

UNDIKUMBUKIRE



Government of Ireland
International Development Programme



UNDIKUMBUKIRE PROJECT ZAMBIA

DISCUSSION PAPER ON

ACCESS TO JUSTICE FOR CHILDREN IN ZAMBIA
UNDER THE CHILDREN'S CODE ACT NO.12 OF 2022



(Support to the ELECTORAL DISPUTE RESOLUTION OVERSIGHT AND CAPACITY BUILDING ZAMBIA),
23a District Road, Chelston/Obama,
Tel: +260 765 022807, Email: info@sedrobz.org
SEDROBZ (@sedrobz) / Twitter
Sedrobz (facebook.com)



UNDIKUMBUKIRE
PROJECT ZAMBIA

DISCUSSION

PAPER ON

ACCESS TO JUSTICE FOR CHILDREN IN ZAMBIA
UNDER THE CHILDREN'S CODE ACT NO.12 OF 2022

TABLE OF CONTENTS

1 INTRODUCTION	03
2 OVERVIEW OF THE CHILDRENS' CODE ACT	05
3 ANALYSIS	11
4 RECOMMENDATIONS	15
5 IMPLEMENTATION	17

1 INTRODUCTION

In the past, laws relating to children in Zambia were spread across various pieces of legislation. However, the enactment of the Children's Code Act No. 12 of 2022 (hereinafter "the CCA") consolidated the laws pertaining to children in Zambia by housing them in one Statute, making it the principal Act for dealing with children. The CCA has also domesticated key international laws, including the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, and the Convention on the Civil Aspects of International Child Abduction.¹ This is a huge step in the right direction in ensuring that Zambia meets international minimum standards and best practices.

Children encounter the child justice system in three main ways; as victims, witnesses, or when they come into conflict with the law. Notwithstanding how they find themselves in the justice system, children are still susceptible to victimisation due to the challenges currently faced in the child justice system attributed to factors such as lack of human resources from the various actors in the system, inadequate infrastructure in both rural and urban areas, lack of advanced technology in certain areas to support the provisions of the CCA, and lack of trained specialised officers and actors in child justice space which has frustrated the efforts the CCA is trying to achieve.

Despite the great strides Zambia has made to ensure children's rights are upheld in the child justice system, there is a disconnect between the law and its implementation that places children at heightened risk of victimisation and marginalisation. Given the pressing need to align the child justice system with the newly established legal framework and international standards, this policy brief discusses some of the criticisms against the law. It also highlights the provisions that decision-makers should prioritise to address these challenges and make the law more effective by ensuring that the rights and needs of children are met and protected.

¹ Children's Code Act

UNDIKUMBUKIRE



2 OVERVIEW OF THE CHILDREN'S CODE ACT

The domestication of the United Nations Convention on the Right of the Child (CRC) and other international instruments has enabled Zambia to meet international minimum standards such as the "Best Interest of the Child Principle" pursuant to section 3(1) of the CCA and which principle is emphasised throughout the CCA. The CCA goes further by ensuring that it creates a practical implementation mechanism under section 3(2) of the CCA which mandates all the actors in the child justice system to prioritise the best interest of the child at all times when deciding on how best to deal with all issues relating to children.

2.1 Rights of Children

Another salient feature of the CCA is the express provision for children's rights under part II. Some of the rights enshrined are aimed at protecting children who come in contact or conflict with the child justice system, including:

- **Section 6 of the CCA** provides for the right to expression, this entails that children must be informed and provided the opportunity to express their opinions on decisions that affect them, considering their age, maturity, and the nature of the decision involved. This is cardinal, as children who come into contact or conflict with the law ought to be free to express themselves to ensure that they have a more friendly experience with the child justice system.
- **Section 7 of the CCA** prohibits discrimination against a child. This provision protects children by ensuring that children are not discriminated against in the child justice system regardless of their background.
- **Section 12** provides that a child has the right to social protection and social services. As earlier alluded to, children come into the justice system in various ways and have different backgrounds, hence making each case unique and different. This results in the need for social protection and social services to cater for the special needs for each child that comes into the system.
- **Section 15** provides that children with disabilities have the right to be treated with dignity and respect. Children who come into the child justice system have different and special needs and children with disabilities are no exception. This mandates the different actors in the Child Justice System to consider the special needs and requirements of children with disabilities throughout the duration of the proceedings.
- **Section 16 of the CCA** provides for the protection of children on the move. The definition section of the CCA defines a child on the move to mean "a child who, voluntarily or involuntarily, moves within or outside the Republic with or without the child's parent, guardian or person having parental responsibility for the child and whose movement places the child or could place the child at risk of economic or sexual exploitation, abuse, neglect or any other form of violence."

Section 16 of the CCA states that a child on the move is entitled to appropriate protection and human assistance in accordance with the Anti-Human Trafficking Act, 2008 the Refugee Act, 2017, and any other relevant written law. Children on the move in most cases come into contact with the law as prohibited immigrants. Many times, they are treated as children in conflict with the law and not as children on the move or victims of human trafficking.

- **Section 19 of the CCA** provides for protection of children against sexual exploitation. Children can experience sexual violence at any time. Unfortunately, they do experience sexual violence and exploitation when they come into the justice system at various stages, hence the need to protect children from sexual exploitation. A research policy report conducted by Undikumbukire Project Zambia on "Sexual Violence of Boys in Detention Facilities" highlights the high frequency of sexual violence, thus the need to uphold this right.²
- **Section 23** provides for the protection of children from torture and deprivation of liberty. The CCA makes detention of children a measure of last resort and diversion a measure of first resort, thereby creating the right for protection from deprivation of liberty. However, there are instances where there is no option but to detain the child, hence the need to protect children from torture. In the 2023 Children's Code Act Survey³, 62% of children interviewed in detention or who had been detained by law enforcement reported experiencing torture, beatings, or other mistreatment during their detention.
- **Section 24** provides for the right to privacy for children. Any information involving children must be kept private, especially when they come into contact or conflict with the law. Identification of their personal information may put them at risk of danger.
- **Section 25** provides for the rights of child witnesses and victims. Child witnesses and victims may suffer secondary victimisation and re-traumatization when they come into contact with the law, hence the need to create child-friendly procedures that address their needs throughout their contact with the justice system.

2.2 Children in Conflict with the Law

Part V of the CCA covers Arrest, Bail, and Deprivation of a Child's Liberty. This Part also sets out a child's right to privacy and protection from exposure of the child's identity, prohibiting the release of any information or publication that is likely to lead to the identification of a child throughout their process in the Child Justice System.⁴

Part V provides for how children ought to be treated when they are apprehended or arrested. Some of the salient provisions include:

1. **Section 47 (2) of the CCA** provides that, a law enforcement officer shall not be in uniform or carry a firearm when apprehending a child at the child's dwelling place. However, there are exceptions to this provision.⁵ It also provides for how interviews should be conducted when a child has been arrested or apprehended. Additionally, it provides that questioning and interviews regarding an alleged offence should take place in the presence of a parent, guardian, child welfare inspector, legal representative, a close relative of the child, and the person with parental responsibility.⁶ Non-compliance with this requirement may compromise the validity and admissibility of the child's statement.

² *Sexual Violence of Boys in Detention Facilities Research Policy Report 2024*

³ *Children's Code Act Survey In Relation To Children In Conflict And In Contact With The Law, 2023*

⁴ *Section 46 of the CCA*

⁵ *Section 47 of the CCA*

⁶ *Section 55 of the CCA*

2. **Section 57 of the CCA** provides that, unless a child is accused of a serious offence, the law enforcement officer shall release a child on his own recognisance or that of a child's parent, guardian, close relative, or person having parental responsibility. Where the child is not released the officer should seek an order from the court to place the child in a place of safety and this may be done within 48 hours after the arrest of the child.⁷ It is important to note that the CCA provides that a child shall not be taken into custody except as a measure of last resort, and the child should not be detained for more than 48 hours.⁸

The provisions regarding children in conflict with the law aim to protect these vulnerable individuals, who are susceptible to abuse within the criminal justice system. It is important to note that, in the case of children in conflict with the law, the focus of the legal system is on reformation rather than punishment. This emphasis on reformation justifies the provisions mentioned above.

2.3 Diversion

When a child comes into conflict with the law, diversion shall be applied as a measure of first resort.⁹ This means that law enforcement officers ought to find other suitable means of dealing with children before charging them, especially in instances where the offence is not serious and does not have aggravating factors. The following diversion options are available as prescribed by the CCA.

- An informal reprimand by a law enforcement officer
- A formal and recorded caution made by a law enforcement officer in the presence of the child's parent, guardian, close relative, or person having parental responsibility.
- Taking the child through a diversion programme.
- Mediation between the complainant and the child in conflict with the law in the presence of the guardian, parent, officer, or child welfare inspector.
- Family group conferencing, and
- Restitution

However, there are a lot of considerations that are considered when deciding on which cases are suitable for diversion despite the law prescribing that it be a measure of first resort. Some of the considerations include¹⁰:

- The nature and circumstance of the offence;
- Degree and harm caused;
- The culpability of the child;
- The extent of the child's involvement in the offence;
- The child's age and developmental needs;
- Whether the child is a repeat offender;
- If the child committed the offence with an adult;
- Remorsefulness of the child;

⁷Section 56 of the CCA

⁸Section 57 of the CCA

⁹Section 56 of the CCA

¹⁰Section 58(3) of the CCA

- The child's cooperation; with the relevant authorities;
- The child's vulnerability;
- The child's level of education;
- The child's domestic and environmental circumstances;
- The child's cognitive ability,
- Interest of society and;
- Whether the child failed to respond to a previous diversion.

2.4 Court Proceedings

The CCA is now the principal legislation in respect to criminal procedure in cases involving children in conflict with the law. The Court in the case of *The People v GM HPI/06/2022* held that: ***"In determining this question, I have referred to the short title of the Children's Code Act. The relevant portion reads as follows:***

An Act to reform and consolidate the law relating to children; provide for parental responsibility, custody, maintenance, guardianship, foster care, adoption, care and protection of children; provide for the grant of legal aid to, and establish procedures for the treatment of, children in conflict with the law...." (Underline is for emphasis only)

From the quote above, it is clear that the CCA was enacted to, among other things, establish procedures for the treatment of children who find themselves in conflict with the law."

In this regard, section 65 of the CCA establishes the Juvenile's Court. In summary, the Subordinate Court is mandated to constitute itself as a Juvenile Court for purposes of hearing a charge against a child. According to section 66 of the CCA, the Juvenile's Court can hear and determine any criminal matter against a child, except for cases where a child is charged with murder, treason, or any class of offences triable by the High Court. Furthermore, a Juvenile Court cannot hear and determine a case where a child is jointly charged with an adult.

Article 133(2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 establishes the Family and Children's Court Division of the High Court for Zambia. **Section 67 of the CCA**, in summary, provides for the Court's jurisdiction, inter alia, the Court has original jurisdiction to hear a charge of murder, treason, or any class of offences triable by the High Court, and in cases where a child is jointly charged with an adult. The Children's Court also has appellate and supervisory jurisdiction.

To protect and uphold the right to privacy, cases involving children are held in-camera and there is a restriction on who can be present at a sitting of a Juvenile or Children's Court. These include: a member or officer of the Children's or Juveniles Court, a party to the case, a legal representative, a witness, a parent, guardian or a person having parental responsibility for the child, a person that the court authorises to be present, or any other person directly or indirectly concerned with the case.¹¹

¹¹Section 68 of the CCA

Section 71 of the CCA requires the court to inquire about the age of the person who appears before it; whether the person has been charged with an offence or not; if it appears to the court that the person before it is a child, or the person alleges to be a child. Ordinarily, proof such as a birth certificate or an affidavit certifying the date of birth should be presented before the court. However, in the absence of the above, a certificate signed by a health practitioner as to the age of a person below the age of nineteen years shall be used as evidence of the child's age without proof of signature, unless the court uses its discretion to direct otherwise.

It is important to note that **Section 73(2) of the CCA** provides that where a child appears before a juvenile court or children's court charged with an offence, the court shall inquire into the case and, unless there is a danger to the child or the community, release the child on bail. The provision relating to bail for children in conflict with the law has not excluded any offence from bail considerations when it involves a child. This was further interpreted in the case of **GM vs The People HPI/06/2022**. Where the court held in summary that a child can be granted bail for any offence as the CCA does not provide for conditions and limitations for bail in respect to which offences are bailable and not bailable. The Court concluded that all cases are bailable and the only consideration to make is whether granting bail will be a danger to the child or the child will be a danger to the community.

The CCA prioritises the freedom and liberty of children by ensuring that there are adequate laws on recognizance and bail. However, in instances where a child cannot be released, the law provides for an alternative way of dealing with them. **Section 75 of the CCA** mandates the Court may make an order for the remand of a child in a transit centre situated within a reasonable distance from the Courts. Furthermore, **section 75 (4) of the CCA** envisages that a child must appear before the Court every seven days for either a hearing of the case or mention and renewal of the remand warrant.

Section 75 (6) of the CCA prohibits the detention and remand of children in adult prisons or correctional centres. This is meant to prevent the mixing of children and adults in the same space. This is very progressive and a clear way of implementing the best interest of a child and the international best practices envisaged by international laws.

2.5 Child witnesses and victims

Section 78 of the CCA specifically provides protections for child witnesses and victims who come into contact with the law. The provisions under this section aim at ensuring that child witnesses and victims go through the child justice system in a child-friendly manner that protects their rights and prevents secondary re-traumatization. Some of the provisions include having the child testify in camera; the child being questioned in a child-friendly manner; having the child be questioned in a manner that is proportionate to the age of the child witness; the child not interacting or being in the same room with the person the child is testifying against; the child not being questioned more than twice; and having the child be cross-examined through a video link, a child welfare inspector or intermediary.



3 ANALYSIS

3.1 Arrest

Section 47 (2) of the CCA in summary provides that law enforcement officers must not be in uniform or armed when apprehending a child. This provision is progressive and well-intended by the legislature. However, the majority of children in conflict with the law are not apprehended from their homes. Between January 2022 to October 2024, UP Zambia represented a total of 211 cases involving 333 children in conflict with the law, of which only 23 Children were apprehended from home. This represents 7% while 93% of the children were apprehended from public places such as schools, markets, bus stations, shopping malls, Lusaka CBD, incomplete or abandoned buildings, and at the scenes of the crime. This evidence also shows that officers were in uniform, armed, and used handcuffs to restrain the children while using unreasonable force and violence.

Currently, this section protects less than 10% of the children in conflict with the law in Zambia. This particular provision does not protect the interest of children apprehended from public places especially schools where the children and other pupils may be traumatised by the conduct of armed and uniformed officers and equally increase the risk of stigmatisation by the school and other peers.

Section 47 (3) (ii) (b) CCA suggests that the duty to request identification is placed on the parents or guardians of the child. This provision is unreasonable because it is the duty of a law enforcement officer to introduce him/herself when apprehending a child. Furthermore, the law does not define what identification refers to. Leaving it open to unreasonable interpretation of what identification means under this law. On the other hand, the law does not provide the consequences for failure to provide Identification.

Section 55 (2) of the CCA provides in summary that, where the law enforcement officer fails to locate the parents or guardians of a child, the officer will have to request the social welfare inspector or officer to be present when interviewing the child. This is a good provision. However, the law does not provide a timeline within which an officer must request the social welfare officer to be present. The failure to provide a timeline within which to request a social welfare inspector affects the effective implementation of the duties of the social welfare inspector under section 55 (2), section 57(1), and section 34 (f) of the CCA, which duties include to provide guidance and other assistance and treatment for children arrested or remanded in police custody and ensuring that they are present during the interview of a child in conflict with the law.

It is important to note that under section 57 (1) (a) and (b) of the CCA, a child should only be detained as a matter of last resort and not for a period exceeding 48 hours, therefore, it is concerning that the law enforcement officer is not given a mandatory period or timeline within which to engage a social welfare inspector. The case of *The People v JC, JM, DB, MN, PM, SM, ML, EM, MS, EP And JP HPI/59/2023* where Lady Justice M. Bah Matandala after conducting a trial within a trial in respect to the admission of a confession statement relating a James Mwanza (a Child), the court excluded the confession statement because: The first confession statement was recorded in the absence of Parents, Guardians or social welfare inspector and the same was obtained after 9 days while the second confession statement was recorded after 14 days of detention in an adult police cell which situations contravened the provisions of CCA.

The case above is a practical example of the inadequacies of section 55 (2) of the CCA with respect to ensuring that a law enforcement officer expeditiously secures the presence of a social welfare inspector where parents cannot be found.

3.2 Deprivation of Liberty and Bail

Once there has been arrest, **Article 18 (1) of the Constitution of Zambia Cap 1** of the Laws of Zambia requires that such a person should be presented before a court within a reasonable time. Reasonable time is not defined by the Constitution. The CCA attempts to define what reasonable time within which a child ought to be taken to court to mean **48 hours**; this is not expressly provided but an implied interpretation of **section 56 (3) of the CCA**. In the case where the law enforcement agency is unable to take the child to court within 48 hours, the child ought to be released on their recognizance.

Comparatively, **section 33 of the Criminal Procedure Code Act Cap 88** of the Laws of Zambia requires that a suspect must be taken to court within **24 hours**, failure to which the person should be released on their recognizance.

Looking at the two laws it appears that the maximum period in which a child can be detained before being presented before court or released on their recognizance is a day longer than that of an adult. This is an anomaly, especially with the fact that **section 57 (1) (a) of the CCA** provides that detention of a child must be a measure of last resort, meaning securing a child's freedom is the first resort. Therefore, 48 hours within which to decide whether to present before a court or release on their recognizance is not a reasonable implementation of **section 57(1) (a) of the CCA**.

3.3 Recognizance and Bail Pending Trial

Section 56 (1) of the CCA provides for recognizance for children in conflict with the law. The provision is progressive however, the downside of the way the provision has been drafted is that it creates a condition and/or limitation to accessing recognizance if the child is **charged with a serious offence**. However, the law does not define what constitutes a serious offence.

Comparatively **section 73 (2) and (3) of the CCA**, provides for bail and the provision does not provide for conditions to limit access to bail. In construing the provision, the Children's Court in the case of *The People v GM HPI/06/2022* held in summary that a child can be granted bail for any offence as the CCA does not provide for condition and limitation for bail in respect to which offences are bailable and not bailable. The Court concluded that all cases are bailable and the only consideration to make is whether granting bail will be a danger to the child or the child will be a danger to the community.

Comparing the two provisions, there seems to be a disparity to the extent that a child will not be released on recognizance by a law enforcement agency because it **considers the offence serious** while the same child will be released by the court on bail because the courts will not consider any case too serious to be considered non-bailable for children. There is a need to harmonise the two provisions for consistency and fair application of the law.

From UP Zambia's statistics, out of the 333 children in conflict with the law represented between 2022 and 2024, 168 children were charged with aggravated Robbery, Trafficking in Narcotics, or Murder, of which no child was granted police bond by law enforcement agencies on grounds that the offences were **serious and non-bailable**. It is also noted that the Subordinate Court and the High Court have been able to grant bail to any child who has applied for bail for the same offences.

3.4 Bail Pending Appeal

Section 73 (2) of the CCA provides for bail, however, in its wording it may be construed to mean bail pending trial and not bail pending appeal. In the case of **EM v The People 2PA/042/24**, the state in their oral submissions objected to the granting of bail pending appeal based on three reasons - one of which was that section 73 only deals with bail pending trial before a Juveniles Court and a Children's Court. The subordinate court agreed with the state and thus defence counsel was requested to apply for bail by referring to both the Children's Code Act and Criminal Procedure Code Act.

To make bail accessible to children, it is imperative to enhance the law by ensuring that the provision on bail encompasses bail pending trial and bail pending appeal.

3.5 Custody of Children

The general legal principle and spirit of the CCA is that the detention of children is a measure of last resort. The CCA places the freedom and liberty of a child as a priority. Generally, it envisages a situation where children in conflict with the law are dealt with in a manner that promotes the best interest of a child under **section 3 of the CCA** and is availed with restorative processes with respect to Diversion under section 58 (1) of the CCA as a measure of first resort. Further sections **56 (1) and 57 (1) and (3) of the CCA** requires that a child must either be taken to court or released on recognizance within 48 hours.

These general provisions are progressive; however, the challenge comes in when the same law permits the detention of children in the following places:

3.5.1 Police Cells

Section 57 (2) and (3) of the CCA in its wording suggests that it is permissible to detain a child in Police cells, provided the child has access to food, medical attention, reasonable visits, and any other reasonable conditions required for the welfare of a child. The practical and operational issue in this section is that the Zambia Police Service is neither funded nor does it have stations and posts designed to provide decent meals for detainees. The Police cells are not designed to have decent and reasonable conditions such as beds, blankets, and health facilities. Therefore, **section 57 (2) and (3)** cannot be implemented effectively as the provision vests the function of a correctional facility on a police station or post when in fact the funding, functions, and infrastructural design is not adequate to satisfy the provision.

Section 56 (2) and (3) of the CCA suggests that a child can be held or detained at a police station for not more than 48 hours. This interpretation is derived from the fact that subsection 2 mandates the law enforcement officer to seek an order from a court to place a child in a place of safety if the child has not been released on recognizance. Furthermore, subsection three allows the court to order that the child be placed in a place of safety within 48 hours after arrest.

Based on UP Zambia's statistics from the children it has represented, the period of pre-trial detention at Police Stations ranged from 21 days minimum to 3 months maximum before being taken to court. The length of time children were detained before being released on recognizance ranged from 5 days minimum to 30 days maximum.

The reason for this delay is the lack of legal provision to prescribe a timeline within which investigations and formal arrests ought to be done. It has therefore been observed that the warn-and-caution, interview, and formal arrest are usually delayed and during the period of detention technically the child is only apprehended and not arrested. This technical loophole in the law to some extent justifies the detention of children and in most cases, the law enforcement officers will merely indicate that the child is being kept at the police station for his /her safety and to an extent the 48 hours envisaged by the law is circumvented.

3.5.2 Place of Safety

A place of safety is defined under section **2 of the CCA** to mean a childcare facility, a house or other suitable place, the occupier of which is willing to accept the temporary care of a child but excludes a child-approved centre or a child reformatory centre.

This definition expressly excludes child-approved centres and reformatory centres (facilities run by the Department of Social Welfare and Zambia Correctional Service respectively) but does not exclude a police station or post. The failure to expressly exclude a police station has created a justification for the long detention of children in police cells. The term "place of safety" appears in the CCA 58 times however, none of those provisions clearly explain who is in charge or how the place of safety is to be managed, funded, its scope and functions leaving it to speculation and unreasonable interpretation of the law.

3.5.3 Transit Centre

Section 75 (6) of the CCA prohibits the detention of children in an adult prison or correctional facility. However, the Act provides for the detention of children in a "transit centre" which is defined under section 2 to mean a child transit centre established for the temporary custody of children under section 99.

Section 75 (1) of the CCA, provides that where a child has not been released on bail, the court will order that the child be remanded in a transit centre. However, according to section 99, a transit centre is managed and maintained by the Zambia Correctional Service. To date, there is no provision under the Zambia Correctional Service Act No. 37 of 2021 which clearly provides for the management of the transit centres.

Section 99 (1) (b) of the CCA provides that a transit centre must be established by a statutory instrument by the Minister of Home Affairs and as of today, there is no Statutory Instrument to that effect. Conveniently located in Lusaka Province, Lusaka Remand Correctional Facility was declared to be a "transit centre" for children in 2023. This declaration was not supported by law but merely an administrative decision.

Furthermore, Lusaka Remand continues to house adult inmates who are convicts serving prison sentences and adult inmates in remand. This contravenes the provisions of section 75 (6) of the CCA and the principle that children should not be remanded in any facility holding adults and whilst in detention ought not to interact with adults. It is also a well-known fact that there is no transit centre for females and thus girls are detained in adult prison facilities.

Section 75 (5) of the CCA envisages that, the total remand period for a child is 90 days for any offence and 180 days for offences carrying a death penalty. However, **sections 8, 9, and 15 of the Penal Code (Amendment) Act No. 23 of 2022** abolished the death penalty and replaced it with life imprisonment. The

abolition of the death penalty implies that there no longer exists offences that carry a death penalty in Zambia. Thus, the maximum period of remand in a transit centre is 90 days. Comparatively **section 79 (7) of the CCA** envisages that cases involving children must be expedited and completed within 6 months (180 days). This is confusing and inconsistent and likely to lead to an absurdity if interpreted literally. This is because the remand of a child ought to be tied to the maximum period within which the case ought to be completed.

3.6 Diversion

Diversion refers to voluntary measures for dealing with children who have committed a crime outside the formal justice system without resorting to judicial proceedings. **Section 58 (1) of the CCA** provides that, where a child is in conflict with the law, diversion shall be applied as a measure of first resort. This envisages that once a child is arrested, the law enforcement agency is mandated to consider diversion as a matter of priority.

The provisions on diversion are well intended and progressive, but they are undermined by the lack of a legal provision which provides for consequences of failure to apply diversion. Furthermore, section 58 (3) of the CCA, implies the responsibility of determining whether the case can or cannot be diverted to law enforcement agencies. Yet, there has been no deliberate legal or policy direction to amend various laws establishing law enforcement agencies to include diversion for children.

The law on diversion needs to be strengthened to allow stakeholders in the justice system to hold law enforcement officers and agencies accountable for not diverting cases which meet the criteria for diversion.

3.7 Court Proceedings and Jurisdiction

Sections 68, 69, 73 and 74 of the CCA provide for Juveniles Court and the Children's Court procedure. However, the CCA has not provided in clear terms, how a trial ought to be conducted. Most of the procedures applied in these courts are borrowed from the Criminal Procedure Code Act. In practice, the Subordinate Court has adopted the summary trial system used for all criminal matters in the Subordinate Court.

The downside of the summary trial system is that it is based on an old English principle of **Trial by Ambush**. This principle has been done away with by most of the common law countries, including England, and is considered to be an abuse of the rights of the accused.

Our view is that cases involving children need to be tried in a conducive environment and with favourable conditions within which a child can defend him/herself adequately. Therefore, trial by ambush is an affront to the best interest of a child and infringes on the child's right to be availed with all necessary information and evidence to enable him/her to defend their case adequately.

4 Recommendations

To ensure a child justice system that upholds children's rights by prioritising the safety and well-being of the children who come into contact and conflict with the law, we propose the following recommendations.

1. Section 47 of the CCA on apprehension ought to be amended by expanding the scope and safeguards of the section to include situations where children are apprehended in non-residential locations or



UNDIKUMBUKIRE

places that are not dwelling homes.

2. Section 47, subsection 3 (1) of the CCA needs to be refined, by ensuring the wording used clearly provides a safeguard in respect to when and what circumstances would lead to officers apprehending a child while in uniform and armed. Merely making an exception where the child's dwelling home poses a danger to the law enforcement officers is insufficient.
3. Section 55 (2) needs to be refined by ensuring that it provides a reasonable timeline within which a law enforcement officer ought to request the presence of a social welfare officer. We propose 24 hours as a maximum period.
4. Section 56 (3) needs to be amended or there is a need to insert a new provision that clearly provides and defines reasonable time within which a child ought to be taken to court to mirror the provision of section 33 of the CPC. We recommend maintaining the 24 hours provided for in the CPC.
5. Section 56 (1) on bond/recognisance needs to be harmonised with the provisions on bail by removing references to "Charged with a serious offence" so that there is consistency in the application of the law.
6. Section 73 (2) and (3) need to be amended to ensure that it is clear that it applies to bail pending appeal. It would be good if the provision mirrored section 332 (1) of the CPC in respect to bail pending appeal, especially when the bail sought is from Children's Court to Court of Appeal or Court of Appeal to Supreme Court, which courts are not "Children's Courts".
7. Section 56 (2) and (3), and section 57 (2) and (3) on detention of children need to be amended. The amendment ought to create a situation where a law enforcement officer under section 56 (3) ought to seek for an order to place a child in a place of safety within 24 hours and the court ought to make the order within the same period. This will prevent any further detention of children in Police custody.
8. "Place of Safety" needs a proper definition that expressly excludes Police stations and posts.
9. Transit centres must be established in accordance with the law by way of statutory Instrument. Further, any facility gazetted as a transit centre must accommodate children only.
10. Section 75(5) of the CCA and Section 79 (7) of the CCA must be harmonised so that they are consistent with the period within which a child ought to be remanded in a transit centre. Furthermore, section 75 (5) must be amended to ensure it reflects the provisions of section 8, 9 and 15 of the Penal Code (Amendment) Act which abolished the Death penalty in Zambia.
11. The CCA must be strengthened to ensure that the provision of diversion is justiciable and law enforcement agencies to become accountable for not conducting diversion in cases that are deserving.

5 Implementation

Implementation of the recommendations made herein is vested in the Government of the Republic of Zambia particularly Ministry of Justice and Zambia Law Development Commission. We are aware of plans to review the legal process for the Children's Code Act and as stakeholders we can utilise this process by making submissions and recommendations on the issues discussed in this policy brief.

Issues such as enactment of statutory instruments creating transit centres can be done by the Minister of Home Affairs as and when the logistics and finances are available.

However, we hope that the challenges and contentious issues identified in the CCA are dealt with within the life of the current Parliament and Government. This means before the next general election, we ought to have a refined Children's Code Act.

UNDIKUMBUKIRE

