understand and at a level that is appropriate to their age and maturity. Children and young adults in detention must have access to information about complaints mechanisms and avenues for appeal. JSMP believes that these rights to information are currently insufficiently protected in the draft laws and that provisions guaranteeing these rights must be strengthened.

Detention

JSMP is concerned that the current laws rely too heavily on the use of detention and do not adequately protect the right of children to be deprived of liberty only as a last resort and for the shortest period possible.⁹ While JSMP recognizes the need to strike a balance between protection of children in conflict with the law and protection of citizens from violent and serious crimes, it is important that detention and confinement is seen as a last resort and that the priority remains for restorative justice and the promotion of children's best interests.

JSMP is also concerned that the language of 'Educational Centres' and 'tutelage' is being used to describe what is essentially detention. The adverse effects of removal of a child or young adult from his or her community should not be underestimated. Calling an institution 'educational' does not alter the nature of the institution.

JSMP is also concerned that the Special Regime for Young Adults consists primarily of a separate system of detention and does not adequately address other important aspects of juvenile justice and possible penalties.

The current draft laws foresee the creation of two new forms of detention institutions: educational centres (for those between 12 and 16) and detention centres (for those between 16 and 21). It is envisaged that at least some of these new detention institutions will be private entities, run by religious or non-government organizations. JSMP wishes to emphasise that operating such centres without having a close monitoring and supervision mechanism in place creates a significant risk for child abuse. This risk is heightened in an environment, such as the present, where there are limited resources.

JSMP questions the need to create two separate systems of juvenile detention (one for 12-16 year olds and one for 16 – 21 year olds). Detention is always an expensive penalty, for adults as well as children, and the expense is only increased if there is more than one system. If detention is used only as a last resort for very serious crimes JSMP believes that the creation of one system of juvenile detention could meet this need.

⁹ UN Convention on the Rights of the Child, art 37.

Age limits

JSMP is pleased that the age of criminal responsibility in Timor-Leste is relatively high, compared with other nations (16 years). JSMP also welcomes the provision of special measures for 18 – 21 year olds who commit crimes, since adults in this age group are particularly vulnerable in the justice system and potentially have a greater capacity for rehabilitation. This said, JSMP believes that the definitions of 'child' and 'young adult' contained in the two draft laws are problematic and do not comply with Timor-Leste's international obligations.

According to the CRC, which has been ratified by Timor-Leste, every child *under the age of 18* has the right to be treated under the rules of juvenile justice in accordance with section 40 of the CRC.¹⁰ This was explicitly stated by the CROC in its Concluding Obligations on Timor Leste, where it noted that:

[Timor-Leste], by virtue of section 9 of the Constitution and incorporation of the Convention directly into its domestic legal framework, has defined a child as being every human being under the age of 18 years.

The Juvenile Justice Law defines a 'child' for the purposes of the law as a person between the ages of 12 and 16 years old. The Special Regime for Young Adults defines a 'young adult' as being between 16 and 21 years old. This means that the draft laws do not currently afford children between the ages of 16 and 18 the protections of the CRC.

JSMP is also concerned that despite the age of unimputability being 16 years old, children from the age of 12 are being subjected to what appears to be essentially a penal process with minor alterations. While even (very) young children have the capacity to infringe the penal law, international law provides that if they commit an offence when below the imputable age the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. In relation to these children, only special protective measures can be taken and only if necessary in their best interest.¹¹

Female and special needs children

JSMP is concerned that the current draft laws do not address the specific status and needs of female children and young adults in the juvenile justice system. While girls and women generally consist of a smaller number in juvenile justice system when compared with boys and men, they are particularly vulnerable and have specific needs. It is extremely important that these needs are addressed and that girls and young women are afforded special protection. Care should be taken to ensure that training programs, educational facilities and detention facilities are appropriately tailored to meet the needs of females as well as males.

JSMP is also concerned that the present draft legislation does not specifically provide for the special needs of children with intellectual or physical disabilities

¹⁰ CROC, General Comment 10, para. 21.

¹¹ CROC General Comment 10, para 16.

or a mental illness. Such children have the right to access services that meet these needs.

Complexity, Comprehensiveness and Consideration of existing structures

In JSMP's view the Juvenile Justice legislation is extremely lengthy, complex and difficult to understand. JSMP believes that if the law is not clarified and simplified, implementation and socialization of this law will be very difficult.

The language of the current draft often lacks clarity and terms are used inconsistently. JSMP believes that this problem has only been made greater by dividing the legislation into two.

There is also a lack of clarity surrounding the different actors in the juvenile justice system. For example it is not clear what the role of the National Commission for Children will be. The link between the Ministry of Justice, Department of Protection and Social Assistance of Vulnerable Children is also unclear.

JSMP believes that for reasons of clarity juvenile justice legislation should be enacted in one piece of legislation (this includes establishment of detention centres, registration of education facilities and regulations for children under 12 years old).

JSMP also believes that in order for this law to be successful the use of existing institutions and structures should be maximized. Duplication in legislation and functions of public entities should be avoided. The introduction of new procedures and institutions should only occur where demonstrably necessary and should be as simple as possible.

Recommendations

JSMP believes that the two draft laws require significant work in order for them to be consistent with Timor-Leste's international obligations and appropriately tailored to the realities of the situation in this country. Therefore, JSMP recommends that the MOJ take the following steps:

- Convene a working group with representatives from national and international institutions with expertise in this field, including representatives from MSS, VPU and other relevant government bodies. This working group would support the development of an appropriate draft, relevant to the situation in Timor-Leste and consistent with Timor-Leste's international obligations;
- Produce a Tetun translation of the draft laws so that those who will be impacted by these draft laws have a genuine opportunity to provide input; and
- Produce a revised single draft law that incorporates the comments of the working group and is based on human rights principles and the best interests of children and young adults.