

## 6. Law and Practice Relating to the Arrest of Children for Nuisance-Related Offences

*Whilst Malawi's laws now demonstrate a concern for the proper handling of children who have been arrested, the new legal framework has not yet translated into practice. This chapter outlines several legal provisions dealing with the special needs and situations of children who are suspected of having committed an offence. In addition, the chapter highlights the findings of field research on the police's use of these laws in cases where children are suspected of having committed minor nuisance-related offences in Blantyre, Malawi.*

### Laws Relating to the Arrest of Children

Malawi has a comprehensive set of laws relating to the arrest of children and their diversion away from the criminal justice system. These include the Constitution; the Criminal Procedure and Evidence Code and the Child Care, Protection and Justice Act.

#### **The Constitution of Malawi**

Section 23(1) provides that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them. For the purpose of section 23, a child is defined as a person under the age of sixteen years.<sup>274</sup> Section 20(1) of the Constitution provides that all persons are entitled to equal treatment.

Section 42(2)(g) of the Constitution provides that if an arrested or accused person is a person under the age of eighteen years,<sup>275</sup> he or she is entitled to treatment consistent with the special needs of children, which shall include the following rights:

- i. Not to be sentenced to life imprisonment without possibility of release;
- ii. To be imprisoned only as a last resort and for the shortest period of time;
- iii. To be separated from adults when imprisoned, unless it is considered to be in the child's best interest not to do so, and to maintain contact with the child's family through correspondence and visits;

---

<sup>274</sup> Section 23(6) of the Malawi Constitution.

<sup>275</sup> This section was recently amended to make it clear that the section applies to persons under the age of eighteen years.

- iv. To be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces respect for the rights and freedoms of others;
- v. To be treated in a manner which takes into account the child's age and the desirability of promoting the child's reintegration into society to assume a constructive role; and
- vi. To be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards.

Section 42(2)(h) has recently been inserted into the Constitution to provide that, in the case where an arrested or accused person has a disability, he or she should be held in separate accommodation where possible in recognition of his or her particular vulnerability. This section appears to apply to both adults and children.

### **The Criminal Procedure and Evidence Code**

The circumstances under which an individual may be arrested without a warrant are specified in the Criminal Procedure and Evidence Code. Section 20D of the Criminal Procedure and Evidence Code provides that, where a child or young person is arrested, "such steps as are necessary shall be taken to ascertain the identity of a person responsible for his welfare". The person identified must be informed as soon as practicable that the child or young person has been arrested, the reasons for the arrest and the place where the person is being held.<sup>276</sup>

Section 32A(3) of the Criminal Procedure and Evidence Code provides that where a child voluntarily admits commission of a non-serious offence, the child may be released on caution if the parent or guardian consents to the disposal of the case in this manner.

The Child Care, Protection and Justice Act requires, however, that in addition to the procedures outlined in the Criminal Procedure and Evidence Code, due regard must be had to the best interests of the child and the guidelines set out in the Child Care, Protection and Justice Act for dealing with suspected child offenders.

### **The Bail (Guidelines) Act**

The Bail (Guidelines) Act, 8 of 2000 provides in section 5 that where an accused is a child, the court must consider the welfare of the child, whether it is necessary in the interests of the child to remove him or her from any undesirable persons and whether the release of the child will defeat the ends of justice.

### **The Child Care, Protection and Justice Act**

Part III of the Child Care, Protection and Justice Act, 22 of 2010 deals with children suspected of having committed criminal offences. The Act defines a child as a person under the age of sixteen and introduced a new method of dealing with children in conflict with the law. Under section 86, for example, the words "finding of guilt", "conviction" and "sentence" may not be used with respect to any child defendant subject to court proceedings. Section 88 provides that a court, when adjudicating a matter involving a child defendant, shall take steps to remove the child from undesirable surroundings and ensure provision is made for his or her nutrition and education. Moreover, the court must give primary consideration to the rights of the child as set out in the Convention on the Rights of the Child.

Any police officer arresting a child must have due regard to the best interests of the child and effect the arrest in accordance with the Act.

---

<sup>276</sup> Section 20D(2) and (3) of the Criminal Procedure and Evidence Code, inserted by Act 14 of 2010.

## **Rights of Children During Arrest, Section 90 of the Child, Care Protection and Justice Act**

A police officer or any person executing the arrest of a child shall ensure that:

- a) The child has been informed of his or her rights in relation to the arrest or detention and the reasons for the arrest in a manner appropriate to the age and understanding of the child;
- b) There is no harassment or physical abuse of the child;
- c) The child is provided with medical attention where necessary;
- d) There is no use of handcuffs, except if the child is handcuffed to the arresting police officer or the person effecting the arrest;
- e) The child is not mixed with adults;
- f) The child is provided with nutritious food;
- g) The child is accompanied by a parent, guardian or appropriate adult as far as it is practicable to do so;
- h) A parent, guardian or appropriate adult is informed immediately after the arrest if such parent, guardian or appropriate adult was not present at the time of the arrest;
- i) In serious offences, the child is provided with legal representation; and
- j) The child has been provided with counselling services where possible.”<sup>277</sup>

According to section 93, a child who has been arrested must be referred to a probation officer for an assessment in order to establish the possibility of diverting the case; to determine whether the child is in need of care and protection; to estimate the child’s age and to formulate recommendations regarding release or to evaluate bail. Section 93(4) further requires that the probation officer submits the assessment report with recommendations to the relevant prosecutor. The prosecutor may, upon consideration of the recommendations, release the child with or without bail; release the child into the care of a parent, guardian or other appropriate adult; or detain the child. Where it is not possible to refer the child to a probation officer or where such a referral may cause unnecessary delays, the prosecutor handling the matter may arrange transportation for the child to a place of safety and arrange for a preliminary inquiry within forty-eight hours. Alternatively, the prosecutor may opt to release the child.

A police officer holding the rank of sub-inspector (or above) may caution a child offender against the repetition of the crime and release the child with or without conditions, provided the offence alleged to have been committed is not serious; that there is enough evidence to warrant prosecution in the case; and that the child voluntarily admits responsibility for the offence.<sup>278</sup> A police officer imposing a condition under this section shall take into account the best interests of the child and the condition shall not be penal in nature.<sup>279</sup>

According to section 95(1), no child shall be detained before a court issues a finding against

---

277 Section 90 of the Child Care, Protection and Justice Act, 22 of 2010.

278 Section 94(1) of the Child Care, Protection and Justice Act.

279 Section 94 of the Child Care, Protection and Justice Act further states that the caution and release of a child shall be administered in the presence of a parent or guardian, or an appropriate adult or a probation officer, unless the police officer considers it to be in the best interests of the child to dispense with this requirement. A police officer shall, when cautioning and releasing a child, take into account the circumstances in which the offence was committed; the views of the victim or complainant; personal conditions of the arrested child (including age, physical or mental infirmity, general character and family circumstances) and the views of the parent or guardian of the child.

him or her unless the Director of Public Prosecutions, in writing or upon hearing, satisfies the inquiry magistrate or court that the prosecutor wishes to charge the child with a serious offence in respect of which there is sufficient evidence to prosecute; it is necessary in the interest of such child to remove him or her from undesirable circumstances; or the prosecutor has reason to believe that the release of such child would defeat the ends of justice.

Where a child is detained pending a preliminary inquiry, such detention must take place in a place of safety and authorities must either bring the child before a court within 48 hours or release him or her. An officer-in-charge of a police station or prosecutor can apply to a magistrate for an alternative order if it is not feasible to detain the child at a place of safety.

Where a child is released and cannot be brought before a magistrate, the officer-in-charge of the police station shall release the child into parental custody with or without sureties, unless the child is alleged to have committed a serious offence punishable with imprisonment exceeding seven years.

The Child Care, Protection and Justice Act moreover contemplates the diversion of children away from the criminal justice system. Section 112 provides that the court or the prosecution will consider a child-defendant for diversion if the child admits responsibility for the alleged offence without undue influence; the child understands the right to remain silent; there is sufficient evidence to prosecute the child; the diversion options have been explained to the child and his/her parents or guardian and the offence is not one specified in Schedule 4.<sup>280</sup>

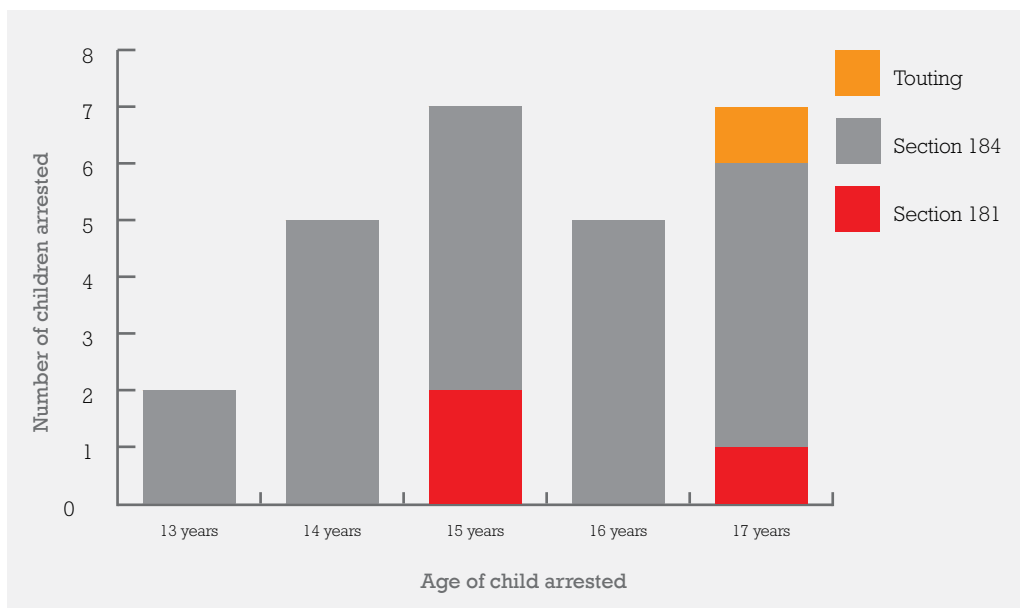
### **Options to Divert Children Away from the Criminal Justice System**

Diversion is an individualised process that should by its nature consider the needs of each child, is available after the child admits commission of an offence and may occur in one of two ways:

- Informal diversion of children involves a prosecutor at the police station withdrawing the charge and referring the child to the Victim Support Units (VSUs), where the child is counselled by the Child Protection Officer, informed of various problems relating to the offence and cautioned. Such an approach works well in non-serious cases. VSU officers also have a role in visiting police cells and transferring children discovered in custody to the VSU or police prosecutor for diversion. Diversion is an individualised process and should consider the needs of the child.
- Formal diversion of children involves a child appearing before the inquiry magistrate with a probation officer or paralegal arguing his or her case for diversion. Formal diversion options include probation; warning; bond of good behaviour during prescribed time; reparations for damaged property, compensation; victim-offender mediation; specific diversion programmes; or compulsory education. A diversion may involve individualised options best suited for the child.

280 Schedule 4 of the Child Care, Protection and Justice Act, 22 of 2010 lists offences for which diversion is not possible. These offences include rape; attempted rape; abduction; defilement of a girl and attempted defilement; defilement of a person with a mental disability; manslaughter; murder; attempted murder; infanticide; killing an unborn child; disabling in order to commit a felony or misdemeanour; stupefying by overpowering drug or thing with intent to commit a felony or misdemeanour; robbery with violence; attempted robbery with violence; house-breaking and burglary; arson; offences against aircraft; offences against motor vehicles or trains; conspiracy to murder; aiding suicide; acts intended to cause grievous harm or prevent arrest; preventing escape from a wreck; maliciously administering poison with intent to harm; intentionally endangering safety of persons travelling by railway; and accessory after the fact to murder.

**Chart 5: Number of Child-Arrestees According to Offence:**



## Arrests of Children for Nuisance-Related Offences

### Notes on Methodology

In the period May to September 2012, paralegals from the Centre for Human Rights Education, Advice and Assistance (CHREAA) conducted field work at Limbe and Blantyre police stations. Using datasheets, paralegals collected regular quantitative information on the number of child arrests made by police for nuisance-related offences. Due to insufficient record-keeping by police, however, it was not always possible to establish the outcome of individual cases. In addition, qualitative interviews were conducted with police (10) and magistrates (5). The interviews were of an exploratory nature only. The interviews with magistrates did not include magistrates from the Child Justice Courts.

For the purpose of this chapter, the reference to “children” includes those up to and including the age of seventeen, which corresponds with the UN Convention on the Rights of the Child definition of a child. Under the Child Care, Protection and Justice Act, by contrast, a child is defined as one under the age of sixteen. Nevertheless, children aged sixteen and seventeen who come into contact with the law remain entitled to the rights listed in section 42(2)(g) of the Constitution.

### Documented Cases of Arrests of Children for Nuisance-Related Offences

During the research period, interviewers documented twelve cases of child arrests by Blantyre police for nuisance-related offences. During the same period, there were fourteen documented cases of child arrests by Limbe police for the same category of offences.

All child arrests in Limbe were effected on charges relating to section 184 (rogue and vagabond offences), whilst the arrests of children in Blantyre were based upon charges under section 181 (conduct likely to cause breach of peace), section 184 and for touting. These specific offences are explained in more detail in chapter 4.

Arrests tended to occur during the day, apart from a sweeping exercise conducted in Limbe on 6 August 2012 in the early evening and the arrest of one seventeen year-old female at midnight. Aside from the arrest of that single female, all other child arrestees were male. Children in custody at the time of the researchers' visits to the police station typically reported that they had been arrested on their way to or from the market.

Data was not available regarding the length of time children spent in custody or the outcome of pending cases. Nevertheless, the evidently frequent practice of keeping child arrestees in custody was experienced first-hand by researchers, suggesting that at least some cases involving child arrests are not properly dealt with according to the new Child Care, Protection and Justice Act and the Constitution, which discourages the detention of children except in serious cases.

### **Examples of Arrest and Detention of Children at Blantyre and Limbe Police Stations**

The following detentions of child-arrestees were observed in Limbe police station:

- Two children aged fourteen and seventeen years were arrested on Sunday 5 August 2012 and were still in custody on Wednesday 8 August 2012. They were first-time offenders.
- Three children aged thirteen, fourteen and sixteen years were arrested on Tuesday 14 August 2012 midday outside a restaurant in terms of section 184 and were still in custody on Thursday 16 August 2012. They complained that they had no food for two days.
- Two children aged fourteen were arrested alongside seven adults on Monday 6 August 2012 as part of a sweeping exercise. The children were first-time offenders. The one child was still in custody on 8 August, and the other was still in custody on 15 August 2012. The latter child complained that he did not have access to food and was not informed of the reasons for his arrest and detention.

The following detentions of child-arrestees were observed in Blantyre police station:

- A child aged fifteen who was arrested under section 181 on Friday 6 July 2012 was still in custody on Sunday 9 July 2012.
- A child aged seventeen who was arrested for touting on 4 July 2012 was still in custody the following day.

The direct observations of researchers call into question the procedures followed by police officers and their willingness to abide by the limitations on law enforcement capacities that apply in cases of child suspects.

### **Police Use of Section 184 Offences in Cases Involving Children**

Specific concerns relating to the interpretation and application of section 184 offences are dealt with in detail in Chapter 4. Within the context of this research, all but one of ten police officers interviewed had at some point arrested a child on the charge of being a rogue and vagabond. Six police officers interviewed explicitly stated that the children arrested on

rogue and vagabond charges were street children found loitering in town.<sup>281</sup> The rationale behind these arrests was the assumption that street children are generally involved in crimes such as pick-pocketing, robbery and rape. The arrests themselves, however, were not linked to specific crimes. Police sought to explain their arrest practices relating to street children in particular:

- “Most of them are street kids who end up stealing or pick-pocketing”;<sup>282</sup>
- “Usually we arrest street kids that are mostly used by adults in conducting other crimes”;<sup>283</sup>
- “It is usually street kids who are involved in crimes like pick-pocketing or robbery. If they are just found loitering for no proper reason we arrest them”;<sup>284</sup>
- “Mainly these are street kids who loiter around in town with no place of abode”;<sup>285</sup>
- “Most children arrested on charges of rogue and vagabond are street kids and are usually arrested walking around in town at night”;<sup>286</sup>
- “Mainly street kids who rob and rape people”.<sup>287</sup>

Police also cited other reasons for arresting children under section 184 not limited to street children:

- “Most of them we found them that they are about to commit a crime. Sometimes you find that those children are drunk and they end up disturbing people”;<sup>288</sup>
- “Children are arrested on charges of [being a] rogue and vagabond once they have been found at odd hours which can result in them engaging themselves in robberies, gambling and other offences”;<sup>289</sup>
- “Normally because children are just loitering at times they go as far as raping women and robbing other people”.<sup>290</sup>

The terminology used by police is informative; only two officers asserted that the street children arrested had actually been engaged in crime, whereas others employed words such as “end-up”, “at times”, “can result”, “are about to”. Thus, officer interviews suggest that children are being arrested, not when there exists evidence of the commission of specific crimes, but rather when there exists a mere possibility for criminal activity.

---

281 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

282 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012).

283 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012).

284 Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012).

285 Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

286 Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

287 Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

288 Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012).

289 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

290 Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012).

## **Police Procedures During Arrest and Detention of Children**

*We do not follow any procedure when we arrest them and when they are brought to the police station. Then we take their statement, that is, when we know that it is a child, when they tell you their age and then we put them in a different cell from an adult. And at court they are supposed to go to child justice court but most of them we give them police bail and they do not go to court.*<sup>291</sup>

Six police officers out of ten said that they separated children from adults for the purposes of detention in police cells.<sup>292</sup> One officer from Blantyre police station said that “normally, they are just arrested as any other person and put in the adult cells because there are no children cells”.<sup>293</sup> There was no mention during police interviews of a need to separate children from adults during transport to the police station, and the procedure for arrest did not differentiate between adults and children.<sup>294</sup> One officer noted that street children were treated as dangerous criminals in cases of arrests in terms of section 184: “at the time of the arrest we handcuffed them because most of these street kids are dangerous and not cooperative”.<sup>295</sup> This contravenes section 90 of the Child Care, Protection and Justice Act, which states that a police officer effecting arrest shall ensure that handcuffs are not used on children and that the child is not mixed with adults.

Five police officers indicated that children would be taken to the Child Justice Court or magistrate designated as a child court magistrate after arrest.<sup>296</sup> This prescribed practice, however, was not followed in all cases: “They are supposed to go to the child justice court but in most cases they don’t, we just give them police bail.”<sup>297</sup> There can be various reasons for this difference between the provisions of the law and their application in practice. Additional research is required to determine the exact reasons why the provisions of the Child Care, Protection and Justice Act are not adhered to.

---

291 Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012).

292 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

293 Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012). The same officer recommended that more children’s cells should be built “because mixing children and adults in cells only worsens the children’s minds in criminal activities”.

294 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

295 Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

296 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

297 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012).



With regard to statements taken from child-detainees after their arrest, one officer indicated that at least this aspect of the arrest procedure would be executed in the presence of parents, if they were available.<sup>298</sup> Only one police officer indicated that special police officers were dedicated to deal with children: “When arresting children, we usually follow the children procedures, whether during arrest, at the police station and court. The procedures are that we have special police officers who are designated to deal with children issues.”<sup>299</sup> Another police officer indicated that there would be a special officer responsible for prosecuting child cases “if the case needs court intervention”.<sup>300</sup> However, few police officers have been trained on child justice.

One police officer pointed out that arrested children were sometimes counselled prior to their release. “On arresting the children, it is like once they have been arrested on these charges, and are brought here at the police, it has proved that counselling has done a great job because when they have been released at some point, other children have changed their behaviour and others became child ambassadors”.<sup>301</sup> The reference to counselling and special officers dealing with children’s cases suggests that at least some police officers appreciate the value of intervention by the Victim Support Units (VSUs) after arrests for section 184 offences, even if these procedures are not frequently or consistently followed.

## Magistrates’ Responses to Children Charged with Section 184 Offences

Magistrates who were interviewed noted that they had encountered children charged in terms of section 184. A magistrate in Blantyre noted that such cases often concern girls involved in prostitution.<sup>302</sup>

The responses of magistrates to cases in which children had been arrested for section 184 offences varied greatly. Only one magistrate referred to the need to treat children in accordance with the provisions of the Child Care, Protection and Justice Act.<sup>303</sup> Another magistrate said he would refer such cases to the Child Justice Court.<sup>304</sup> Yet another noted that children were often charged jointly with adults in terms of section 184, but that there was a need to treat the children differently in such cases.<sup>305</sup> Two magistrates, however, felt that in child offender cases, the court’s primary responsibility was to consider the evidence and protect the public.<sup>306</sup> The absence of a common philosophy regarding the role and procedure of these offences in the context of children who come into conflict with the law is cause for concern.

---

298 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012).

299 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

300 Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

301 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

302 Interview with Anonymous Magistrate 5 (3 October 2012).

303 Interview with Anonymous Magistrate 1 (9 October 2012).

304 Interview with Anonymous Magistrate 4 (10 October 2012).

305 Interview with Anonymous Magistrate 5 (3 October 2012).

306 Interview with Anonymous Magistrate 2 (9 October 2012); Interview with Anonymous Magistrate 3 (8 October 2012).

## Conclusion

### Alternative Approaches to Child Arrests

Police interviews reflect a key problem in the management of children who come in conflict with the law. All police stations in Malawi have dedicated Victim Support Units (VSUs) as a component of the Community Policing Services Branch. These VSUs include Child Protection Officers who are trained in child counseling and appreciate the need to divert children away from the standard criminal justice system. Unfortunately, there is little coordination between the VSUs who counsel children and the police officers who arrest children. Children thus continue to encounter police officers unaware of the protective provisions of the new Child Care, Protection and Justice Act.

### Respecting the Rights of Children

It is unacceptable that some children are labeled “street children” whose rights deserve little respect, when each child’s case should be attended to on an individual basis. The arrest and release of children who live on the streets is not a sustainable or effective measure to prevent crime. The UN Special Rapporteur on Extreme Poverty and Human Rights has noted that street children are vulnerable to penalization measures, e.g. the prohibition of begging and the stigma that they carry as being “criminal” reduce the avenues available to them to escape the abusive situations they face on the street.<sup>307</sup>

The practice of diversion presents possible solutions, as well as troubling limitations. One problem is that children may be intentionally or unintentionally pressured by police into admission of an offence; moreover, a default assumption frequently operates that if a child has been arrested, he or she must be guilty. This reality suggests that the due process protection relating to adults, i.e. the right to be presumed innocent until proven guilty, is not always afforded to children.

Infrastructural limitations also pose continued problems – many police holding facilities are not custom built, are old and have not been maintained.<sup>308</sup> Whilst police interviewed said that children were kept apart at police stations, this practice is not always followed. At some stations, including Blantyre police station, children continue to be detained alongside adults. This problem has been noted on numerous occasions and stem from the fact that the entire police station has been intended for temporary use only.<sup>309</sup> Elsewhere, children might be held in a cell next to adults, but during the day cell doors are open and children mingle freely with adults. Accordingly, there is very little privacy in police cells, and the potential for children to be negatively influenced or abused by adult prisoners is very real.

In addition, the law adds to the confusion. Section 97<sup>310</sup> of the Child Care, Protection and Justice Act allows for children to be transported and detained with adults where they were jointly charged with such adults. This provision ignores the potential for abuse that may occur, even instances where adults and children know each other. Police seem to have

---

307 *Report by Special Rapporteur on Extreme Poverty and Human Rights supra* note 1, 13.

308 OSISA *supra* note 266, 55-60, African Policing Civilian Oversight Forum *Policing and Human Rights: Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials* (2012) 67.

309 OSISA *supra* note 266, 55 and 62.

310 Section 97 of the Child Care, Protection and Justice Act provides that “no child, while in detention in a safety home or reformatory centre or while being conveyed to or from any court or while awaiting before or after attending a criminal court, shall be permitted to associate with an adult, not being a relative, who is charged with an offence other than the offence with which the child is jointly charged with the adult.”

taken this provision to also mean that children can be conveyed with adults where they are rounded up for similar offences, even if they are not jointly charged. This is often the case where sweeping exercises are conducted and both adults and children are arrested on charges of contravening section 184 of the Penal Code. Section 97 is contrary to section 42(g)(iii) which requires that children under eighteen be kept separate from adults. This demonstrates the difficulties in interpretation created by the variance in ages in the Child Care, Protection and Justice Act and the Constitution. At all times, the best interests of the child should prevail. This also means that there will be instances when older children should not be kept with younger children due to the risk of abuse.<sup>311</sup>

The fact that children cannot access food whilst in custody is similarly unacceptable and a clear violation of the provisions of the Child Care, Protection and Justice Act, as well as various international standards. The UN Standard Minimum Rules for Treatment of Prisoners require that every prisoner be provided by the administration at usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.<sup>312</sup> Relying on non-governmental organisations (NGOs) to provide food to persons in custody is also not a sustainable way to address this concern.

From the above research, it is apparent that there has not been enough of an effort to educate and sensitise police and magistrates about new laws concerning child arrest and detention. Arrests effected for crime-prevention purposes are unacceptable. It is worrying that researchers consistently discovered children in custody. More training is needed to communicate the facts and spirit of reformed laws affecting child-offenders.

More recently, the police have been training officers as part of a diversion pilot programme in Blantyre and Limbe. The focus of this programme is to divert children from the criminal justice system by cautioning the child first. It is only in the case of repeat offenders where children should then be arrested and taken to a place of safety.<sup>313</sup> It is important to monitor the progress of this intervention.

When it comes to the problems relating to the arrest of children for nuisance-related offences under section 184 of the Penal Code, it is important that stakeholders continue collaboration to ensure that the provisions of the Child Care, Protection and Justice Act are enforced.

The National Child Justice Forum (NCJF) seeks to establish a fair and human juvenile justice system based on the principles of restorative justice. The immediate purpose of the NCJF is to ensure that detention is a last resort, of the shortest possible time and takes into account the interests of the victim and child offender. The NCJF is a programme of the judiciary involving the police; the Ministry of Gender; the Ministry of Justice; the Ministry of Health and NGOs. The NCJF specifically works to strengthen existing structures that respect the rights of children in conflict with the law and other vulnerable children.

The Paralegal Advisory Services Institute (PASI) employs paralegals who are often the only resource for legal consultation with which child-offenders have contact. These paralegals visit police detention facilities and help to hold police accountable where individuals have

---

311 Interview with Kayira and Kainja *supra* note 264.

312 Rule 20 of the UN Standard Minimum Rules for the Treatment of Prisoners (1955).

313 Interview with Kayira *supra* note 193.

been detained for longer than 48 hours.<sup>314</sup> Paralegals can furthermore explain the legal process to children and assist them in locating and contacting their parents or guardians. To a certain extent, PASI fills a gap in government services where neither the police, nor legal aid, nor social workers are available to adequately attend to the needs of children.

The judiciary is responsible for convening Court User Committees (CUCs), which bring together a range of stakeholders to discuss challenges relating to the criminal justice system, particularly as they relate to women and children in prison and pre-trial detention. A CUC Taskforce exists at the national level to guide the development of performance standards for dealing with individuals who have been arrested or imprisoned. CUCs are an important intervention to improve the provision of services at a district level and to improve coordination between service providers. The Lay Visitors' Scheme is also an important tool to regularly monitor conditions in police detention facilities.<sup>315</sup>

Together, these and other stakeholders can approach different aspects of the situation of child-offenders and work together to address the myriad challenges posed by this area of Malawi's criminal law.

---

314 The Centre for Human Rights Education, Advice and Assistance (CHREAA) in Blantyre houses the PASI paralegal programme in the district and screens all women and children at the six police stations in Blantyre.

315 Interview with Kayira and Kainja *supra* note 264.