



JUVENILE JUSTICE ACT REPORT

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Key stakeholders in Port Vila and Luganville:

The staff in the government administrations, municipalities, non-government organizations, Constitutional bodies and statutory bodies, as listed in Appendix 1.

Others:

The staff in the provincial administrations, non-government organizations and government departments in the provinces as listed in Appendix 1.

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FOREWORD

I first joined the Vanuatu Law Reform Commission on 27th April 2018. At this time, consultations in provinces have all been undertaken by the Research Team. So I cannot be able to share the excitement of making consultations and seeing people expressing themselves about this exercise that addresses one of the major gaps within Vanuatu's social justice sector.

As we read more articles on the newspaper these days on the Court decisions on criminal offences, we tend to concentrate our focus on the perpetrators but ignore the victims of these crimes who are often juveniles. Further to that, it also lingers in my mind as to what would have happened to myself during my juvenile years if there was such a system in place.

Juveniles are the core of the family unit but often they lose track of the expectations of the family. However the family should always be the first institution of discipline and discipleship. This is the very core of our society. One interesting aspect of our society is the continued use of custom and its parallel pathway with the formal system and Juvenile Justice would for sure benefit from this parallel paths.

In this report, we would experience a new area of law that is long overdue. As always, there may be skepticism about what a juvenile justice system would bring to Vanuatu. I believe that as we move on to take the initial steps forward, the citizens of Vanuatu would be able to embrace the benefits of having a juvenile justice system in place.

This new area of law would also be a stepping stone for other institutions to venture on to enhance their organizational framework to adhere to the international covenants that Vanuatu is a signatory to especially in the field of human rights.

And lastly, I would like to take this opportunity to thank all the stakeholders who participated in our consultations. Despite the challenges and difficulties we had, we all achieved this final recommendations and report for the Stakeholders especially the Ministry of Justice.

Lawson Jack Samuel

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INTRODUCTION

Juvenile justice system is a system that was first established in the US a century ago with the aim of diverting young offenders from harsh punishment in criminal courts and encouraging rehabilitation based on the individual juvenile's needs.¹ It focuses on the child as a person in need of assistance, not on the act that brought him or her before the court². The components of a juvenile justice system include the juvenile court proceedings as well as the corrections that a child must go through. The judge in most cases during proceedings is to act in the best interest of the child.³

Vanuatu lacks a Juvenile Justice Act that establishes a separate formal juvenile justice system. Currently many institutions hold responsibilities for different parts of the juvenile justice system. The requirements for the management of juveniles in contact with the law is scattered throughout many laws and guided by international human rights instruments such as the United Nation Convention on the Right of Children (CRC) which Vanuatu became a member of in 1993. These international laws set out frame works on the rights of a child as a guide that is followed by certain institutions in the country in dealing with juvenile offenders. It is left to those institutions through the development of procedural guidelines with their own respective offices, and individual officers to exercise discretion in their dealings with juveniles.

This report will look at ways to address juvenile issues in Vanuatu and specific considerations will be given to:

- a) Age determination and rights of juveniles;
- b) Juveniles, police and chiefs in Vanuatu;
- c) Court proceedings and juvenile courts;
- d) Sentencing and diversion program of juveniles;
- e) Juvenile and Institutions;
- f) Records and privacy issue of juveniles;
- g) Victim support; and
- h) The issue with other laws that relate to juvenile issues in the country.

In addressing these issues, the Vanuatu Law Reform Commission (VLRC) undertook consultations of this review through-out five provisions within the country. These provisions are

¹The National Academic Press, *Juvenile Crime, Juvenile Justice*, (2001) <https://www.nap.edu/read/9747/chapter/7>, (Accessed: 1/08/18)

² Ibid

³ Above n1

Shefa, Sanma, Malampa, Penama and Tafea provisions. This report considers Vanuatu's obligations internationally, nationally and traditionally and recommendations made are based on findings made in the communities, provinces and with stakeholders in Luganville and Port Vila.

TERMS OF REFERENCE

Section 7 of the *Law Reform Commission Act* allows the Commission to carry out, on its own initiative, studies and research as it considers necessary. In 2017, the Law Reform Commission in one of its meeting decided that there was a great need for the creation of a Juvenile Justice Act. Since independence, Vanuatu has not had a Juvenile Justice Act and as a result, different departments who deal with juveniles who come into contact with the law have come up with their own informal system of dealing with these juveniles.

As the review was initiated by the Commission, the directions given from the Commission's meeting was used as the reference in place of a terms of reference form. In taking over this review, the office of the Law Reform Commission found that there were several issues that needed to be dealt with.

Issues that were raised with a lack of a Juvenile Justice Act ranged from a concern on the definition of the terms used with young people and the ages related to these different terms to how young people were treated by the police. Furthermore, there were questions raised on the availability of resources for programs, such as diversion and counselling, directed towards helping young offenders as well as victims and witnesses.

The Commission in undertaking this review also had to consider the practicality and feasibility of the establishment of a Juvenile Court along with a Juvenile Detention center to cater for juveniles. With these issues at hand, the Law Reform Commission has proceeded to carry out a consultation to find out the people's views on these issues and this report is the result of this consultation.

METHODOLOGY

The Juvenile Justice Review Report began as a new initiative in 2017. A TOR was created by the office in the beginning of the year on the issues relating to Juvenile Justice. To clarify issues, a brief consultation was first carried out with stake holders and Independent research was made which led to the production of the Issues Paper. An issues paper was created which documented all the issues relating to the topic and questions which require opinions from the stakeholders and the public as to what they think is appropriate with regards to Juvenile Justice. The scope of research was limited to the Pacific region for relevance purposes. Being an initiative from the LRC, costs and funding relating to the production of an evidence based report came from the LRC office.

Coverage

In meeting the requirement to carry out consultation in Vanuatu, the LRC team could only visit five out of six provinces. Torba province was excluded for consultation in this review due to financial and time constraints.

For each province, the team made arrangements beforehand with each Secretary General of each Province to arrange for the team to speak with the Area Secretaries. The Area Secretaries will represent the views of the communities. Government department in the outer provinces were also contacted to arrange for a meeting with the team for consultation.

During mid-March, the team began its consultations in the province of Sanma followed by Penama, Malekula, Tafea then finished off with Shefa. An average of 2 days was spent in each province except for unforeseen circumstances, which are discussed later, which prolonged the teams stay in Sanma province.⁴

In Santo, a total of 14 participants took part in the consultation comprising of mostly government officers. A few officers belonged to non-government agencies. Only the Secretary General of Sanma province participated as the Area Secretaries could not make it. Although the team visited Malampa province, there was no consultation carried out. In Penama province, a total of 14 participants provided their views involving the acting Secretary General and the representatives of government offices. In Tafea province, a total of 11 participants took part in the consultation comprising mostly of Area Secretaries, a few government officers as well as representatives from non-government organizations.

In Efate, a two days' workshop was organized which brought together main stakeholders in Port Vila to provide their views on the issues which was less timely and costly. On the first day,

government and non-government agencies took part in the consultation. Where it was impossible for relevant stakeholders to attend the workshop, the office made individual office visits to obtain views. On the second day, a group of young people attended workshop to provide their opinion on the issues. A total of 25 participants participated in the Port Vila consultations.

Method of Data Collection

Prior to writing up the Issues Paper, discussions were made with relevant stakeholders to gather more information and clarify issues. Note taking was used to record data during discussions.

Desktop research was also another method of collecting data whereby research is carried out using the internet to compare approaches used in various jurisdictions.

The main method used by the team during consultation was the use questionnaires which were formed based on the issues and questions raised in the Issues Paper. There are two different categories of questions, the technical ones and the non-technical questions. The technical questions are directed at the relevant stakeholders who would have knowledge in these areas according to their positions in their work places. Non-technical questions were directed to all people who participated in the consultation.

During discussions each day, one person from the team takes notes with a pen and paper while another asks questions to the participants.

After each day of consultation, the team members meet and compile notes. Discussion also happens during these meetings to clarify ideas that are still clear in the minds of the team members. Notes are saved to be used for the report writing.

The team was fortunate to visit Ambae Island in the Penama Province when there was a Meeting taking place which brought together all the representatives of government offices in the Province. The team took the opportunity to consult during this meeting instead of visiting each office located on Ambae.

Limitations and Challenges

This review had its own set of limitations and challenges. Being a new initiative from the LRC, funding was limited hence consultation was planned and carried out accordingly. The team had to carry out consultation for a period of 2 days' maximum on each island except for Santo which had to be extended due to a tropical cyclone happening at that time. Being on a strict schedule, a cyclone happening, resulted in flight cancellation prolonging the stay in Santo and thus shortening the consultation period on the other islands. Torba province being the most

northern province of Vanuatu was not visited for consultation purposes due to limited funds. Another contributing factor affecting the limited places for consultation was that the team had to plan its consultations according to flight schedules. Communities in the provinces could not be visited as well due to limited funds. Consultation thus took place in the provincial headquarters for most provinces with the Area Secretaries representing the views of the people they represent.

Another challenge which could not be controlled was the fact that consultations could not happen on weekends as offices were closed.

In Malekula, the team faced a different set of challenges where no consultation could be carried out because of land ownership issues which saw Namele leaves being placed in front of government offices which meant Tabu and prevented government officers from entering. Not only this, but a tropical cyclone also hit Malekula which affected the team's schedule to conduct consultations. Certain government offices had to go out into the other villages of Malekula to provide relief and thus could not participate in consultations. Issues papers and questionnaires that were left in one of the offices were never returned and or worked on after a number of follow ups from the LRC team.

Prior to departure to the outer provinces, confirmed arrangements were made with the Area Secretaries for consultation to take place on certain days. Lack of cooperation among the leaders did not permit this to happen with certain offices and individuals as there was no notice given. Other government officers and individuals also had other plans going on and could not make it to participate.

Back in Port Vila, a two-day workshop which was organized and took place had poor attendance from all the relevant stakeholders despite confirmed attendance. This limited the general populace to participate in consultations. For over 50 invitations, only 25 representatives from stakeholders attended and participated in this consultation.

EXECUTIVE SUMMARY

While there is a lack of legal framework for juvenile issues, some government institutions have already been working together to address any arising juvenile matters from when a juvenile is first caught to when they are being dealt with, with the different available measures. This review carried out by the VLRC office aims to highlight the issues that are faced by the different institutions involved in the juvenile justice system and the juvenile justice system itself. Furthermore, it provides recommendations or approaches that can be used to address these issues.

The report begins with the first steps or stages that a juvenile goes through when he or she commits an offence. The first chapter of the report basically provides recommendations that address the lack of a proper definition or determination of age. Another missing element as well is there are no provisions within any law that provides for children's rights.

From here, the report then takes a look at juvenile's interaction with the Police. Currently, the Police Department work with and by a Standard Operating Procedures (SOP), which provides a guideline on how the Police are to deal with juveniles when they come into contact with them. It is this SOP that the VLRC has recommended be used as a general guideline in the proposed Act for the Police to follow with regards to juveniles, as it already being used. Furthermore, as the chiefs are also already participating in carrying out certain diversion programs pre-court hearing, recognition should be given to their role and that they be identified and appointed as Authorized Person, similar to that of the Vanuatu *Family Protection Act*.

For the juvenile cases that are sent to the courts to be dealt with due to the seriousness of the offence, it was discovered during consultations that the Chief Justice had already a paper giving Practice Directions in relation to children who are in contact with the Court Process in 2013. These Practice Directions cover all the areas and stages that children go through with the formal court procedures, from their first contact with the police to after sentencing. The Practice Directions are very detailed and extensive and as such, it has been on of VLRC's recommendations that these Practice Directions be used as guidelines for when children are sent through to the formal court system.

The report also looked at the sentencing and diversion programs offered by the relevant departments to juveniles. Like most other countries, Vanuatu does not encourage the sentencing and imprisonment of juveniles. While some juveniles do go through the formal court systems, when it comes to sentencing they are often referred to diversion programs as opposed to serving an imprisonment term. There are already some existing diversion programs being offered by the Department of Correctional Services and the VLRC has recommended that a

section be provided to cater for these along with some more programs to be added to the diversionary programs.

When it came to the issue of institutions, there was a lot of discussion on whether a separate institution should be established to look after juvenile issues. As stated earlier, there is already an informal system in place with different governmental departments working together to address juvenile issues. Due to the lack of resources such as human resources and financial constraints, the VLRC recommended that the current informal system in place be formalized in the proposed Act until such time when the establishment of a separate institution becomes a possibility.

Other issues considered included the identity of juveniles involved in any crime or cases and the juvenile records of any juvenile offenders. It was recommended by the VLRC that there was to be a prohibition of any information disclosed by any person to the public regarding the details and records of any juvenile who is a party to the proceeding. Furthermore, the records of juvenile offenders are to be deleted once they become adults after the age of 18 and anyone acting contrary to this is to be held liable.

With all this in mind, amendments will also be needed to be made to the *Correctional Services Act* to cater for some of the recommendations made by the VLRC. In addition, as is common practice, a provision is also to be put in to allow for regulations to be made by the Minister.

TERMS AND ACRONYMS

Abbreviation	Explanation
UNCRC	United Nations Convention on the Rights of the Child
PNG	Papua New Guinea
CRC	Convention on the Rights of the Child
UNICEF	United Nations International Children's Emergency Fund
SRBJ	Stretem Rod blong Jastis
VPF	Vanuatu Police Force
SOP	Standard Operating Procedure
FPU	Family Protection Unit
PIMS	Police Investigation Managing System
MOA	Memorandum of Agreement
NGOs	Non-Government Organizations
UK	United Kingdom
UN	United Nations
USA	United State of America
NZ	New Zealand

PART ONE – AGE DETERMINATION AND RIGHTS OF JUVENILES

JUVENILES AND AGE DETERMINATION IN VANUATU

Current Situation

In Vanuatu, the term ‘Juvenile’ is not defined in any of its legislation. Collins English Dictionary defines the term Juvenile as a child or young person who is not yet old enough to be regarded as an adult⁵. Different legislations have diverse definitions of the term ‘Child’. The definition of the term ‘Child’ and the determination of age vary and are inconsistent.

The *Penal Code* differentiates ages against the different types of offences committed by offenders under the age of 18 years or classified as a child or minor. The age of responsibility as prescribed to be a child of 10 years of age but under 14 years of age⁶. However, the *Penal Code* does not specifically state that the term Juvenile should refer to persons or individuals under the age of 18 years.

Similarly, Section 2 of the *Control of Marriage Act* (Cap 45) provides that no person of the male sex being under the age of 18 years and no person of the female sex being under the age of 16 years may lawfully marry⁷. The *Employment Act* (Cap 160) restricts person under the age of 12 to be employed in agricultural undertaking, 15 or under to be employed on ships or industrial undertaking and 18 or under is not allowed to work at night in any industrial undertaking⁸.

While provisions of the domestic laws vary in terms of the definition and the age determination of a child, Article 1 of the CRC explicitly stated that a child is someone under the age of 18 years unless under the law applicable to the child, majority is attained earlier⁹.

A clear definition of the term Juvenile including the determination of the Juvenile age would set light to the current issues relating to the definition and age of juveniles.

⁵ Collins English Dictionary, Definition of Juvenile, <https://www.collinsdictionary.com/dictionary/english/juvenile> (Accessed: 06/06/18)

⁶ Section 17, *Penal Code* [Cap 135] (Vanuatu), http://www.paclii.org/vu/legis/consol_act/pc66/ (Accessed: 06/06/18)

⁷ *Control of Marriage Act* [Cap 45] (Vanuatu), http://www.paclii.org/vu/legis/consol_act/coma194/ (Accessed: 06/06/2018)

⁸ *Employment Act* [Cap160] (Vanuatu), http://www.paclii.org/vu/legis/consol_act/ea666/ (Accessed: 06/06/2018)

⁹ United Nation Convention on the Rights of the Child, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (Accessed: 06/06/2018)

Comparable Jurisdictions

The Fiji's *Juveniles Act* [Cap 56] differentiates the term 'child' from 'young person' and 'juvenile'. The term 'child' means a person who has not attained the age of 14 years. 'Young person' means a person who has attained the age of 14 years, but who has not attained the age of 17 years. The term 'Juvenile' means a person who has not attained the age of 17 years, and includes a child and a young person¹⁰.

The age jurisdiction of the juvenile justice system in Victoria is from 10 years to 17 years inclusive¹¹. In Western Australia, the *Young Offenders Amendment Act 2004*, refers to juveniles as children under the age of 18 years¹².

In Papua New Guinea (PNG) juvenile is defined to mean a person who is 10 years old or older but less than 18 years old¹³. In Solomon Islands the term child refers to someone under the age of 14 years and young person to mean a person who is 14 years of age or upwards and under the age of 18 years¹⁴.

With regard to age determination, PNG's legislation provides the courts with power to determine age based on the person's birth certificate or baptismal certificate, previous determination of age by courts, medical records, church, village or school records, or other documentation of a similar nature, statements made by the parents or any other person likely to have direct knowledge of the age of the person, an estimation of the age of the person made by a medical practitioner, and the person's physical appearance. The legislation restricted the courts to not determine the age of a person solely on the basis of the person's physical appearance¹⁵.

¹⁰ *Juveniles Act* [Cap 56] (Fiji), http://www.paclii.org/fj/legis/consol_act/ja129/ (Accessed: 06/06/18)

¹¹ *Children and Youth and Families Act 2005* (Victoria, Australia), [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/edfb620cf7503d1aca256da4001b08af/15A4CD9FB84C7196CA2570D00022769A/\\$FILE/05-096a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/edfb620cf7503d1aca256da4001b08af/15A4CD9FB84C7196CA2570D00022769A/$FILE/05-096a.pdf) (Accessed: 07/06/18)

¹² *Young Offenders Amendment Act* (Western Australia), [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_5191.pdf/\\$FILE/Young%20Offenders%20Amendment%20Act%202004%20-%20%5B00-00-02%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_5191.pdf/$FILE/Young%20Offenders%20Amendment%20Act%202004%20-%20%5B00-00-02%5D.pdf?OpenElement) (Accessed: 07/06/18)

¹³ Section 4, *Juvenile Justice Act 2014* (Papua New Guinea), http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 07/06/2018)

¹⁴ *Juvenile Offenders Act* (Solomon Islands), http://www.paclii.org/sb/legis/consol_act/joa194/ (Accessed: 07/06/2018)

¹⁵ Section 4, *Juvenile Justice Act of 2014* (Papua New Guinea), http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 09/06/18)

Consultations

During the consultations, 90% of the people that were consulted were of the view that the term juvenile should be defined as children under the age of 18 years of age. This is to correspond with the standard age of 18 years as set by the CRC. The 18 years of age is not an arbitrary age but recognises the inherent vulnerability of people under this age and the need for protection.

Another popular view that emerged was that juveniles under the age of 18 years should be further categorised similarly to that in the *Penal Code*. The different age groups should be placed separately with different correction programs designed to suit their age and applied to them.

Others suggested that two different ages should be stipulated in the law, the minimum age of criminal responsibility and the maximum age for the application of special juvenile justice protections. The minimum age was suggested to be put at 14 years above the 12 years as stipulated by the CRC as the minimal acceptable age of criminal responsibility¹⁶. The maximum age of criminal responsibility on the other hand is suggested to be put at 18 years of age.

Commission's Views

The issue with the definition of the term Juvenile varies and is unclear in Vanuatu. The Commission had carried out researches and public consultations into this area of interest and after careful consideration, the Commission is of the view that the definition of the term 'juvenile' must be clearly defined in any proposed Juvenile Justice legislation. The definition must take into consideration the social as well as the international age standard given to juveniles as specified under the CRC.

More so, the Commission notes that Article 40.3(a) of the CRC requires state parties to establish a minimum age below which children are presumed not to have the capacity to infringe the penal law. The UN Committee on the Rights of the Child has stated that 12 years is the minimal acceptable age of criminal responsibility¹⁷. That being said, the Commission is of the view that any proposed Juvenile Justice legislation must correspond with the required minimal acceptable age as provided for by the CRC.

In view of the different terminologies 'Juvenile', 'Young Offenders' and 'Young Person', the Commission agrees that the use of a number of different terms throughout the different domestic legislation and international conventions is sometimes confusing. The Commission

¹⁶ Juvenile Justice Issue Paper: UNICEF Submissions 2017

¹⁷ UN Committee on the Rights of the Child, General Comment No. 10, para 32

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11
(Accessed: 09/06/18)

agrees with the response paper from the Stretem Rod of Justice Program (SRBJ) that any proposed legislation as well as the existing legislation needs to differentiate and identify people under 18 years old to reflect current research which strongly supports a recognition of the mental and physical state of people at different stages of development not ignoring associated issues in relation to the mental and physical state of mind of Juveniles¹⁸.

With regard to the issue of age determination, the Commission is of the view that any proposed legislation should outline proper procedures and criteria to cater for age determination. These procedures and criteria must be used across the board and the courts should be able to determine the age of juveniles who ended up in courts against those criteria and procedures. The courts should be able to know what documents are required to determine the age of a person as seen in the *Juvenile Justice Act* of PNG.

Therefore, the Vanuatu Law Reform Commission makes the following recommendations:

Recommendations: That any proposed *Juvenile Justice legislation* as well as the existing legislation should have provisions clearly defining the term 'Juvenile' as being the person under the age of 18 years of age as outlined by the CRC as well as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

Recommendations: That the age of criminal responsibility be increased to 12 years of age as stipulated by the CRC.

Recommendations: That any proposed Act as well as the existing legislation needs to differentiate and identify people under 18 years old. For instance, 'child' to mean person under the age of 12 years, and 'young person' to mean person who has attained the age of 12 years, but who has not attained the age of 18 years. The term 'Juvenile' to mean a person who has not attained the age of 18 years, and includes a 'child' and a 'young person'.

Recommendations: That the age determination must be included in any proposed Juvenile Justice legislation to cater for situations where no proper civil status records are available. A proposed legislation should be able to establish criteria's and procedures in place for the courts to follow in determining the age of a person.

¹⁸ Richards K. 2011. What makes juvenile offenders different from adult offenders? Trends and issues in crime and criminal justice No. 409, Canberra: Australian institute of Criminology.
<http://aic.gov.au/publications/tandi/tandi409> (Accessed: 09/06/18)

THE RIGHTS OF JUVENILES

Current Situation

Vanuatu does not have a legislation to specifically regulate the rights of juveniles. Juvenile offenders, victims and witnesses have different rights which supposed to be regulated. Currently basic rights of a child are scattered amongst different legislation. For instance, with regard to child victims, some sections of the *Penal Code* made reference to the protection of children from all forms of sexual exploitation and abuse as highlighted by Article 34 of the CRC. Section 96 (1) states that a man shall not have or attempt to have sexual intercourse with a girl (under 20 years) under his care or protection¹⁹. Section 98(1) protects the child from the act of indecency and section 102 protects the child from the act of slavery and human trafficking and so forth. Moreover, the *Penal Code* protects children under 10 years of age from responsibility for crime²⁰.

The CRC of which Vanuatu is a State Party to provides for the summary of all the rights of a child²¹. Article 1 talks about the age and the protection for all the children under that specific age, Article 2 provides for non-discrimination of a child on the basis of their race, religion or abilities and so forth²².

The Constitution²³ provides for the fundamental rights and freedoms of the individuals which also relates to juveniles. The Constitution also provides for freedom from inhuman treatment and forced labour²⁴ and equal treatment under the law, except that no law shall be inconsistent with this subparagraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of underprivileged groups or inhabitants of less developed areas²⁵ as stipulated by Article 37 of the CRC.

19 *Penal Code* [Cap 135] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/pc66/ (Accessed: 18/06/2018)

²⁰ Section 17(1), *Penal Code* [Cap 135] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/pc66/ (Accessed: 18/06/2018)

²¹ Article 1-40, United Nation Convention on the Rights of the Child, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (Accessed: 18/06/18)

²² Ibid

²³ Constitution of the Republic of Vanuatu, Article 5, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 18/06/2018)

²⁴ Constitution of the Republic of Vanuatu, Article 5(1)(e), http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 18/06/2018)

²⁵ Constitution of the Republic of Vanuatu, Article 5(1)(k), http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 18/06/2018)

Comparable Jurisdictions

The Constitution of PNG provides for the rights and freedom of individuals. People have a right to life, freedom from inhuman treatment, freedom of movement, freedom of expression and so forth²⁶. The *Juvenile Justice Act* of PNG emphasises on the rights of a child or juvenile. One of the objectives of the Act is to ensure that the rights of juveniles charged with or alleged to have committed an offence are fully respected and protected. The Act also provides support and counselling to juveniles. It also advice juveniles on their legal rights in refusing to answer questions, legal rights of juveniles to treatment if arrested, informs juveniles of their right during pleas and inform juvenile detainees about their different rights while in the correctional centers²⁷.

On the contrary, the *Criminal Procedure Code* of Fiji²⁸ and the *Evidence Act* of Samoa²⁹ have included the special procedural protections for child victims and witnesses in the criminal justice system. Chapter 2 of the Fiji's Constitution does mention the bill of rights of individuals³⁰ and so as the Samoan's Constitution. Part II of the Samoan's Constitution reflects on the fundamental rights of individuals which includes that of a juvenile³¹.

Consultations

From the consultations, more than 95% of the people were of the view that any proposed *Juvenile Justice Legislation* must take into consideration the rights of juveniles that were provided for under the CRC and those in accordance to the local context or culture.

Whilst dwelling on the above general consensus, around 90% of those consulted were of the view that care and caution should be given to those rights. This is to avoid the misuse of these rights by children to abuse the process of the law. Furthermore, misrepresentation of these rights can give children the sense and thought that they can get away with any criminal act due to these rights.

The Police were of the view that rights should come with responsibilities, should be properly controlled and should be clearly spelled out in law. This is to avoid Police of being wrongly accused when carrying out their duties. The establishment of the Professional Standard Unit by

²⁶ Division 3 of the Constitution of Papua New Guinea, http://www.paclii.org/pg/legis/consol_act/cotisopng534/ (Accessed: 16/06/2018)

²⁷ *Juvenile Justice Act* (Papua New Guinea), http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 18/06/18)

²⁸ Criminal Procedure Code (Fiji), http://www.paclii.org/fj/legis/consol_act/cpc190/ (Accessed: 26/06/18)

²⁹ Evidence Act 2015 (Samoa), http://www.paclii.org/ws/legis/consol_act/ea201580/ (Accessed: 26/06/18)

³⁰ Constitution of Fiji <http://www.paclii.org/fj/Fiji-Constitution-English-2013.pdf> (Accessed: 26/06/18)

³¹ Constitution of Samoa http://www.paclii.org/ws/legis/consol_act_2008/cotis1960438/ (Accessed: 26/06/18)

the Vanuatu Police Force creates a caution for officers to undertake their duties with caution and in a very strict, procedural manner and according to law.

Commission's Views

The Commission notes that the rights of juveniles must correspond with the international standard, the CRC. However, the Commission is of the view that careful considerations should be given to allow juveniles rights bearing in mind that such rights also have with them responsibilities. Any proposed Juvenile Justice legislation should take into consideration the issue of balancing the rights of a child against the responsibilities that comes with those rights.

Any proposed juvenile justice legislation should provide for the rights of the juveniles in these different categories; rights of the juveniles as victim, rights of the juveniles as witness to an offence committed and the rights of the juvenile as an offender. This is so that the Constitution as well as the international obligation under the CRC are adhered to. Human rights are universal and everyone are equal under the law. A juvenile offender has the same right as everybody else.

With regard to issue of the rights of a juvenile and the work of the police officers, the Commission is of the view that any proposed Act should be explicit in terms of responsibilities that comes with the rights and where the police may be able to intervene to uphold the rule of law. The drafting of such a legislation must be clear so as it would not cause hindrance to the work of the Police.

In view of whether the rights pertaining to children found in the different legislation be combined under the proposed Juvenile Justice legislation, the Commission feels that those rights should remain where they are but must correspond with the principal Act which is the *Juvenile Justice Act*, the Constitution and the CRC.

Therefore, the Vanuatu Law Reform Commission makes the following recommendations:

Recommendations: That any proposed Juvenile Justice legislation should have a specific part on the rights of juveniles. That the proposed Act should take into consideration the rights of the juvenile as spelled out in the United Nation Convention on the Rights of the Child (CRC).

Recommendations: That any proposed Juvenile Justice legislation should be able to take into consideration the rights and responsibilities of Juveniles and be able to stipulate clearly where the law enforcement officers such as the police may be able to intervene to uphold the rule of law.

Recommendations: That any proposed Juvenile Justice legislation should explicitly express the rights of the juvenile as a victim to the offence committed, the rights of the juvenile as witness to an offence committed and the rights of the juvenile as an offender.

Recommendations: That the proposed Juvenile Justice legislation should be the principal Act to deal with juveniles, children, minors, young persons or young offenders and that relevant amendments should be done with the other Acts to correspond with the proposed principal Act which is the *Juvenile Justice Act*, the Constitution and the CRC.

PART TWO – JUVENILES, POLICE AND CHIEFS IN VANUATU

JUVENILES AND POLICE IN VANUATU

Current Situation

The Vanuatu Police Force (VPF) plays a critical role in maintaining law, peace and order in the country. Section 4 of the *Police Act* (Cap 105) stressed that the essential duty of the police is to maintain an unceasing vigilance for the prevention and suppression of crime³². The Act stressed that the police forces are to be deployed throughout the country to preserve peace and maintain order, protect the lives of the people and their property and enforce the laws. It continues to stress that the Police will work with the community and the courts in order to effectively carry out their duties and responsibilities³³.

Whilst the law clearly outlines the roles and functions of the police officers, it failed to stipulate how police could conduct themselves when dealing with juveniles. The law fails to provide clear guidance on how juveniles are to be treated when reported to the police and it does not outline clear procedures on how to deal with juveniles when reported, arrested and charged, investigated and the processes leading up to court.

In August 2011 the Police with the support of UNICEF developed a 'Standard Operating Procedures' (SOP) to address the issue of handling juveniles in the country. This SOP clearly outlines the duties of police officers when dealing with juveniles. It highlights the different procedures and processes to follow, the right for legal representation, the different diversionary programs available to juveniles and so forth³⁴. The SOP acts as an investigation checklist for dealing with juveniles and it contains information and clear procedures beginning at the time of reporting up to the end of the police investigation³⁵. The VPF is currently teaching the SOP at the Police College³⁶ and currently implementing the SOP.

Prior to the development of the SOP, a huge number of juvenile cases ended up at the courts registry. Human rights violation in the past had also been high due to the lack of operating procedures to deal with juveniles³⁷. A recent report from the Family Protection Unit (FPU) shows that the number of cases report for investigation is slowly decreasing. Since the year

³² *Police Act* [Cap 105] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/pa75/ (Accessed: 09/06/18)

³³ Ibid

³⁴ Standard Operating Procedure– Investigations Involving Children and Youth (August 2011), Vanuatu Police Force

³⁵ Interview with the Deputy Commission and the Police Management Team, Police Commissioners office, Vansec, Port Vila

³⁶ Interview with the Deputy Commission and the Police Management Team, Police Commissioners office, Vansec, Port Vila

³⁷ Interview with inspector Davis Saravanu, Family Protection Unit (FPU), Police Station, Port Vila

beginning January to August of 2017, the FPU in Port Vila shows only a total of 40 cases so far as shown in the table below³⁸.

Types of Offence	Law Governing the Offence	Total Number of Reported Cases
Sexual Intercourse without Consent	S. 90 Penal Code (Amendment) Act 2006	11
Act of Indecency with a Young Child	S. 98A Penal Code Amendment Act 2006	7
Unlawful Sexual Intercourse	S. 97 Penal Code Act [Cap 135]	7
Sexual Intercourse with Child under Care and Protection	S. 96 Penal Code Act [Cap 135]	2
Incest	S. 95 Penal Code Act [Cap 135]	1
Others		12
TOTAL		40

Comparable Jurisdictions

The CRC Article 37(b) requires that arrest and police custody be used against a child only as a measure of last resort³⁹.

Part IV of the *Juvenile Justice Act* of PNG provides provisions on juveniles and the police. The system was set up to manage juveniles who come into conflict with the law. It provides the limited guidance on police interaction with a child or a juvenile⁴⁰. The Act includes limitation on the use of force against children, guidance on the use of language and police conducts towards children, standards for the treatment and requirement for juveniles to be separated from adult detainees⁴¹. The Act also has provisions on diversion programs, arrest of a juvenile and methods of initiating proceeding against a child⁴².

The *Children, Young persons, and Their Families Act* 1989 of New Zealand share a similar view to the *Juvenile Justice Act* of PNG. However, the Act further explicitly stated that if the child is

³⁸ Country Report on Youth Justice System – Vanuatu 25th to 28th September 2017.

³⁹ The Convention of the Rights of the Child, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (Accessed: 18/06/18)

⁴⁰ *Juvenile justice Act* of 2014 (Papua New Guinea), http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 16/06/18)

⁴¹ Juvenile Justice Issue Paper: UNICEF Submissions 2018

⁴² Above n40

to appear before a court, it does lay out court procedures that the court needs to follow in dealing with the juvenile⁴³.

Consultations

During the consultation, there was general consensus that Vanuatu should uphold the international principal that requires that arrest and police custody be used against a juvenile only as a measure of last resort. The safest place to deal with juveniles is at the community level as suggested by the concept of community policing addressed in the newly gazetted amendment to the Police Act⁴⁴. This is to protect and safe guard the reputation of juveniles.

There was also general consensus that the SOP of the VPF is a good document that could effectively manage juveniles in Vanuatu if properly implemented. Those consulted were of the view that any proposed Juvenile Justice legislation should give effect to the SOP and that the main provisions of the SOP should be incorporated into any proposed Act.

More than 50% of the people consulted agreed with the idea of having a separate unit within the VPF to manage juvenile cases. However, the issue with lack of resources and the availability of data must be addressed. It was noted from the police that the current statistics for juveniles that come in contact with the law does not require the establishment of a separate Unit within the police department as yet⁴⁵.

Commission's Views

After careful consideration, the Commission agrees with the international standard on ensuring that children are treated with care and compassion, with due regard for their special procedural rights and that the proposed Act should cater for a part on juveniles and the Police to properly regulate the work of the police when dealing with juveniles.

As to whether the proposed legislation should take into account the VPF SOP, the Commission in this regard consents to the idea but stressed that only the main ideas stipulated in the SOP be incorporated into any proposed legislation. The proposed legislation must take into account the different procedures for dealing with juveniles as stipulated by the SOP as well as the use of force on juveniles as spelled out in the *Juvenile Justice Act* of PNG.

In regard to the issue of the age of responsibility, the Commission agrees with the views of the public and that of the SRBJ that children under the age of responsibility should not be criminally responsible for any offence committed by them. This raises the need to have a multi-faceted

⁴³ *The Children, Young persons, and Their Families Act* 1989 (New Zealand), <http://www.legislation.govt.nz/act/public/1989/0024/65.0/DLM147088.html> (Accessed: 26/06/18)

⁴⁴ Police (Amendment) Act No. 15 of 2018 (Vanuatu)

⁴⁵ Ibid

Juvenile legislation which recognises that some children exhibiting criminal behaviours cannot be dealt with in the criminal law. Instead they are best dealt with through child protection mechanisms⁴⁶.

The Commission is also of the view that any proposed *Juvenile Justice legislation* should have a provision that explicitly provides for the 'Best Interest of the Child' principle and that the legislation should stress that the interest of the child must be paramount in all dealings with juveniles.

Therefore, the Vanuatu Law Reform Commission makes the following recommendations:

Recommendations: That any future interaction between the Police and juveniles either as suspects or defendants should be subject to legislation and that a specific part on juveniles and the police should be inserted whereby it will outline special procedural protections for children at the arrest and investigation stage. That Vanuatu should look at PNG's *Juvenile Justice Act* as a guidance in this regard.

Recommendations: That any proposed Juvenile Justice legislation should be able to take into consideration the main principles in the SOP developed by the VPF to ensure an open, transparent and accountable management of Juveniles by Police.

Recommendations: That any proposed legislation must give effect to the use of the SOP by the police serving to provide more detailed guidance to the police on their obligations under the law.

Recommendations: That any proposed legislation should cater for diversionary programs and to include custom based referrals to ensure consistency in terms of response and effective evaluation. The proposed legislation should be able to empower other stakeholders such as Chiefs to deal with juveniles in the community.

Recommendations: That Community Policing should be provided for in any proposed Juvenile Justice legislation and that the Family Protection Act should be considered for current practices.

Recommendations: That any proposed Juvenile Justice legislation should cater for juveniles under the age of responsibility and that such juveniles cannot be dealt with under any national criminal laws and should be dealt with by an institution established by the proposed legislation.

Recommendations: That the best interest of the child should be of paramount consideration at all times and should be recognized by any proposed Juvenile Justice legislation.

⁴⁶ Juvenile Justice Issues Paper: Strettem Blo Jastis Program Submission 2018

JUVENILES AND CHIEFS IN VANUATU

Current Situation

Today in Vanuatu there are two legal systems, an official and an unofficial system. The official system is that established by the State, which consist of the Courts, the Police, the Public Prosecutor and the Public Solicitor. The unofficial system, Custom, encompasses the traditional norms of behaviours that are backed up by a sanction of some description administered by chiefs in the community⁴⁷. It also includes the practices by which disputes are dealt with by the chiefs.

Interestingly in Vanuatu, unlike other jurisdictions, custom law and the formal justice system share the burden of responsibility in the justice system. The chiefs in the community work together with the police to deal with juveniles and adults in combating crimes.

Usually chiefs involved in juvenile justice processes in the first instances of criminal offending⁴⁸. Repeated offenders and serious offences are dealt with by the Police. In most cases, counselling is provided by the responsible chief in the community and police then will keep an eye out on the offender. A 2008 baseline study showed that around 11% of child abuse cases are reported to police, and of those 95% are diverted back to the community⁴⁹.

In remote locations, chiefs are seen as the first stop for a large percentage of complaints in criminal matters. The assistance of chiefs are so effective in remote locations and the assistance of Police is requested only if:

- custom fine imposed by chiefs not paid;
- one party is dismayed with the custom process or;
- the victim has gone to the police to make a complaint and then either forgotten, or was prevented from withdrawing it after the custom settlement⁵⁰.

If in the event that the matter is proceeded to court, the court notes the importance of the custom ceremony as seen in the case of *Waiwo v Waiwo and Banga*, where the Senior Magistrate (now Chief Justice) Lunabek stated⁵¹:

⁴⁷ Beyond Case Law: Kastom and Courts in Vanuatu, Miranda Forsyth, pg 430, https://mjcs.gov.vu/images/research_database/Beyond_Case_Law_Kastom_and_Courts_in_Vanuatu.pdf (Accessed: 14/06/18)

⁴⁸ Interview with inspector Davis Saravanu, Family Protection Unit (FPU), Police Station, Port Vila

⁴⁹ Michael Copland and Goimel Soalo, 2011, Mapping Report, Informal and Formal Systems to Protect Children in Vanuatu (Vanuatu National Child Protection Policy 2016 -2026)

⁵⁰ Above n47

In addition, in Tanna like other Islands of the Archipelago, custom plays an important role in day to day life of their inhabitants. One very common example to the knowledge of the Courts and in particular Magistrates is that when the Courts hear criminal cases on Tanna, very often, the Magistrate will not be surprised to see appearing before the Court into the Accused box, next to the Accused, his custom chief. The chief pays respect to the bench and informs the Court that they have already dealt with the matter in custom and the Defendant or Accused is already punished for his wrongdoing. ... The Court explains to the chief concerned the position within the criminal law, the Accused is dealt with accordingly and the Court then invites the chiefs to explain the custom. Obviously the Court does take into account the customary settlement, compensation and punishment ... as a mitigating factor when considering the sentencing of the Accused.

Comparable Jurisdictions

Article 40(3)(b) of the CRC requires States parties to promote the establishment of measures for dealing with children in conflict with the law without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected⁵².

The *Juvenile Justice Act* 2014 of Papua New Guinea gives police discretion to divert children by issuing a warning, referring the child to a community conference, or imposing other stipulated diversionary measures for all summary offences and indictable offences triable summarily⁵³.

Pursuant to the *Young Offenders Act* 1997 of New South Wales, police have the authority to divert juveniles by issuing a warning, a formal caution, or referring the child to a youth justice conference for any summary offence or an indictable offence that may be dealt with summarily, except for specified violent crimes and some drug offences⁵⁴.

Similarly in New Zealand, *The Children, Young Persons and their Families Act* 1989 gives police broad discretion to divert juveniles by issuing a warning or caution with conditions, and requires all offences to be referred to a family group conference for recommendations prior to charging⁵⁵.

Consultations

⁵¹ *Waiwo v Waiwo and Banga* (12 February 1996) Senior Magistrates Court, Vanuatu, Civ Cas 324/1995 <http://www.paclii.org/vu/cases/VUMC/1996/1.html> (Accessed: 09/06/ 2018)

⁵² Above n41

⁵³ Above n40

⁵⁴ *Young Offenders Act* 1997 (New South Wales, Australia), <https://www.legislation.nsw.gov.au/inforce/bdab64b2-e3a9-ec97-ed47-d4fe2ed2ad1e/1997-54.pdf> (Accessed: 18/06/18)

⁵⁵ *The Children, Young Persons and their Families Act* 1989 (New Zealand), <http://www.legislation.govt.nz/act/public/1989/0024/65.0/DLM147088.html> (Accessed: 26/06/18)

During the consultations around 90% of the people agreed with the idea of having the chiefs involved in the early stage of the diversion program before the child ends up in court. In doing so, chiefs should be able to undergo specific trainings on how to handle juvenile offenders.

The police, through their SOPs, are already using three forms of diversion: cautions, victim and offender mediation and customary dispute resolution. There is a general concession that the three forms of diversion be incorporated into any proposed *Juvenile Justice legislation*, with clear guidance on the police and prosecutors on how to use the options as an alternative to formally charging the child. In particular, any proposed legislation should formally acknowledge the important role of chiefs and customary resolutions in the juvenile justice system.

There were also suggestions that any proposed juvenile justice legislation should incorporate the procedural safeguards in line with international standards and also address the recommendations of the UN Committee on the Rights of the Child to include the following:

- Diversion should be used only when the child freely and voluntarily acknowledges responsibility for the offence, and that no intimidation or pressure has been used. Children who assert their innocence are entitled to a full and fair trial.
- The child must freely and voluntarily consent to being diverted, and to any conditions in the diversion plan. A child who wishes to have the matter determined by the courts, instead of through mediation or community dispute resolution, must have that right respected.
- Any proposed legislation should contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other authorities to make decisions regarding diversion should be clearly stipulated in the law to protect the child from discrimination.
- The child must be given the opportunity to consult with legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities.
- Any admission made by the child in the diversion process must not be used against him/her in any subsequent legal proceeding;
- The completion of the diversion agreement by the child should result in a definite and final closure of the case.
- Diversion should not include any measures that are exploitive, harmful or hazardous to the juvenile's physical or mental health; that involve corporal punishment, public humiliation, or anything that would degrade or stigmatise the juvenile; that involve any

form of deprivation of the juvenile's liberty; or that amounts to punishment that is more onerous than the juvenile would have received through the formal legal system⁵⁶.

In relation to the allowance of custom as mitigating factor especially in the sentencing of a juvenile offender, there was general consciences that custom should continue to be used as a mitigating factor in the criminal justice process including the juvenile justice system as it helps to mitigate the sentencing but not used as an excuse.

Commission's Views

With regard to the issue of whether or not custom should be formally recognized when dealing with offenders who are juveniles, the Commission in this regard agrees with the idea put forward by the general public, specifically Stretem Rod blong Justice Program (SRBJ) and UNICEF Vanuatu that custom should be formally recognised in a manner consistent with the Constitution of the Republic of Vanuatu. The Commission agrees with SRBJ that the law as it currently stands allows for custom to be used where it is not in conflict with other laws of Vanuatu. It also allows custom actions, such as compensation, to be taken into account. This could result in mitigation (if compensation is paid to victim), neutral (if the Judge considers actions have no impact to show remorse) or aggravating (if during a custom ceremony the accused indicated no remorse)⁵⁷.

The Commission is also of the view that custom should also be recognised in child protection matters and should be able to play a key role in family or community conferencing where relevant and appropriate. However, it must be a role that is fair, transparent and accountable. With that being said, the Commission is in support of the view that chiefs or any other authorised person should undergo special trainings before handling juvenile offenders in the communities.

In view of the current police practice of handling first time juvenile offenders, where offenders are sent home to their parents and community chiefs for counselling, the Commission agrees with the idea but only to the extent that if the offence committed is a minor offence and does not require the involvement of the police. If in the instance that the offence committed is one that is major such a rape or resulting in death, then that is a serious matter that does not require the assistance of the chief. In that case, the matter must be investigated and charged by the police even if a custom reconciliation is performed.

⁵⁶ Above n41

⁵⁷ Juvenile Justice Issue Paper: Stretem Rod blong Justice Program Submission 2018

Therefore, the Vanuatu Law Reform Commission makes the following recommendations:

Recommendations: That any proposed Juvenile Justice legislation should cater for custom to be formally recognized in a manner consistent with the Constitution.

Recommendations: That any proposed Juvenile Justice legislation should include a chapter on earlier Diversion giving Police discretion to divert juveniles at the pre-trial stage by issuing a caution, mediating an agreed resolution with the victim, or referring the child to a chief or community leader for customary dispute resolution.

Recommendations: That any proposed Juvenile Justice legislation should have a provision on customary reconciliation and sentencing. That custom reconciliation may be taken into account on or during sentencing of a juvenile.

Recommendations: That any proposed Juvenile Justice legislation should prohibit dealing with criminal matters (serious) in custom unless it is done through the legislative framework. The legislative framework can be in the form of diversion or prosecution. Custom may come into play to uphold peace and unity in the community rather than dealing with the problem at hand.

Recommendations: That custom should also be recognized in child protection matters and play a key role in family or community conferencing where relevant and appropriate, however, it must be a role that is fair, transparent and accountable.

Recommendations: That any proposed Juvenile Justice legislation should identify leaders in the community who are suitable to assist in rehabilitation and have these leaders statutorily appointed (similar to the Authorized Persons provisions in the Vanuatu *Family Protection Act* and the 'volunteer juvenile justice officer of PNG).

Recommendations: That any proposed Juvenile Justice legislation should provide for the training and development of official dealing with Juvenile Justice.

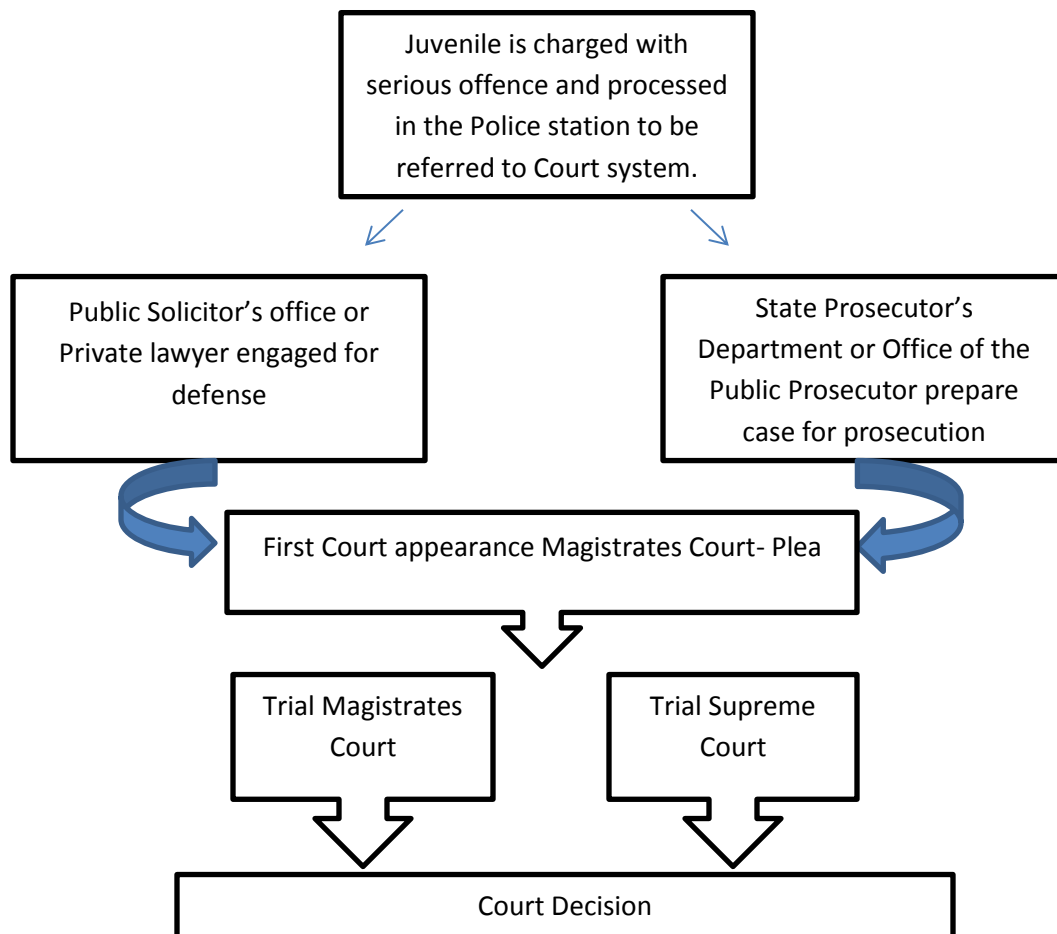
Recommendations: That any proposed Juvenile Justice legislation provide for proper reporting systems to the child agency and court if appropriate in relation to children being supervised.

PART THREE: COURT PROCEEDINGS AND JUVENILE COURTS

Current Situation

The current ad hoc 'juvenile justice system' in Vanuatu has in place a number of different institutions having different legislated responsibilities as there is no legislation that caters specifically for juvenile issues. All these institutions are connected and interdependent with their roles and responsibilities when dealing with juvenile issues. When a juvenile commits an offence, they are either referred to early diversion by the Police, especially if it is a minor offence or it is processed and taken to the courts because of the severity of the offence. Once a juvenile is charged and detained, the Public Solicitor's office is informed to act for or legally represent the juvenile. From a legal procedural perspective, once a juvenile has been arrested and detained, the matter is then referred to the legal offices of the Public Solicitor and Public Prosecutor before it is processed to the Courts. The diagram below shows the process in which a juvenile is processed through the legal and court proceedings.

Court Proceedings



As stated by Magistrate Florence Sam in a country report on Youth Justice System, Vanuatu has been and is still today addressing the need for a permanent Court house, specifically a Youth Court.⁵⁸ In civil cases, though the laws do not specify how to conduct civil proceedings, the Magistrates have formulated a process to set up informal court settings, sitting in a conference like setting and hearing both parties accordingly.⁵⁹ For criminal cases the same procedures applies for youths as with adult offenders in preliminary enquiry cases, given the lack of specific Juvenile Offender's Act or related laws that specifically addresses these special proceedings.⁶⁰

Furthermore, a Memorandum of Agreement (MOA) has been signed by the Courts, Public Solicitor's Office, State Prosecution Department, Correctional Services and other stakeholders to reaffirm Magistrate's Florence's views. While the document endorsed universal juvenile justice principles and urged the government to implement youth justice legislation, it also proposed the following youth justice measures to be implemented:

1. The Public Solicitor to provide a roster of lawyers to be contacted during office hours and after hours to provide advice to young person in police custody.
2. Police to divert as many youth offenders as possible. This includes on the spot warning, caution, mediation and community conferences.
3. The age of the youth must be clearly stated on the young offenders' charge sheet and the case identified as a youth justice case.
4. A separate list day for young offenders is to be arranged for at the Magistrates Court which is the third Thursday of every month.
5. The court room furniture is to be set out in an informal layout where possible.
6. The PSO will provide a lawyer for each young person appearing in court.
7. Court sittings are to be held in private.
8. Correctional services will also be at the court sittings and provide reports on young offenders and a custodial sentence will be a sentence of last resort.
9. Separate custodial facilities will be developed for young persons.
10. Data will be collected on youth justice cases and the agreement will be revisited every six months for the next two years.⁶¹

⁵⁸ Florence Sam (24/9/17) 'Country Report on Youth Justice System- Vanuatu'

⁵⁹ Ibid

⁶⁰ Above n58

⁶¹ Lawyers Handbook (Public Solicitor's office)

Comparable Jurisdictions

Like Vanuatu, Tonga and Tuvalu both do not have a *Juvenile Act*. In Tonga, adults and juveniles are arrested and detained following the same procedures of being detained in the same prison cells.⁶² This also applies to prosecution procedures and sentencing options. For Tuvalu, discussions were raised in *Anderson v R* [2003] TVHC 27 about guidelines should be given by the Chief Justice for cases dealing with juveniles.⁶³

In PNG, its *Juvenile Justice Act* provides that proceedings should be conducted in an informal manner to encourage maximum participation by the juvenile and the juvenile's parents. The Court should also take steps to ensure that the juvenile and his or her parents participate and have the full opportunity to share their views during the proceedings. The juvenile and his or her parents must also be informed of the nature of the offence, the Court's procedures and the consequences of any Court orders that are made. With regards to juvenile courts, the Minister has the power to establish a Juvenile Court. In addition, the Chief Magistrate may appoint as Juvenile Court Magistrates, such Magistrates as in his or her opinion have the necessary qualifications, training and experience to be a Juvenile Court Magistrate.⁶⁴

Samoa differs slightly in that it has established its own "Youth Court" and is presided over by District Court Judges. Where determined appropriate, the court proceedings may be conducted in a manner consistent with Samoan custom and tradition and the proceedings will be conducted in the Samoan language. However if the young person's first language is not Samoan, English is to be used and where English and Samoan are not used, then an interpreter in the language spoken by the offender is to be provided where practicable. The Youth Court must apply the criminal standard of proof but may otherwise determine own procedural guidelines. However, when doing so, most of these guidelines seemed to adopt rules of criminal procedure⁶⁵.

Consultations

Over 90% of the people consulted during the consultations felt that there should be separate juvenile court set up to deal specifically with juvenile cases and issues. It was stated that the current formal and forbidding settings of the present Court is not a familiar place for children

⁶² Superintendent BP Korff (2010) 'Treatment of Juvenile Offenders and their Reintegration into Society' *South African Police Service, Division Training: Education Training and Development*
https://www.saps.gov.za/resource_centre/women_children/book_layout.pdf (Accessed: 6/6/17)

⁶³ *Anderson v R* [2003] TVHC 27 [http://www.paclii.org/cgi-bin/sinodisp/tv/cases/TVHC/2003/27.html?stem=&synonyms=&query=title\(Anderson%20and%20R%20\)](http://www.paclii.org/cgi-bin/sinodisp/tv/cases/TVHC/2003/27.html?stem=&synonyms=&query=title(Anderson%20and%20R%20))

⁶⁴ Above n40

⁶⁵ *Young Offenders Act 2007* (Samoa) http://www.paclii.org/cgi-bin/sinodisp/ws/legis/WS-consol_act_2012/yoa2007181/yoa2007181.html?stem=&synonyms=&query=Young%20Offenders (Accessed: 8/8/17)

making them feel vulnerable. A separate juvenile court would help a child understand the court's process and procedures as normal court procedures consist of legal jargons and the formal setting up of the courts are formidable for a child. In the best interests of the child, there needs to be a separate juvenile court.

However, while the remaining 10% also agree that a separate Juvenile court was an option, they were more practical with their approach. It was raised that in considering this option, thought should be given to the available resources especially the financial burden. . Currently there is no permanent building that houses the Courts and so the possibility of establishing a separate juvenile court house would be impractical at this stage. Other participants also suggested that the establishment of a Juvenile Court also depends on the demand or need for one in that if there is a high demand for the Juvenile Court due to high number of juvenile offenders, then it would be reasonable for there to be one a Juvenile Court. However, if there is a low demand for it, then another alternative would be to establish a Family Court that would consider family issues and juvenile issues.

In addition, there was also the question of whether there should be a specialized judge to focus specifically on juveniles and also what procedures were to be followed within a juvenile court. Over 80% of people consulted indicated that there should be different procedures established for juveniles alone and that the specialized judge should be the one setting these procedures. According to Magistrate Florence Sam report,⁶⁶ some informal procedures have already been put in place. This includes closing the court when there is a child involved, setting up screens holding court sessions in the Magistrate's chambers and so forth. However, the remaining 20% felt that while it was practical to have a specialized judge, consideration should also be given to the likely cost especially when there are already existing judges. Furthermore, there is the risk of the specialized judge being biased in the proceedings procedures.

Notably during consultations, it was also revealed that Chief Justice Vincent Lunabek has already provided formal procedures to be followed within the legal system by way of Practice Directions in relation to children who are in contact with the court process. These practice directions are very detailed and extensive and covers issues that children face when they come into contact with the courts. It also considers the particular role of children, child victims, child witnesses and juvenile offenders within the justice process and how they should be addressed. Overall, it provides a guideline of how children are to be dealt with in whatever role they enter the formal legal system from the beginning of when a case is being formed to the post trial phase.⁶⁷

⁶⁶ Above n58

⁶⁷ Chief Justice Vincent Lunabek (July 2013) ' Chief Justice's Practice Directions in relation to children who are in contact with the court process'

This is also particularly important as it provides for one of the issues which was raised during consultation which was how children as witnesses were to be treated. The initial Issues Paper overlooked this and this was pointed out during the consultations. Whilst no proper consultation was carried out, this issue was held as an important aspect that had to be included in any proposed Juvenile Justice legislation. The Chief Justice's Practice Directions also addresses how child witnesses are to be treated. The Practice Directions begins by stating that a child shall be treated with respect and dignity in a Courtroom including the reliability of a child's evidence and also a competency examination of child's reliability as required by the court. It caters for children with particular needs as well. A child is not required to swear an oath if he or she is unable to understand the consequences of taking an oath and discusses the ways in which a child's evidence. The strict rules of evidence are not to be applied with a child's evidence and a support person is to accompany the child during the trial. The Court shall provide appropriate waiting areas for the child and there shall be emotional support for the child witnesses. Courtroom facilities are to be set up in ways that are not intimidating to the child, such as providing elevated seats and assistance for children with disabilities. Cross-examination of a child is also covered and measures have been put in place to protect the privacy and well-being of child victims and witnesses.⁶⁸

Commission's Views

The Commission is of the view that careful consideration should be given with establishment of a juvenile court especially with regard to resources. While the establishment of the juvenile court would be in the best interest of the child, if no resources are available, it would be impractical to establish a Juvenile Court. Currently some measures such as having closed courts and setting screen to protect child's view of other party are already in place. In comparison to PNG and Samoa, they have established Juvenile Courts in a localised setting.

Accordingly, these countries have gone on to formalize the procedures that are to be followed when dealing with juvenile cases. For Vanuatu, the Chief Justice's Practice Directions have outlined how to deal with children when they enter the legal system whether as a victim, a witness or a juvenile offender. Some of the provisions of this practice direction, such as having hearings in the informal settings of the Magistrate's chambers instead of the courts, are currently being applied and so it would only make sense for these practice directions to be included in the any proposed *Juvenile Justice legislation*. These practice directions also provide for the court to be referred to as a Juvenile courts when a court proceeds to hear juvenile related issues. Given the limited number of juvenile cases that the Courts have to adjudicate every year, the establishment of a full-time separate Juvenile Court is not feasible at the moment.

⁶⁸ Above n65

Therefore with regards to the establishment of a Juvenile Court, until such time where there are sufficient resources available to establish and run a separate Juvenile Court, the Vanuatu Law Reform Commission make the following recommendations:

Recommendation: That any Court proceeding purposely to adjudicate over a charge against a juvenile or exercising any other jurisdiction, any proposed juvenile justice legislation should refer to such existing court as Juvenile Jurisdiction until such that resources are available to establish a special juvenile Court.

Recommendation: That the main principles of the Chief Justice's practice directions be used as guidelines in any proposed *Juvenile Justice legislation* and any other legislation that deals with juveniles who come into contact with the formal legal system and to include child witnesses and child offenders.

PART FOUR: SENTENCING AND DIVERSION

Current Situation

In Vanuatu, subsection 54(1) of the *Penal Code* states that a person under 16 years of age is not to be sentenced to imprisonment unless no other method of punishment is appropriate and if a person under 16 years is sentenced, the court must provide reasons for doing so. This is supported further by the Chief Justice's practice directions⁶⁹. Notably, the diversion programs offered in sentencing differ to that offered by the Police in diversionary programs offered by the Police. Especially when a juvenile is a first time offender and is given the chance to change. Diversionary programs offered to juveniles are meant to avoid the imprisonment of juvenile and also to help rehabilitate them.

Diversion programs are a form of sentencing for juvenile offenders. This usually consists of the offender joining a rehabilitation program to help remedy his or her behaviour. It is an approach of holding offenders accountable for their behavior while preventing or reducing court involvement and criminal records⁷⁰. The list of rehabilitation programs provided by the Vanuatu Corrections Department for offenders who are in the correctional centers consists of spiritual/chiefly counselling and awareness programs offered to youths on committed crimes relating to alcohol and drugs and other related issues⁷¹. A 'Niufala Rod Program' is also offered to both adult and juvenile offenders as a form of self-reflection and understanding on their wrongs so as to avoid committing the same offence again in the future.⁷²

However, the Probation Unit of the Corrections Department also has its fair share of challenges which mainly revolve around lack of financial resources. While the Corrections Department have established a network with the chiefs and community leaders especially in outer islands. Often, it was difficult to visit all the islands. As such, it is often the case that only certain areas in the island are aware of the programs carried out by Corrections Services. In addition, most of the supervision work being carried out by the chiefs or pastor are carried out on a voluntary basis.

Comparable Jurisdictions

Within the Pacific region, most jurisdictions do not encourage sentencing or imprisonment for juvenile offenders unless on offences of serious nature, except Tonga, where adult and juvenile offenders are treated alike.

⁶⁹ Above n67

⁷⁰ http://www.belknapcounty.org/pages/belknapcounty_justice/What+is+Diversion.pdf

⁷¹ Above n58

⁷² Above n58

Fiji and Solomon Islands have similar general provisions with regards to diversionary measures which do not condone sentencing or imprisonment of juvenile offenders. PNG differs slightly in that it has a part that is solely focused on diversionary measures as opposed to the other Pacific countries with general provisions. The PNG Legislation provisions outlined the purpose of diversion, who to be eligible for diversion and the different diversionary options which may include warnings or cautions, oral or written apology, compulsory school attendance, requirement for juvenile to comply with certain standards of behaviors, counselling, vocational trainings or rehabilitation programs, return of item taken or repair of damage done, community service or community based conference and any other appropriate measure considered fit for juveniles.⁷³ There is also provisions outlining the minimum standards applicable to diversions, the use of diversion admissions and statements, purpose of community based conferences, convening of community based conferences, participants and procedures at community based conferences, diversion agreements, compliance with diversion agreements and authorized facilitators.⁷⁴

Consultations

From the consultations, 100% of the people who were consulted stated that no sentencing should be given to young offenders. Sentencing should only be used as a last option or resort and only for the very serious offences such as murder. The rationale was that young offenders were still at a tender age where they are still learning and thus, if they are put in a harsh environment such as prisons, this could possibly harm their learning and growth and they would become hardened criminals. Furthermore, there is a high possibility of juveniles reforming or changing their behaviour.

In addition, it was also stated that the chiefs who were involved in these diversionary programs must be trained on how to deal with juveniles as kids or juveniles are seen as more savvy nowadays. The purpose of the diversionary program would be defeated if the chiefs, or any of the authority figure, did not know how to deal with a juvenile properly to rehabilitate that juvenile's wrongful thinking and actions.

It was also raised by over 50% of those consulted that while the diversionary programs provided by the Correctional Services were admirable, additional programs should also be provided to provide more options for the juvenile to help lead them away from crime. Some examples that were given was having the Agriculture Department work with the Police to assist the youths in carrying out farming projects, such as planting cash crops, vegetables or poultry farming. The rationale behind this being that most youths commit offences nowadays for lack

⁷³ Above n40

⁷⁴ Above n40

of work and money and any form of direction as to how to live their life. They lack the incentive to be productive and so it is best to provide such juveniles the opportunity to help them be productive and be financially independent. Another example given also was encouraging the juveniles to engage in sports disciplines, such as to attend the Football Training Academy.

This was further supported by the Chief Justice in his Practice Directions to state that the importance of rehabilitating young offenders should be stressed while acknowledging the importance of restitution to the victim and the community. All necessary measures need to be taken by the responsible departments to cater for rehabilitation of young offenders which may involve the Vanuatu Correctional Services, Vanuatu Women's Centre, chiefs or churches in this process as the need arises.⁷⁵

Another important aspect agreed upon during consultations was that diversion should only be offered for first time offenders and not repeat offenders. Repeat offenders, no matter their age, should be dealt with by the courts and sentenced to a harsher sentence as they had not learnt their lesson from their first offence and are a risk to the safety of the Society.

Commission's Views

With regards to sentencing and diversion, the Commission is in agreement with the views that were presented during the consultations. The Department of Correctional Services already has diversionary programs in place and this could be expanded as raised in the consultations, to include agricultural and sports activities so as to provide a number of opportunities and chances for juveniles to focus their time and energy on productive activities as opposed to criminal offences. With this in mind, any proposed *Juvenile Justice legislation*, should clearly state that imprisonment is not an option for a juvenile offender unless it is either a very serious offence or a repeated offender.

As for whether the proposed Act should have a whole section mainly based on diversion as in PNG or whether it should follow Fiji's example, the Commission's view was that the proposed Act should have a general provision on Diversion to allow for the fluid addition or change of any future diversion programs depending on the need from time to time. Juvenile related crimes are still currently low and thus, there is still room to change and to consider available options to deal with these issues so a general provision should be more appropriate.

⁷⁵ Above n67

Therefore the Vanuatu Law Reform Commission makes the following recommendations:

Recommendation: That sentencing to an imprisonment term should not be an option to juvenile offenders unless the offence committed was of a very serious nature or if it is a repeated offence.

Recommendation: That a general provision to be provided for in any proposed *Juvenile Justice legislation* regarding Diversion and the details of these diversionary programs to be administered with the departments concerned.

Recommendation: That additional diversionary programs be added to the current existing programs being undertaken by the Department of Correctional Services. These programs to include but not limited to agricultural and sportive activities and psychological services.

PART FIVE: INSTITUTIONS

Current Situation in Vanuatu

An institution refers to a society or organization founded for religious, educational, social, or similar purpose. It could also mean established law, practice or custom or behaviour patterns important to a society and to particular formal institutions created by legal entities such as the government and public service.⁷⁶

Formal institutions such as the Courts and the Police have been discussed in the previous chapters and thus are not covered in this Part. Institutions in this section refers to a place used solely to house juveniles who have been sentenced and committed for a period of time or are awaiting court hearings as well as other informal bodies involved in the administering of juvenile justice. Young offender institution, Youth detention center, remand center, juvenile detention center, juvenile detention, juvenile hall or the colloquial term juvie are some of the terms used for places used to house juveniles. Long term care and programs are implemented in these facilities.

Other less formal institutions include parents or guardians, Church and the custom and chiefs of a community. For the parents and the families involved, family communication improves when parents and guardians assist in the juvenile justice process and diversion from formal courts to the juvenile justice system. For example, it tends to make parents a more caring and loving institution. This also provide the parents with the skills and support to be more effective in providing guidelines and support to their child.⁷⁷ Elders and Pastors in a church can also be included to provide rehabilitation in Diversion programs.

In the Pacific, there are various practices. Firstly, there is the approach where an exclusive legislation relating to Juvenile Justice is lacking but other pieces of laws are applied establishing informal institutions to enforce juvenile justice. Secondly there is the existence of specific Acts managing juvenile justice by establishing separate detention centres and their managing bodies. And finally there is the approach undertaken by certain jurisdictions where juveniles are managed inclusively with adult offenders. Existing institutions in Fiji, Papua New Guinea and Solomon Islands will be examined to provide all avenues in order to decide on the most appropriate approach to be applied in Vanuatu. Tonga lacks a juvenile justice system,

⁷⁶ Institution,

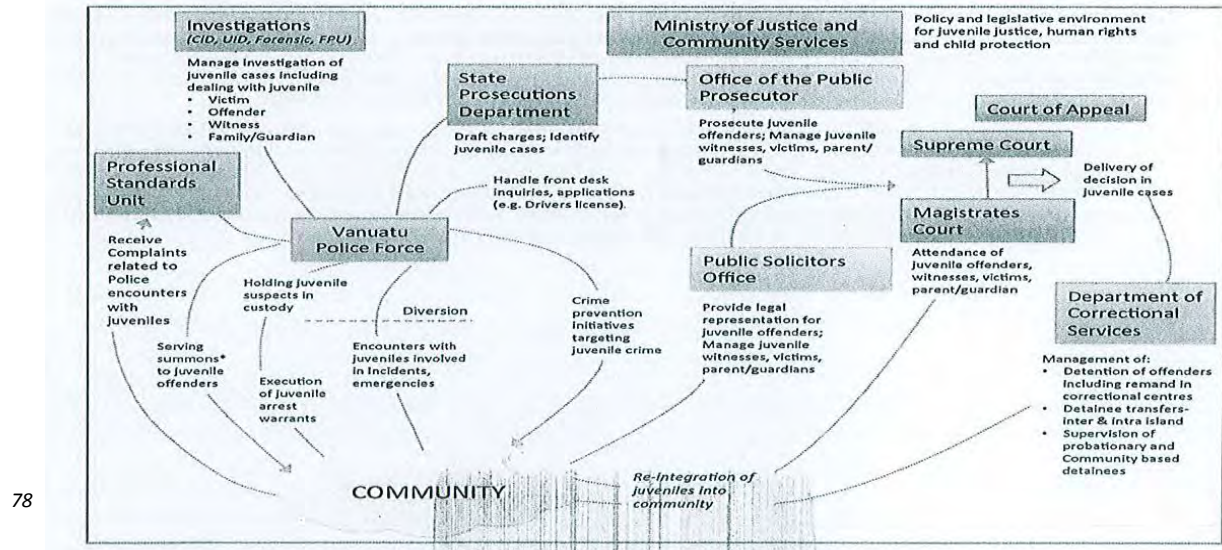
<https://www.google.com/search?q=institution+AND+meaning&oq=institution+AND+meaning&aqs=chrome..69i57j69i61j69i60l2j69i59l2.3184j0j7&sourceid=chrome&ie=UTF-8> (Accessed: 4/06/18)

⁷⁷ Juvenile Diversion, Stephen T. Russell and Susan Wood,
<https://www.unicef.org/tdad/usanebraskajuvenilediversionfactsheet98.pdf> (Accessed: 27/06/18)

nevertheless it will be looked at with respect to the approach it takes to manage juvenile justice.

With all the various practices and the effect, it has on society, the government of Vanuatu is required to decide on what will best suit Vanuatu. The diagram below depicts the involvement of the current institutions in delivering juvenile justice.

Map showing Institutions that display a role in implementing juvenile justice



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Source: *Where to from here?* Vicky Vaartjes, Capacity Development and Leadership Adviser, Policing and Justice Support program Vanuatu, November 2016

The above diagram portrays the main stakeholders in the juvenile justice framework that plays a part in implementing juvenile justice in Vanuatu. Once a juvenile commits an offence, he or she comes into contact with the various institutions, both formal and informal such as the Police, the courts, the correctional services and the community or custom. Obligation to implement juvenile justice by these institutions are thus provided for in their respective legislations.

Political will is required at the highest level to establish legal frame work that will address the specific rights and needs to children and juveniles in contact with the law as well as the capacity

⁷⁸ Vicki Vaartjes, *Where to from here?* (Report prepared to show the institutional status of the Juvenile justice system in Vanuatu) November 2016

to organize and resource the responsible institutions.⁷⁹ Support, however, is required to fund separate facilities.

Currently all detainees including minors are governed under the *Correctional Services Act of 2006*. The principal objects of this Act are as follow:

- to maintain public safety, consider the victims best interest;
- ensure that offenders in the Correctional centres have access to rehabilitative and reintegration programmes;
- ensure that there is fair treatment of offenders undergoing sentences of supervision;
- community work or detained in correctional centres; and
- also to ensure that offenders as far as is reasonable and practicable within the resources available be given access to activities that may contribute to their rehabilitation and reintegration into the community⁸⁰.

The object of this Act is primarily focused on adult detainees and not juveniles. Minors are nevertheless managed by the Authorised personnel responsible for the Correctional Centre.

The Correctional centre in Vanuatu is established by the Minister responsible for Justice and community services by a declaration that a land or building becomes a correctional centre or temporary correctional centre and that declaration is published in the Gazette.⁸¹

The Director of the Correctional Centre is obligated to operate in accordance with the purpose and objectives of this Act.⁸² Other obligations include establishing and implementing rehabilitation programs, work in correctional centre, education and vocational training for detainees.⁸³ In the Correctional Centers, the minors are separated from adults unless it is not in the best interest of the minor to do so and to keep the detainee's safe and secure with humane living conditions.⁸⁴ This Act also provides for the appointment of correctional officers to assist

⁷⁹ Juvenile justice: a basic framework for the implementation of a functional juvenile justice system, Commonwealth secretariat, Vol 35, No. 2, June 2009, 301-313, Common wealth Law Bulletin, Email from Miranda Forsyth, 30 June 2017.

⁸⁰ Section 1, *Correctional Centre Services Act 2006*, http://www.paclii.org/vu/legis/num_act/csa2006234/ (Accessed: 21/07/17)

⁸¹ Section 7, *Correctional service Act 2006* (Vanuatu) http://www.paclii.org/vu/legis/num_act/csa2006234/ (Accessed: 19/07/17)

⁸² Section 3, *Correctional service Act 2006* (Vanuatu) http://www.paclii.org/vu/legis/num_act/csa2006234/ (Accessed: 19/07/17)

⁸³ Section 4, *Correctional service Act 2006* (Vanuatu) http://www.paclii.org/vu/legis/num_act/csa2006234/ (Accessed: 19/07/17)

⁸⁴ Section 21 (c) and 22 of the *Correctional service Act 2006* (Vanuatu) http://www.paclii.org/vu/legis/num_act/csa2006234/ (Accessed: 19/07/17)

the correctional centre manager to provide for the order, security and discipline in his or her correctional centre.⁸⁵

The Child Desk office at the Ministry of Justice and Community Services in Vanuatu is the focal point to implement the CRC in Vanuatu.⁸⁶ Specific relevance to a child's placement are:

- Article 3 stating that when dealing with a child in all circumstances, a child's best interest must be paramount.
- Article 20 (3) which mandates the state to place a child in a suitable institution for their care where a child is temporarily or permanently deprived of his or her family environment. At such a situation, due regard shall be paid to the desirability of continuity in a child's ethnic, religious, cultural and linguistic background.
- Article 37 provides for the human treatment and punishment for children and that every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.⁸⁷

Also, in agreeing to the Articles of the CRC, Vanuatu recalled the provisions of the Declaration on the United Nations Standard Minimum Rules for the Administration of Juvenile Justice or the Beijing Rules⁸⁸. These set of rules encourage:

- Use of diversion programs
- Childs best interest standard
- Careful consideration before deprivation of liberty
- Specialized training for all juvenile justice personnel
- Consideration of release at arrest & at earliest possible time thereafter⁸⁹

A juvenile justice system should:

- Be fair and humane

⁸⁵ Section 13, *Correctional service Act* 2006 (Vanuatu) http://www.paclii.org/vu/legis/num_act/csa2006234/ (Accessed: 19/07/17)

⁸⁶ Elizabeth Emil Mael, Child Desk Office, Ministry of Justice and Community Services, Government of Vanuatu, <https://mjcs.gov.vu/index.php/justice-sector/child-desk-office> (Accessed: 26/07/2017)

⁸⁷ Convention on the Rights of the Child, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (Accessed: 28/06/18)

⁸⁸ UN Rules for the Protection of Juveniles Deprived of their Liberty, <https://www.ohchr.org/en/professionalinterest/pages/juvenilesdeprivedofliberty.aspx> (Accessed 2/08/18)

⁸⁹ Sheryle Buske, 'Topic 6 Juvenile Justice notes' *LW395 International Childrens Right, Semester II 2013*, School of Law Emalus Campus, Email from Kylie Bakeomemea kbakeomemea@vanuatu.gov.vu to Gracelyn Tasso tgracelyn@vanuatu.gov.vu 24 February 2017

- Emphasize child’s well-being
- Ensure proportionality
- Stress importance of rehab programs⁹⁰

Comparable Jurisdictions

Despite having acceded to the CRC in 1995, Tonga has yet to incorporate the CRC into the national legislative frameworks or laws.⁹¹ Directives which authorizes the probation officers in carrying out their duties are provided for in the following legislations:

- Court orders, particularly under section 25A of the *Criminal Offences Act* 1990.⁹² This is in relation to community Service orders;
- Cabinet decisions, particularly the new rehabilitation program for youth known as the “Youth Diversion Program”;
- Traditional procedures formulated by Ms. Grigg, a volunteer from the UK who founded the probation service in 1994; and also
- Legal Advice from the Crown Law Officers.

The probation Division (The Secretary of Justice) in Tonga enforces these directives and handles both the adult and youth cases through the justice system. Arrangement and supervision of community work, counselling and outreach programs for youths and adults are executed inclusively by this Division.⁹³ The challenges faced in Tonga in relation to youth rehabilitation services includes limited funds and cultural belief that all criminals must be tried in a court.⁹⁴

Case study

In November 2006, a riot broke out in Nukualofa, Tonga by young people which led to the Tongan government implementing a Youth Diversion Scheme to address the cases of youth under 18. A number of community conferencing based on the principle of restorative justice, where youths involved in crimes are generally diverted from the court system but are given the opportunity to assume responsibility for their actions and make reparation by performing community work, were held. Certain institutions were involved in this scheme and were shown

⁹⁰ Ibid

⁹¹ White and Case LLP. ‘Access to Justice for Children: Tonga’

https://www.crin.org/sites/default/files/tonga_access_to_justice.pdf (Accessed: 1/08/17)

⁹² *Criminal Offences Act 1990* (Tonga) http://www.paclii.org/to/legis/consol_act/co136/ (Accessed: 27/06/18)

⁹³ Lopua Kuli, ‘Effective Measures for the Treatment of Juvenile offenders and their reintegration to society’

http://www.unafei.or.jp/english/pdf/RS_No75_14PA_Kuli.pdf (Accessed: 01/08/17)

⁹⁴ Ibid

by the presence of the Tongan Attorney General and the Ministry of Justice families, the town office, the Civil Society, the police and the media in the community conference.

Also in another case, *Fa'aoso v Paongo & Ors*, a 12 year old was arrested after being falsely accused of theft. For 20 hours, he was in police custody before being released where he was beaten. The officer who beat him up pleaded guilty and was dealt with accordingly.

In PNG the *Juvenile Justice Act 2014*⁹⁵ provides for a Remand Centre whereby the Minister has the authority to approve any premises to be used as a correctional institution or remand center for juveniles.⁹⁶ Management of this Remand center is designated to the Director of the Juvenile Justice Service who is responsible for the welfare of all juveniles held in custody in any of the approved institution.

Other Juvenile Justice Officers assist to care and protect the juveniles in the Remand centers.⁹⁷ Functions of the Juvenile Justice Officers include providing juveniles with opportunities for rehabilitation.⁹⁸

Juvenile institutions in PNG must be detached from all other sections within the correctional institution and be used exclusively for juveniles.⁹⁹

In Fiji the *Community Work Act 1994*¹⁰⁰, *Probation of Offenders Act 1952*¹⁰¹, and the *Juveniles Act 1978* implements Juvenile Justice and are less detailed compared to PNG's approach.

The *Juveniles Act 1978* specifically provides for the custody and protection of juveniles in need of care, protection or control and for the correction of juvenile delinquents and young offenders.¹⁰² It is enforced by the Ministry of Women, Children and Poverty Alleviation under

⁹⁵ Above n40

⁹⁶ Section 95(1) *Juvenile Justice Act* PNG, http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 20/07/17)

⁹⁷ Section 8, *Juvenile Justice Act 2014* (PNG), http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 20/07/17)

⁹⁸ Section 10 *Juvenile Justice Act 2014* (PNG), http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 20/07/17)

⁹⁹ Section 96(1)(a) *Juvenile Justice Act 2014* (PNG), http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 20/07/17)

¹⁰⁰ *The Community Work Act 1994* http://www.paclii.org/fj/legis/num_act/cwa1994208/ (Accessed: 26/07/17)

¹⁰¹ *The Probation of Offenders Act 1952* http://www.paclii.org/fj/legis/consol_act/pooa224/ (Accessed: 26/07/17)

¹⁰² Purpose of *Juvenile Justice Act* [Cap 56] Fiji, http://www.paclii.org/fj/legis/consol_act/ja129/ (Accessed: 18/07/17)

the Department of Social Welfare.¹⁰³ The *Juveniles Act* 1978 provides for approved institutions not being owned or operated by approved societies or approved voluntary institutions, for the reception, maintenance and training of juveniles who are subject to care orders¹⁰⁴. The Minister is also obligated to make rules for the appropriate control and management of approved institutions.¹⁰⁵ Section 37 continues with the powers and duties of the Director and of welfare officers which includes the welfare of the juveniles and his or her best interest.

The Juvenile Rehabilitation and Development Centre¹⁰⁶ and the Mahaffy Girls Home¹⁰⁷ are examples of places where custody and protection are provided for juveniles in need.

Another approach is seen in the Solomon Islands where the juveniles are housed in one Correctional facility but have the building divided into separate rooms for juveniles and adults and managed inclusively by the Correctional services.

*Juvenile Offenders Act*¹⁰⁸ makes specific provision for proceedings in reference to juvenile offenders¹⁰⁹. There is also the provision for a place of Detention with the purpose of implementing ongoing rehabilitation programs in education, vocational and faith based life skills programs.¹¹⁰

Additionally, the Correctional Services in the Solomon Islands also has the mandate to manage young prisoners¹¹¹. The Correctional Service is obliged to provide rehabilitation of young

¹⁰³ Probation and Juvenile Justice <http://www.welfare-women.gov.fj/index.php/child-services/probation-and-juvenile-justice.html> (Accessed: 26/07/17)

¹⁰⁴ Section 36(1) *Juvenile Justice Act* [Cap 56] Fiji, http://www.paclii.org/fj/legis/consol_act/ja129/ (Accessed: 18/07/17)

¹⁰⁵ Section 36(2) *Juvenile Justice Act* [Cap 56] Fiji, http://www.paclii.org/fj/legis/consol_act/ja129/ (Accessed: 18/07/17)

¹⁰⁶ Litia Cava, New Juvenile Center opens, <http://fijisun.com.fj/2014/09/17/new-juvenile-centre-opens/> (Accessed: 31/07/18)

¹⁰⁷ Timely Gift for Mahaffy's Girls Home, <http://www.fiji.gov.fj/Media-Center/Press-Releases/TIMELY-GIFT-FOR-MAHAFFY-GIRL%E2%80%99S-HOME.aspx> (Accessed 31/07/18)

¹⁰⁸ *Juvenile Offenders Act* [Cap 14] (Solomon Islands) http://www.paclii.org/sb/legis/consol_act/joa194/ (Accessed: 18/07/17)

¹⁰⁹ Purpose of Act, *Juvenile Offenders Act* [Cap 14] (Solomon Islands) http://www.paclii.org/sb/legis/consol_act/joa194/ (Accessed: 18/07/17)

¹¹⁰ Solomon Islands: Children's Rights references in the Universal Periodic Review, 25th January 2016, <https://crin.org/en/library/publications/solomon-islands-childrens-rights-references-universal-periodic-review> (Accessed: 1/08/17)

¹¹¹ *Correctional Service Act* 2007 http://www.paclii.org/sb/legis/num_act/csa20078o2007280/ (Accessed: 01/08/17)

prisoners and their reintegration back into the community through access to activities and services that may assist in preventing re offending.¹¹²

The Commissioner of the correctional service is responsible for the administrative command and direction of all correctional services officers. Designating the classification, purpose and function of any correctional center or part of a correctional center also comes under the functions of the Commissioner¹¹³.

Consultations

The Vanuatu LRC undertook consultations on current practices in different jurisdictions and how those practices could be implemented in Vanuatu and these are the insights from those consulted.

Fifty five percent (55%) of those consulted were of the view that Correctional Centers for juveniles subject to remand or imprisonment must be constructed to house juveniles where appropriate programs and services are implemented. Other terms such as the Detention centres that will provide care, protection, education and vocational skills, with a view to assuming socially constructive and productive roles in society. The role of the Detention Centre is to rehabilitate juvenile offenders. Similarly, is the idea of a “safe space” for children to be detained and serve sentences for temporary terms. Twenty two percent (22%) of those consulted made reference to the approach applied in PNG¹¹⁴ and Fiji in terms of Detention Centres stating that the same could be applicable in Vanuatu.

Thirty three percent (33%) of those consulted pointed out that the number of children subject to detention is generally low, and would not warrant the establishment of separate facilities.

Sixty seven percent (67%) of those consulted proposed that any proposed Juvenile Justice legislation must include provisions that the living conditions at the detention centre shall be humane and habitable, reflective of the provisions of the UN Standard Minimum Rules for Juveniles Deprived of their Liberty.¹¹⁵ Hence, the Detention centres must be well equipped with the relevant tools and resources in order to avoid the deprivation of the rights of juveniles.

¹¹² Section 3(b) *Correctional Service Act 2007* http://www.paclii.org/sb/legis/num_act/csa20078o2007280/ (Accessed: 01/08/17)

¹¹³ Section 2(6) (d) *Correctional Service Act 2007* http://www.paclii.org/sb/legis/num_act/csa20078o2007280/ (Accessed: 01/08/17)

¹¹⁴ Above n40

¹¹⁵ UN Rules for the Protection of Juveniles Deprived of their Liberty, <https://www.ohchr.org/en/professionalinterest/pages/juvenilesdeprivedofliberty.aspx> (Accessed: 2/08/18)

Some used the phrase “with rights come responsibilities.” For instance, for education as a right to be provided to the Children, there first must be resources available.

On the issue of detaining and managing juveniles in the same facility as adults, a comment from one of the participants is noted:

It needs to be said that every time a child is detained within an adult facility that their human rights are being infringed... two occasions in 2018, in both cases a Magistrate remanded the children (one 14 years and another 17 years) in custody despite protests from both Prosecution and Defence. These statistics are not caught by the imprisonment statistics, as such we are of the view that children are inappropriately detained at a rate higher than ‘imprisonment’ statistics would indicate. There has been an increase in offences being committed by young sex offenders and there are no appropriate mechanisms to manage them. The National Child Desk within the Ministry of Justice & Community Services is not equipped or resourced to deal with the complex and numerous issues that arise in the Courts and relate to the detention of children. There is a desperate need for a legislative mandate and proper resourcing in this area to ensure both compliance with international obligations but also to ensure the safety and rehabilitation of these complex and vulnerable offenders.

Only twenty two percent (22%) of the participants added that a government agency must be designated and empowered to manage and coordinate programs and services for juveniles (including probation, training and rehabilitation programs, and setting up community service work). This agency should also manage juveniles in facilities such as a Correctional center, Detention centre or Safe place. One participant made specific reference to the draft Child Justice Bill from Fiji and the Samoan *Community Justice Act* from 2008¹¹⁶ which can be referred to when creating the powers of the personnel responsible for a Child Focused Agency.

With the same idea in mind, thirty three percent (33%) provided specifically that a separate unit to be created within the Vanuatu Police Force that will have a similar role as the Family Protection Unit but focusing on juvenile offenders. This is because the Police are flooded with cases each day and consequently do not deal with Juvenile offenders according to the SOP. The Vanuatu Police Force responded to this suggestion that currently the limited resources available make this idea impractical. They also added that the Vanuatu Women’s Centre is the agency that provides rehabilitation for women victims and work closely with the Police to prosecute offenders especially in relation to violence against women. Hence even if there is a separate unit created within the Police Department, there is the need to create an agency to provide rehabilitation programs and services to juveniles.

¹¹⁶ *Community Justice Act* 2008 (Samoa) http://www.paclii.org/ws/legis/num_act/cja2008225/ (Accessed: 2/08/18)

Twenty two percent (22%) of those consulted stated that given that probation services currently falls within the mandate of Vanuatu's Correctional Services; this is likely the most feasible option for the Correctional Services to coordinate, manage and promote community based programs for the supervision, rehabilitation and reintegration of juveniles, in collaboration with NGOs, Faith Based Organizations and community leaders. On the same note, the Vanuatu Correctional Services Centre has made attempts to secure funding to construct a Correctional Centre for Juveniles. The outcome is yet to be known.

Eleven percent (11%) pointed out that adult corrections services dealing with young offenders simultaneously are usually inadequately trained and under resourced to deal with the specific requirement of young offenders and this may result in significant infringement of human rights.

Where relevant, stakeholders mentioned that schools also create and apply their own policies and procedures in place to deal with any offences committed by the students/juveniles. However, if it is a very serious offence or offence is committed repeatedly, then the matter should be taken to the police. However, care should also be taken when handing over issues that deal with children to another body as there is fear of abuse of the children and their rights. An example is when a group of Matevulu College students were taken to the police station to be dealt with and these students were treated harshly.

Fifty six percent (56%) of those consulted mentioned other bodies such as a family, the chiefs in ways of custom to be the first option that a juvenile is deal with before being admitted to the police and the formal institutions.

For Chiefs, there must be training on guidelines for chiefs in delivering diversionary programs so there is consistency. Emphasis must be put on the current governance system and if it is respected, it would be beneficial as juvenile issues are dealt. If this is respect, juvenile issues should be dealt with by the family and community, the nakamal, village council, and area council before the Courts as a last resort.

These bodies must also be recognized in the Juveniles Act.

Commission's Views

The Commission now considers the approaches applied in various countries of the region and the views provided by the Stake holders and the general public.

Firstly, the approach applied in Tonga is the cheapest out of all the other approaches. The current situation in Vanuatu is similar in that there is no exclusive facility with the purpose of housing juveniles alone. Provisions in various pieces of legislation outlines how to deal with juveniles. Juveniles and adults are detained in the same facility and are managed by one

institution. This however has the disadvantage that more focus is directed toward the adults so the rights of juveniles may be infringed or ignored.

During Consultation, none of the participants agreed to this approach to be applied in Vanuatu.

The Commission is of the view that this approach, although is the cheapest approach for Vanuatu, is not suitable in terms of a Child's wellbeing. Juveniles are merely children and thus must not be treated and housed in the same place as adults.

The Commission now deliberates on the approach applied in PNG and Fiji where a separate place is appointed to detain juveniles whereby rehabilitation and vocational programs are offered. In these circumstances, there is a separate managing body that is primarily focused on the children and their best interest in these detention centres. Other terms are also used such as a "safe space", Juvenile Rehabilitation and Development Centre, Girls Home, Correctional Centre and so forth. A government agency is created specifically to provide for the welfare of the juveniles in these premises. A child's best interest is paramount when managing juveniles as their rights are detailed in a separate Juvenile Justice Act as well as the tools and resources provided.

Majority of those consulted (55%) specifically agreed to this idea of constructing a separate facility to house and provide programs and services to juveniles alone while twenty two percent (22%) added the idea of having a separate agency to deal specifically with juveniles. Although thirty three percent (33%) of those consulted suggested that this task is given to a separate unit within the Vanuatu Police Force, the VPF commented that this would not be practical due to the limited amount of resources available and the low statistics available of juveniles admitted to the current Correctional Centres. A Child focused agency is nevertheless required. The Commission agrees with the sixty seven percent (67%) who saw the importance of providing a human living condition. They also agree to the provision of resources and tools in order to accommodate the rights of juveniles in a Detention centre and thus in line with the UN Rules for the Protection of Juveniles deprived of their liberty.

For this to happen, a separate facility to house juveniles exclusively must first be constructed, a separate child focused agency must be created and maintained as well as the rehabilitation and educational programs which will be costly and thus not too applicable for Vanuatu.

Third is the approach applied in the Solomon Islands where there is a separate Act that provides for Juvenile Offenders but are housed in the same structure, yet separated from the adults and managed simultaneously by the Correctional services of the Solomon Islands. This is slightly different from the approach in Tonga where legislation does make references to Juvenile offenders hence juveniles are considered to a certain extent. Comparing this approach to that applied in Tonga with that of PNG and Fiji, this approach falls somewhere between the

two in terms of costs. The Commission thinks that having split objectives between the Adults and juveniles will not result in a child's wellbeing and thus not having the best Interest of a child as paramount, hence breaching the CRC.

During Consultation, twenty two percent (22%) of the populace suggested that the Correctional Service takes on the role of managing juveniles, providing rehabilitation and reintegration programs and services, work in collaboration with NGO's, Faith Based Organizations and Community leaders as this currently falls under their mandate. As rightly pointed out by eleven percent (11%) during consultations, having one agency to manage both the adults and juveniles simultaneously is usually inadequately resourced and trained to deal with the specific requirement of young offenders and this may result in significant infringement of human rights.

The Commission is also aware that the Vanuatu Correctional Service took the idea on board and has made plans and secured funds to construct a separate facility that will exclusively house juveniles. This is a big step forward in terms of juvenile justice and thus the Commission's recommendation in this area is for future references only. With respect to a Child's wellbeing, the Commission recommends that officers trained specifically to deal with juveniles are employed by the Vanuatu Correctional Services to work exclusively with youths in the Correctional Centres in order to rehabilitate and reintegrate into the society. Any proposed Juvenile Justice legislation should also include a provision that allows the proposed Juvenile Justice Act to undergo review from time to time as appropriate.

The Commission agrees with the fifty six percent (56%) of the populace that suggested the inclusion of the informal bodies such as the Family members and the chiefs in one's Community in the Juvenile Justice Act. These bodies are to be the first resorts in dealing with Juveniles before admitting to the formal institutions such as the Police. In doing so, less time and resources is used in the formal institutions. For a consistency in dealing with the juveniles by chiefs, the Commission agrees with the idea of training chiefs to deal with the juveniles in ways that are consistence throughout Vanuatu.

With respect to Schools, the Commission agrees that schools throughout Vanuatu continue to enforce their policies and rules in disciplining juveniles but must be guided by the CRC to safe guard the rights of Children. The Commission think it is appropriate for the Ministry of Education to take on this role and not necessarily include this in the Juvenile Justice Act.

Therefore, the Law Reform Commission makes the following recommendations:

Recommendation 1: Any proposed Juvenile Justice legislation should give recognition to families as the first institution to deal with juveniles, before the Chiefs using custom practices and the last resort should be formal institutions.

Recommendation 2: A Government Agency may take on the role to provide rehabilitation and reintegration programs for Juveniles.

Recommendation 3: This Government Agency as in 2, should work closely with the NGO's, Faith Based Organizations and Community Leaders. (See more in Part 8)

Recommendation 4: There must be recruitment of officers with the specific skills and qualifications to deal with Juveniles in this Government Agency as in 2 above.

Recommendation 5: A Correctional facility and programs for juvenile offenders must be separated from adult offenders.

Recommendation 6: This facility must have the purpose of providing care, protection, education and vocational skills and with a view to children assuming socially constructive and productive roles in society.

Recommendation 7: The separate part in 5 above must be placed under the responsibility of the new officers with the specific skills and qualifications to rehabilitate juvenile offenders.

Recommendation 8: The part allocated for the juveniles must be termed "Safe space".

Recommendation 9: The living condition in 7 above must be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of person of his or her age.

PART SIX: RECORDS AND PRIVACY

Current Situation

Records and privacy of juveniles can be defined as the established protective measures for a juvenile offender, juvenile witness, and a juvenile victim who is party to a juvenile court proceeding. USA is the first State to create separate court settings for juveniles in 1899 to serve the purpose of protection of record, privacy and harsh proceedings against juveniles¹¹⁷. In the Pacific region, some countries have established juvenile justice systems providing standards of handling records and privacy of juvenile offenders, victim and juvenile witnesses.

This chapter covers issues surrounding the records and privacy of juveniles. Records and privacy covers issues such as restriction of the juvenile offenders' identity, records of juvenile courts, transfer of juvenile court records, records of institutions, and restriction on the publication of proceedings. Under this chapter, examples are to be drawn within few countries in the region.

Vanuatu as a State Party to the Convention on the Right of Children (CRC) which provides the underlying legal frame work for handling juvenile issues, including the right to protection of privacy and records of juvenile proceeding. Article 40 of the CRC provides that a child's right to privacy is to be respected at all stages to avoid any risk of publicity or bad labelling¹¹⁸.

Currently there is no legislation regulating privacy and records of juvenile in Vanuatu. Institutions dealing with juvenile issues such as the Vanuatu Police Force, the Courts, and Correctional Services are guided by institutional procedural guidelines for the collection of information on juvenile having conflict with the law. For instance, the Police Officers were guided by their Standard Operating Procedures (SOP) to record data on juvenile offenders¹¹⁹. The SOP provides for the recognition of the rights of children and emphasised that those rights are to be respected at all times. More so the Chief Justice Practice Direction also provides for some measures of protection against the juvenile victims including witness privacy and well-being.

The *Criminal Procedure Code Act* [Cap 136] of Vanuatu provides for later courts to access and follow records of previous courts¹²⁰. Article 5 of the Constitution also provides for the

¹¹⁷ Juvenile Justice Reform Initiative in State, 1994, https://www.ojdp.gov/pubs/reform/ch2_i.html

¹¹⁸ *Convention on the Right of Child*, (20 November 1989), <http://www.unhcr.org/uk/4d9474b49.pdf>, (Accessed on 29 May 2018)

¹¹⁹ Above n34

¹²⁰ *Criminal Procedure Code* [Cap 136], (Vanuatu), http://www.paclii.org/vu/legis/consol_act/cpc190/ (Accessed: 21/05/2018)

entitlement of right for everyone's privacy. This means that the juveniles were also entitled for this same right to protection of privacy of their records when they become¹²¹.

Whilst there is no primary legislation regulating records and juvenile's privacy, several issues are emerging. The imposition of certain restrictions on offenders and victim's identity are in place such as the Chief Justice Practice Direction and the SOP. Chief Justice Practice Direction provides for certain measures regarding protection of juveniles which include:

- Expunging from the public record any names, addresses, workplace, professions, or any other information that could be used to identify the child.
- Prohibiting the defence lawyer from revealing any names, addresses, workplaces, professions or any other information tending to identify the child,
- Ordering the non-disclosure of any records that identify the child's, until such time the court may find appropriate¹²²

When dealing with juvenile victim or witness, it should be noted that the child's interest should be of paramount consideration as well as safeguarding the rights of the convicted offender¹²³. For juvenile rights of privacy and records to be strengthened and highly recognised it is best that they are embodied into a new legislation to cater for a better and consistent standard for handling such issues.

In relation to court records, juvenile cases require proper and separate court recording. In accordance with the Chief Justice Practice Directions, the criminal convictions of young offenders should be deleted after a period of two years or when the juvenile offender attain the age of eighteen years, whichever is attained earlier except where further convictions are recorded¹²⁴. This requirement may exclude serious offences like sexual offences and other similar offences that the Court may deem fit to define as serious¹²⁵.

The transfer of a juvenile court record from one court to another must be consistent. This means that any later court is to pay a maximum attention from previous conviction of the juvenile offender. The *Criminal Procedure Code Act* [Cap 136] does provide for later courts to follow strictly records of previous courts when dealing with the same matter¹²⁶. However, there was no further specification on whether this provision also applies to juvenile courts. Any

¹²¹ *Constitution of the Republic of Vanuatu*, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 4/09/2017)

¹²² Above n67

¹²³ Above n67

¹²⁴ Above n67

¹²⁵ Above n67

¹²⁶ *Criminal Procedure Code* [Cap 136] (Vanuatu), http://www.paclii.org/vu/legis/consol_act/cpc190/ (Accessed: 20 June 2018)

previous court that deals with a juvenile being found guilty of an offence other than murder or attempted murder, can transfer the case to a Juvenile Court if deemed appropriate. With circumstance where any case is transferred, the offender should be brought before a juvenile court and the juvenile court should adjudicate over the matter according to the rules and procedures of the juvenile court.

Furthermore, the records of juvenile offenders held by institutions warrant careful consideration. It is very important for a juvenile court to liaise with other responsible institutions for the careful handling of juvenile's records. Provided that any person within any institution who deals with the juvenile offender must not disclose any information of juvenile offender regarding his or her behaviour or anything that may lead the offender's identity.

Another issue is the unauthorised publication of records and identity of juveniles who were party to a court proceeding. This refers to any unnecessary publications of court proceeding report by any person regarding a juvenile with the intent to identify the juvenile without the consent of the authority responsible in dealing with juveniles. This includes photos and name or any particulars that could tend to identify the juvenile concern. The Chief Justice Direction provides that the Courts are prohibited to publish certain materials or documents which are in relation to any proceeding regarding juveniles.

No newspaper report or radio broadcast of proceedings revealing the name, address or school, or including any particulars that may lead to the identification of any juvenile either the juvenile offender, the victim or witness.

No picture shall be published in any manner as being, or including the picture of, any juvenile so concern in the proceeding¹²⁷.

Since these aspects of juvenile issue are of great concern. It is so paramount that the rules and laws governing the said issues be intertwined even when practised across scattered national institutions. Therefore, it is imperative that these issues are legislated for taking into consideration the procedural guidelines and rules that are currently in place within different national agencies so as to minimise conflict.

Comparison with Other Jurisdiction

Privacy and recordings of juveniles who came into contact undergo juvenile court proceedings has been legislated in some countries within the Pacific region such as PNG, Solomon Islands, Samoa, and Fiji. In PNG there is a specific part to its *Juvenile Justice Act* that provides for the

¹²⁷ Above n67

privacy and records of Juvenile offenders¹²⁸. This Part governs juveniles who are suspected of committing an offence and those who were convicted of or charge with an offence. It recognises the right and privacy of juveniles who were in conflict with the law, while considering the fact that juveniles are to be dealt with to their best interest¹²⁹. The power to obtain juvenile identity vested on the Director of Juvenile Justice¹³⁰.

Similarly in Fiji, the law prohibits publications of juvenile's identity and the power to obtain juvenile identity lies within the Magistrate Court¹³¹. In Solomon, though, its *Juvenile Act* was silent about the obtaining and protection of juvenile's identity their *Correctional Service Act* does provide for the obtaining of offender's identity¹³². The said provision also forbids unauthorised publications unless it is deemed necessary by the Court.¹³³

Moreover, in PNG there is recording of juvenile court from the adult court. Court records are to be made available for other courts¹³⁴. In Samoa with instances where there is pre-sentencing of juvenile offenders, the probation officer has to take records of each sittings¹³⁵. Thereafter, the records are submitted to the Youth court which has the jurisdiction to hear cases of young offenders age 11 to 17 before the next sitting of the Youth Court, provided that any cause of action against young offender is to be taken with the best interest of the child¹³⁶.

Consultation

In view of the general public's view on juvenile offender's identity, 98 % of people consulted agreed that juvenile offenders and victim's identity must always be protected provided that they are young and may have a chance to be good citizens if guided with better rehabilitation programs.

Furthermore, juvenile records should also be sealed off to the public while only high level officials within the relevant departments dealing with juvenile cases should have access to

¹²⁸ Section 108(1), *Juvenile Justice Act* 2014, (PNG), http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 2/06/2017)

¹²⁹ Ibid

¹³⁰ Above n128

¹³¹ Above n128

¹³² Section 33, *Correctional Service Act*, 2007, (Solomon Island) http://www.paclii.org/cgi-bin/sinodisp/sb/legis/num_act/csa20078o2007280/csa20078o2007280.html?stem=&synonyms=&query=Correctional%20Service%20Act (Accessed: 11/06/2018)

¹³³ Section 4(4)(b), *Juvenile Offenders Act* 1996, (Solomon Island) http://www.paclii.org/sb/legis/consol_act/joa194/, (Accessed: 12/06/2018)

¹³⁴ Section 109(3)(a-c), *Juvenile Justice Act* 2014, (PNG), http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 2/06/2018)

¹³⁵ Section 14 (1-3), *Young Offenders Act*, http://www.paclii.org/cgi-bin/sinodisp/ws/legis/consol_act_2012/yoa2007181/yoa2007181.html?stem=&synonyms=&query=Young%20Offenders%20Act, (Accessed: 19/06/2018)

¹³⁶ Ibid

these juvenile records. This will help especially when offenders from other provinces go to another province and commit an offence and their criminal record can be traced back using the Police Investigation Managing System (PIMS). This is a new system used by the Vanuatu Police Force (VPF) funded by the Australian aid to equip VPF manage incidents, investigations and update crime history, but for senior officers to be able to gauge workload, crime trends and having confidence on where a case is up to¹³⁷. For instance, in the Correctional Department only high level officials can access HOMES database and they are the ones that then delegate the cases to the lower officials. All institution dealing with juvenile records and privacy should have a zero tolerance policy in relation to publication of confidential details. As such, severe punishment should be imposed on such acts by officials who fail to adhere to this zero tolerance policy.

Names and records of juveniles should be suppressed. For example, currently courts who deal with cases in juvenile court jurisdiction following the Chief Justice Practice Directions as juvenile identities are now being kept secret, for both offender and victim. Criminal records should be sealed off to avoid future stigmatisation as provide by the Chief Justice Practice Directions that young offenders have the right to protect themselves from future privacy.

However, 2 % of people consulted shared the view that records must be handled with care due to the reason that if other juvenile identifies that such option of restricting juvenile records and privacy being available, this can be taken advantage of. Juveniles would feel that they are free to do whatever they want knowing that once they turn 18 that record will be deleted. More so, they said that record should be left opened for everyone to access to serve as an example of deterrence to others.

Commissions Views

With regards to privacy and records of juvenile, the commission is in a view that the records of juvenile proceedings and privacy should be protected against public accession. The Constitution recognises the right for protection of everyone's privacy confirms that every person is entitle to the said right of privacy, however, it requires further specification especially regarding right for juvenile concerning records of proceedings and privacy. The Criminal Procedure Code Cap 136 does provide for a later court to follow the records of previous court but silent about mentioning the juvenile proceeding records. However, the Chief Justice Practice Direction already establishes a guide which cater for prohibition of unauthorised publications of certain materials which may disclose a juvenile's identity like photos and finger print, particularly those who were party to a court proceeding. This guide provides the similar procedure of handling

¹³⁷ Vanuatu Police Force, *VPF PIMS New System*, October 30 2015, <https://www.facebook.com/1468944803396336/photos/vpf-new-pims-system-in/1530604733897009/>, (Accessed: 19/07/2018)

juvenile record and privacy as in PNG following their current *Juvenile Act of 2014*. PNG has a detail Juvenile Act which have a separate part specifically governing privacy and records of juvenile proceedings.

Solomon Islands and Fiji have the similar approach by prohibiting unauthorised publications of records of proceedings and any privacy information like fingerprint, photograph or any particulars that may lead to the juvenile's identity.

Hence, it is necessary for the above mentioned procedures and guidelines to be incorporated in a legislation to better govern records of juvenile proceedings and privacy of juveniles who undergo a court proceeding.

Therefore, the Vanuatu Law Reform Commission makes the following recommendations:

Recommendation: That the proposed Juvenile Justice legislation to provide for the prohibition of any information disclosed by any person to the public regarding the details and records of any juvenile who is a party to any proceeding.

Recommendation: That juvenile identity be protected by prohibiting any publication of information that may lead to the juvenile's identity, like photograph, name, fingerprint and any particular that may lead to identify the juvenile who undergo a court proceeding. These include the juvenile offender, the victim and juvenile witness.

Recommendation: That records of juvenile offenders to be deleted once the child attain the age, of 18, unless; required by employer for employment purposes, or required by any authorized person within any responsible institution dealing with juvenile issues.

Recommendation: That any unauthorized or unnecessary publication which trying to reveal the offender's identity or juvenile records should be regarded as an offence.

PART SEVEN: OTHER MATTERS

OTHER LAWS

Current Situation

There are a number of Acts that make reference to persons under the age of 18¹³⁸. Most of these Acts do not require changes to gather for the effective and efficient implementation of Juvenile Justice. With the lack of and the limited resources to fund a proper juvenile justice system, the Current laws and resources are looked at with the hope of implementing juvenile justice to an extent with amendments made to them to complement the proposed Act.

The *Correctional Service Act*¹³⁹ 2006 of Vanuatu primarily provides for adult detainees and hence requires amendments to accommodate juveniles.

Comparable Jurisdictions

In the Solomon Islands the *Correctional Services Act* 2007¹⁴⁰ provides for young prisoners and is obligated with the task to provide rehabilitation programs to young prisoners and reintegrate them back into the community.¹⁴¹

Commission Views

The amendment of the *Correctional Services Act* of Vanuatu was not an issue that was thought out at the beginning of this Review hence was not consulted upon during consultation. It was after considering all the approaches available and the people's views that the idea seemed like a more practical one considering the availability of resources now and in the future. The cost is not costly but will nonetheless enforces juvenile justice to an extent in waiting for a separate juvenile justice institution be established.

¹³⁸ See Part 1 of this report.

¹³⁹ *Correctional Service Act* 2006 (Vanuatu) http://www.paclii.org/vu/legis/num_act/csa2006234/ (Accessed: 23/08/17)

¹⁴⁰ *Correctional Service Act* 2007 (Solomon Island) http://www.paclii.org/cgi-bin/sinodisp/sb/legis/num_act/csa20078o2007280/csa20078o2007280.html?stem=&synonyms=&query=Correctional%20Service%20Act (Accessed: 11/06/2018)

¹⁴¹ Ibid

Therefore, the Commission decides that the *Correctional Services Act* of Vanuatu be amended to accommodate the juveniles and the services that should be provided to them under the following recommendations:

Recommendation: That the Correctional Services is obligated with the task to manage and provide rehabilitation programs to juveniles and reintegration into community. Section 1 of the *Correctional Services Act* 2006 must be amended to include the treatment of juvenile offenders.

Recommendation: That the *Correctional Services Act* 2006 be amended in the purposes section to accommodate Recommendation 1 above.

Recommendation: That a provision is included in the *Correctional Services Act* 2006 stating that juveniles being admitted to the Correctional facility must be separated from the adult detainees.

Recommendation: That the *Correctional Services Act* 2006 be amended include provisions to recruit officers with specific skills and qualifications to deal with juveniles.

Recommendation: That the *Correctional Services Act* 2006 be amended to specifically state that the living conditions for juveniles in the Correctional facilities shall be humane and habitable. The needs of the child shall be taken into account and the child shall be provided with basic needs such as food and water and shelter and clothing.

REGULATIONS

Current Situation

In almost all legislation, there is a part relating to regulations. It is usually the sections that fall under this part that authorizes a Minister or an official to make regulations. The rationale behind having such a provision is for the better implementation of the principle ideas of the Act concerned. The regulations however are to be made in such a way that they are not inconsistent with the Act. Regulations, as opposed to legislations, require publishing in the Government Gazettes to become legally binding with legal effect and are guidelines that dictate how the provisions of the Act are applied. They are also required to give effect to certain provisions of an Act of Parliament by Orders. Regulations or subsidiary legislation can be

amended by a notice published in the Government Gazette.¹⁴² Thus regulations are easier to amend compared to legislation.

In the *Correctional Service Act* for instance, under section 68(1), the Minister is authorized to make regulations prescribing all matters that are required or permitted under the Act or are necessary, or convenient to be prescribed, for giving effect to the purpose of the Act.¹⁴³ In almost all legislation in Vanuatu, similar provisions can be found at the end of the legislation.

For a new legislation such as any proposed Juvenile Justice legislation, the provision of regulations is important in order for gaps in this specific law to be addressed. The Minister has the power to make regulations for any legislation to function effectively but it has to be within the purpose of the Act as amended from time to time.

Comparable Jurisdictions

In PNG, the Head of state has the mandate to make regulations required by the Act that is not inconsistent to the *Juvenile Justice Act*¹⁴⁴. More over in the Solomon Islands the Minister has the power to make regulations prescribing all matters required by legislation.¹⁴⁵

Consultations

During consultation, it was asked if provisions for regulations are necessary to be included in any proposed legislation and what should be included in this provision.

All participants responded that there should be a Section provided for regulations. However, only 11% of the populace added that the Proposed Juvenile Justice legislation should be treated in the same manner as any other legislation. Regulations maybe made by the Minister in a manner that is not inconsistent with the Act.¹⁴⁶

¹⁴² Differences: Acts and Regulations, <https://www.slp.wa.gov.au/faq.nsf/Web/Topics/C39627DF9C3527E348256CA8000DCBE5?opendocument> (Accessed: 23/08/17)

¹⁴³ Section 68, *Correctional Service Act* 2006 (Vanuatu) http://www.paclii.org/vu/legis/num_act/csa2006234/ (Accessed 23/08/17)

¹⁴⁴ Section 113, *Juvenile Justice Act 2014*, Act (PNG) http://www.paclii.org/pg/legis/num_act/jja2014191/ (Accessed: 12/05/17)

¹⁴⁵ Section 21, *Juvenile Offenders Act* 1996, (Solomon Island) http://www.paclii.org/sb/legis/consol_act/joa194/, (Accessed: 12/06/17)

¹⁴⁶ Viran Molisa Trief, Stretem Rod blo Jastis mo Sefti, June 2018

Commission's Views

Following similar practices, the commission is of the view that a provision should be included in the Proposed Act for Regulations whereby the Minister is authorized to make Regulations for the effective and efficient implementation of the Act.

Therefore, the Vanuatu Law Reform Commission makes the following recommendations:

Recommendation 1: That a section is to be allocated for the making of regulations by the Minister responsible for Justice in the proposed Juvenile Justice Act.

AWARENESS

Current Situation

Juvenile justice is still a new concept in this part of the Pacific. Inconsistencies in the exercising of juvenile justice are evident in various institutions. In some rural parts of Vanuatu, it is only the chiefs that are responsible to deal with young offenders.¹⁴⁷ With chiefs however, there is lack of formal support and training, juvenile justice is administered subject to risk of bias, favouritism, self-interest and inconsistency in penalties.¹⁴⁸

It is the usual practice for awareness to be made on a new Act in all parts of Vanuatu. A good example was seen in the case of the *Family Protection Act 2008* where awareness activities were funded by the government of Australia to make people aware of the new Act.¹⁴⁹ The same was seen in the new Land Reform Acts in the beginning of 2015. The local newspaper reported that the Vanuatu Government through the Ministries of Lands and Justice have started to implement the new Acts. It started when a team of Land Officers from the Department of Lands and Customary Lands Management office visited the provinces and the islands and carried out awareness. All the chiefs were trained on how the new Land Reform Changes would function.¹⁵⁰

¹⁴⁷ Conflict Management and Access to Justice in Rural Vanuatu, SRBJ, July 2016

¹⁴⁸ Vicki Vaartjes, *Where to from here?*(Report prepared to show the institutional status of the Juvenile justice system in Vanuatu) November 2016

¹⁴⁹ Vanuatu Country Report, https://dfat.gov.au/about-us/publications/Documents/ResVAW_vanuatu.pdf (Accessed: 23/08/17)

¹⁵⁰ New Lands Reform Starts, http://dailypost.vu/news/new-land-reforms-starts/article_b8d212de-0b19-580f-9abf-6c67c40afb5a.html (Accessed: 24/08/17)

Consultations

In the consultation carried out by the Vanuatu LRC team, questions were asked to gather the views of the populace. Furthermore, who would be the responsible persons to carry out this awareness that will be effective and efficient for people to be aware of this proposed legislation. And finally in what mode of communication should the awareness be more reliable.

All participants of the Consultation stated that there must be awareness of the new proposed Juvenile Justice Act.

The table below shows the portion of the populace who suggested what body should be responsible in providing awareness, the matters to be covered and in what mode of communication and the additional comments that were made.

Portion of populace	Responsible Body to provide awareness on proposed Act	Additional Comments	Matters to be covered in awareness	Mode of communication for awareness
33%	Government of Vanuatu	22% in this portion added that the Ministry of Youth and Sports, Education and Justice and Community Services, the department of Correctional Services in particular should coordinate the awareness.	<ul style="list-style-type: none"> - Matters in the new Act - The rights of all children who are involved in the case - Roles of institutions involved - Process of juvenile justice and where children can seek help if they need protection - Rehabilitation programs available for Juvenile offenders and victims 	<ul style="list-style-type: none"> - Radio outlets - Local TV station - Social Media - Public Lawyers during provincial circuits
22%	Australian Government Funded Programs such as the SRBJ and the SCA.	SRBJ has indicated to provide support for the awareness of this proposed Act.	<ul style="list-style-type: none"> - Education about employment and marriage of children and where to seek 	
22%	chiefs	Allowing the		

		chiefs to carry out awareness will mean educating and training them prior to providing awareness.	assistance ¹⁵¹ - Offences that can be dealt with in a school and the type of offences that must be referred to the Police.	
22%	Public prosecutor and Public Solicitors office.			

A team including the following personnel should conduct training for awareness of the proposed legislation:

- Children’s Court Magistrate if possible;
- Criminal lawyers with deep understanding of the legislation;
- Police with knowledge of new legislation; and
- Experienced trainers who can train the chiefs, members of the community responsible for managing conflict or other appropriate people about their role under the Act in rehabilitation and family conferencing¹⁵²; and
- The Vanuatu Correctional Services Department.

Commission’s Views

The Commission is of the view that for the proposed legislation to come into force, awareness is essential to be carried out in all parts of Vanuatu. The importance of this is showed in the consultation where 100% of those consulted agreed to this proposal for awareness.

The Commission also agrees with the 33% of those consulted who stated that the Government should coordinate the awareness that is the Vanuatu Correctional Services Department in particular.

In assisting the Department of Correctional Services, the Commission agrees with the 22% who stated that Chiefs should also be involved in making awareness on any proposed legislation as

¹⁵¹ Viran Molisa Trief, Stretem Rod blo Jastis mo Sefti, June 2018

¹⁵² Ibid

they have access to all the communities throughout the archipelago. Training should also be provided prior to the awareness. Doing so would also have an effect of empowering the chiefs to implement the proposed legislation in communities.

For proper utilization of time and resources, the Commission sees the importance and agrees with the idea of the public lawyers providing awareness during their provincial circuits.

Being an independent body that initiated and participated in all steps of this review, the Commission adds that it is proper to be involved in providing awareness on this proposed Act during its tours into the islands of Vanuatu during their consultation phases.

The Commission agrees with all the matters that must be covered as well as the people responsible to provide training on the proposed legislation before commencement. It also adds that a few more people from other institutions are added to this team. A representative from the Ministry of Justice that is the Child's Desk also be part of this team to clear issues relating to the CRC which provides some important issues relating to Juvenile Justice and a representative from the Malvatumauri Council of Chiefs along with any other relevant offices that are involved in issues relating to juveniles.

Therefore, the Vanuatu Law Reform Commission makes the following recommendations:

Recommendation 1: That the Department of Correctional Services will take the lead to coordinate the awareness of the proposed Act.

Recommendation 2: That the matters to be covered in the awareness are as follows:

- Matters in the new Act;
- The rights of all children who are involved in the case;
- Roles of institutions involved;
- Process of juvenile justice and where children can seek help if they need protection;
- Rehabilitation programs available for Juvenile offenders and victims;
- Education about employment and marriage of children and where to seek assistance; and
- Offences that can be dealt with in a school and the type of offences that must be referred to the Police.

Recommendation 3: That the team that will be responsible to make awareness prior to the commencement of the Proposed Act must consist of the people from the following offices:

- The Vanuatu Correctional Services;
- Malvatumauri Council of Chiefs;
- National Youth Council;
- Child's desk, MOJCSS; and
- Any other relevant offices involved with issues relating to juveniles.

Recommendation 4: That other relevant offices such as the LRC, PSO, PPO, VWC must carry out awareness on the proposed Act where and when convenient.

Recommendation 5: That training is carried out on matters in 2 above by the following people:

- Children's Court Magistrate;
- Criminal lawyers with deep understanding of the Act;
- Police with knowledge of new Act; and
- Experienced trainers who can train the chiefs, members of the community responsible for managing conflict or other appropriate people about their role under the Act in rehabilitation and family conferencing;
- Representative from the Childs desk, MOJCSS; and
- Officers from the Correctional Service with knowledge relating to juvenile issues.

Recommendation 6: That the team will be using all modes of available communication that is efficient for awareness on this proposed Act.

LIST OF APPENDIX

CONSULTATION LIST

Name and Community		Office Name and Position
1.	Alban Garae	President, Penama Province
2.	Anita Naupa	Development Facilitator, World Vision
3.	Basil Pakoa	Bladiniere Estate, Port Vila
4.	Benson Challiy	Bladiniere Estate, Port Vila
5.	Billy Atison	Bladiniere Estate, Port Vila
6.	Charlie Mangawai	Office of the New Zealand High Commission, Port Vila
7.	Damien Boe	Public Prosecutors Office, Santo
8.	Dominic Dimalus	Bladiniere Estate, Port Vila
9.	Elizabeth Mael	Childs Desk Officer, MOJCS, Port Vila
10.	Georgina Faerua	Acting SG, Penama Province
11.	Georgino Neveservette	Family Protection Unit, Luganville Santo
12.	Ginette Morris	Disability Desk, MOJCS, Port Vila
13.	Gwen Ayong	Save the Children Australia, Luganville Santo
14.	Hanaline Ilo	Magistrate, Sanma
15.	Harkuk Vocor	School Inspector Compliance Officer, Education office, Santo
16.	Harold Bule	Bladiniere Estate, Port Vila
17.	Hellen Vusi	PO, Penama province
18.	Henry Saute	Area Secretary, West Tanna, Tafea Provincial Government
19.	Hilton Henry	Vanuatu Meteorological and Geohazard Department, Penama Province
20.	Jacob Kausiama	Public Solicitor, Port Vila
21.	James Anga	MOJCS, Port Vila
22.	Jane Garae	Public Solicitor's office, Santo
23.	Jean Pierre	Malvatumauri Council Of Chiefs, Port Vila
24.	Jesta Toka	Fresh Wota 3, Port Vila
25.	Joel Kalnpel	Agriculture Department, Penama Province
26.	John Tari	Education Office, Penama Province
27.	Joseph Pakoa	Bladineire Estate , Port Vila
28.	Junior Garae	Public Solicitor's office, Santo
29.	Kathleen ALick	Family Protection Unit, Luganville Santo
30.	Kelly Tabi	Penama Province
31.	Ketis Willie	Police Prosecutor, Tafea Province
32.	Kingsley Worek	Crime Prevention Unit, Luganville Santo
33.	Lents Vusilai	Corporative Department, Penama Province
34.	Lolina Martin	Senior Probation Officer, Correctional Centre, Santo
35.	Lorenzo Moli	Public Solicitors Office, Port Vila
36.	Lui Alick	Area Secretary, South West Tanna, Tafea Provincial Government
37.	Luke David	Area Secretary, North Area Council, Tanna, Tafea Provincial

		Government
38.	Malcom Linaoum	Fisheries Department, Penama Province
39.	Manson Tarilenga	NDMO, Penama Province
40.	Mike Brownhill	Bladiniere Estate, Port Vila
41.	Necklum Jiha	Area Secretary Council, Tafea Provincial Government
42.	Noel Yalu	Area Secretary, North East Area Council, Tanna, Tafea Provincial Government
43.	Peter Dini	Police Information Management System Officer, Luganville Santo
43.	Peter Jeffrey	Bladiniere Estate, Port Vila
44.	Peter Maru	Director of Police college, Port Vila
45.	Prosper Buletar	Secretary General, Sanma Province
46.	Ravai Jeffet	South East Area Council, Tanna, Tafea Provincial Government
47.	Ridely Wumalinge	Bladiniere Estate, Port Vila
48.	Rose Harry	World Vision Development Facilitator
49.	Sam K	Department of the Vanuatu Correctional Services, Port Vila
50.	Sargent Rose Stephans	Sargent, Family Protection Unit, Luganville Santo
51.	Setareki	Policy Advisor, MOJCS
52.	Stephane Pipite	School Inspector Compliance Officer, Education Office, Santo
53.	Steward Charlie	Independence Park, Port Vila
54.	Suziane	Vanuatu Women Centre, Port Vila
55.	Taio Johny	Tafea Provincial Officer
56.	Taure Jean Paul	Vanuatu Police Force, Penama Province
57.	Tony Alatoa	PWD, Penama Province
58.	Trevor Rarua	Department of the Vanuatu Correctional Services, Port Vila
59.	Tufunga Teana	Education office, Tafea Provincial Government
60.	UNICEF	UNICEF, Port Vila
61.	Viran Molisa Trief	Stretem Rod Blong Jastis
62.	Walter Atison	Bladiniere Estate, Port Vila
63.	William Mala	Tourism office, Penama Province
64.	Willie Veo	Office of the Youth and Sports, Penama Province

COMMUNITIES AND OTHER INDIVIDUALS WHO ARE MISSED OUT ON THIS LIST BUT HAVE BEEN CONSULTED ARE ALSO ACKNOWLEDGED.

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