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# INTRODUCTORY NOTE

It is with pride that the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community the Resource Material Series No. 101.

Part One of this volume contains the work product of the 164th International Training Course, conducted from 17 August to 23 September 2016. The main theme of the 164th Course was *Effective Measures for the Treatment, Rehabilitation and Social Reintegration of Juvenile Offenders*. Part Two contains the work product of the 19th UNAFEI UNCAC Training Programme, conducted from 12 October to 17 November 2016. The main theme of the 19th UNCAC Programme was *Effective Anti-Corruption Enforcement (Investigation and Prosecution) in the Area of Public Procurement*.

The 164th Course offered participants an opportunity to deepen their understanding of relevant United Nations standards and norms on juvenile justice and introduced practices and measures to facilitate the reintegration of juvenile offenders into society. Juvenile offenders are unique in that their physical and mental development makes them highly amenable to rehabilitation. Rather than receiving criminal punishment, juvenile offenders typically require professional counselling, guidance, education, and a sound social environment in order to learn how to take control of their lives and pursue their life goals. For decades, United Nations standards and norms and the Convention on the Rights of the Child have called for the development of juvenile justice systems that emphasize "care-oriented" treatment with custodial measures as a last resort and established the "best interests of the child" as an international standard.

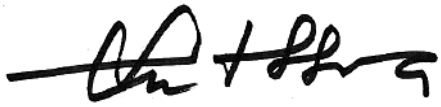
The 19th UNCAC Programme addressed challenges facing anti-corruption officials and encouraged the exchange of best practices to prevent and combat corruption in the area of public procurement. Public procurement is an area in which corruption continues to thrive in the form of non-competitive bidding, bid rigging and bribery. The economic influence of public procurement is so tremendous that it is generally said that it amounts to 15% to 30% of a country's Gross Domestic Product. The impact of corruption can be devastating by wasting taxpayer money, reducing the competitiveness of the marketplace, and reducing the quality of goods, services, buildings and infrastructure procured on behalf of the state. Therefore, combating corruption in this area is deemed as a matter of high priority throughout the world. Demonstrating this global commitment, Article 9 of UNCAC stipulates detailed measures to eradicate corruption related to public procurement.

UNAFEI, as one of the institutes of the United Nations Crime Prevention and Criminal Justice Programme Network, held these training programmes to offer participants opportunities to share experiences, gain knowledge, and examine crime prevention measures in their related fields, as well as to build a human network of counterparts to further international cooperation, which is vital to addressing these issues.

In this issue, in regard to both the 164th International Training Course and the 19th UNAFEI UNCAC Training Programme, papers contributed by visiting experts, selected individual presentation papers from among the participants, and the reports of each programme are published. I regret that not all the papers submitted by the participants of each programme could be published.

I would like to pay tribute to the contributions of the Government of Japan, particularly the Ministry of Justice, the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI's international training programmes. Finally, I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series.

March 2017



Keisuke Senta
Director of UNAFEI

# PART ONE

## RESOURCE MATERIAL SERIES
## No. 101

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**Work Product of the 164th International Training Course**

**"Effective Measures for Treatment, Rehabilitation and Social Reintegration of Juvenile Offenders"**

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**UNAFEI**

# VISITING EXPERTS' PAPERS

## THE JUVENILE JUSTICE IN KENYA: GROWTH, SYSTEM AND STRUCTURES

*Clement Okech**

### I. INTRODUCTION

Every jurisdiction in the world is grappling with the problem of juvenile delinquency. The arrangements which are employed to address the problem depend either on the pre-existing structures or have been variedly modified and influenced by public policy or research. Such arrangements may also lean on other social-cultural support systems that weld with the structural arrangements and acclaimed practices. However, these arrangements have a universal appreciation that a child must not be handled as an adult offender, much as age and social orientation of children are variedly defined by statutes and conventions. In spite of age definition and variance across jurisdictions, the principle of the 'Best Interest of the Child' has had much influence in addressing juvenile justice matters since the Convention on the Right of the Child[1] was promulgated universally.

Delinquency is a deviant phenomenon that may manifest any time before maturity and sometimes may extend into adulthood. The physiological and emotional difficulties or pressures may lead a child to engage disproportionately in anti-social conduct including crime. This can result in the child being processed through the juvenile justice system. Extreme errant behaviours that require State intervention may be processed through the juvenile justice system while children in difficult circumstances may need protection and care by the State or Non-State welfare agencies or both.

This write up employs a historical and contextual approach to demonstrate the origin of present day perspectives of juvenile justice in Kenya and the current structures and processes in place. Certain key variables are discussed including the emergence of juvenile correction in Kenya, the socio-cultural context of the colonial era in which justice for children is located, legislative influence and the institutions and structures that existed and how this has evolved over time. The salient features characteristic of juvenile justice system in Kenya including the responsible agencies, trends and the challenges being experienced especially with emerging complex criminal behaviour of the youth are explored.

### II. UNDERSTANDING THE JUVENILE SYSTEM

The juvenile justice system can be defined as the formal responsive arrangement by government to process and deal with a child in conflict with the law in accordance with the prescribed set of laws while taking cognizance of the child's rights and best interest. Juvenile justice, like in the adult process, presumes a systematic organic arrangement of government agencies that dependent upon each other yet operating distinctly but having a shared objective of addressing delinquency or prevention of crime. However, children who are adjudged to be in difficult circumstances or in need of care and protection may also be processed through the same avenue and have their needs met or rights protected. Various agencies have a role to play in the juvenile justice system including the Police, Prosecution, Probation, Child Welfare Agency, Corrections or Prisons and the Courts. These agencies are robustly independent in operation yet remain symbiotic organs and are expected to function in the best interest of the child.

Before examining the juvenile justice system in Kenya, it would be fitting to discuss what a 'system' is. By definition, and in the context of organisation, a system is an organised purposeful structure that consists of interconnected and inter-reliant elements or components that interact and influence one another yet aiming at a common goal. In the criminal justice perspective, this is conceived as the organised

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[1] UN Convention on the Right of the Child 1989.

state agencies charged with the responsibilities of maintaining law and order and exercising social control over those who violate set laws through arrest, prosecution, trial and adjudication, and punishment or correction. In simple terms, juvenile justice is a formal way that is part of a wider approach to dealing with criminal behaviour in children in accordance with the prescribed set of laws.

In the foregoing context, it is imperative to gauge the extent to which juvenile justice in Kenya would be said to have fully evolved over time into a system. There are, of course, trajectory points to note which were greatly influenced by Kenya's historical past.

## III. THE EMERGENCE OF PENAL LEGACY IN KENYA

The imperial British introduced the English common law into her colonies as a means of promoting common lawful behaviour among widely diverse people, (Kercher 1981)[2]. It is right to say that there were veracious forms of transgression by the indigenous African before the colonial era but how they addressed such transgressions varied from one society to another. Although severe punishment was one way to address deviancy, such was not applicable to juveniles. There were also very good practices not oriented to punishment including reconciliation, restitution, compensation by the individual or community, social exclusion and public ridicule, religious sanctions including curse, etc. (James S. Read, 1966[3] cited in Kercher 1981). On the other hand, there were also harsh penalties including corporal punishment and death if the offence so demanded. These were the various types of social control that exist before the advent of colonialism.

The colonial era later introduced a dual system of justice comprising of courts that practiced purely English common law and the African Courts which were abridged versions practicing both English and traditional justice systems guided by English ordinances. It is worth pointing out that this arrangement was used to process perceived juvenile delinquents. The eventual evolution into the current unitary justice system was greatly influenced by the indigenous clamour for independence in the 1950's (Ibid).

The treatment of the delinquent child during the colonial times was based on the transplanted English common law and culture with its institutional features which brought about formal structures including the police, courts and prisons. Legal definitions and penalties were prescribed to certain acts which were perceived as wrong by the colonial establishment. Before then, the traditional structures and setups were organised in a way that facilitated communal 'ownership' and supervision of the delinquent child. The supervision of the child was not confined to the nuclear family but was a task of every member of the community. To that extent, the doctrine of *parens patriae* was at play. If the common role of disciplining the errant child was a communal responsibility, then the colonial period disrupted this setup as this function was taken over by regimented structures and institutions of corrections.

### A. The Emergence of Penal Institutions for Young Offenders

The growth of perceived juvenile delinquency made it necessary for the colonial government to come up with penal legislation which was strong on institutionalisation. The juvenile corrective institutions were conceived as measures to divert children from punitive adult prisons. With increased urbanisation, many children came to the towns either because their communities had been disrupted by colonial resettlement programmes or by sheer town attraction. According to Kercher (19981)[4], this effort was meant to

- Reduce the likelihood of contamination of relatively inexperienced offenders by more hardcore criminals
- Prevent the hardening of attitudes against society and authority resulting from embittered experience in punitive institutions
- Avoid labelling of the young offender as a criminal by the society and as such encouraging image building
- Provide special programmes for resocialisation with the goal of nipping the errand behaviour in

[2]Leonard C. Kercher, *The Kenyan Penal System, Past Present and Prospect*, University Press of America, Inc.
[3]James Read 1966, some Legal problems in East Africa, *East African law Journal*, (special First Anniversary Issue) Vo. 2, no. 1.
[4]Ibid.

the bud.

The juvenile correctional institutions were based on the English models modified for the African setting. These institutions which included the Approved Schools, Borstal Institutions and Youth Corrective Centres admitted young offenders falling below 19 years. On the other hand, there were other alternative measures available to the courts which comprised corporal punishment, discharge, compensation or payment of cost by the juvenile offender or parent/guardian or committal care of fit persons or society (Ibid). Probation orders were introduced through an ordinance in mid-1943 for both adults and juveniles.

1. The Establishment of Approved Schools

The first Approved School was established in Kenya in 1934 and the second in 1937 further to the English Act of 1933 (Kercher 1981) although reformatory schools were in existence by 1909. Approved schools were established by the state as special residential schools for the care and protection of children in need including delinquents. This means that in situations, 'normal' children were mixed with those adjudged delinquent. This also points out that the State, then, perceived children in conflict with the law as needing welfare support which was thought to be the driving force behind their migration to the towns where they were rounded up and charged with vagrancy.

The Approved Schools which initially were under the Prisons Service were moved to the Probation Service in 1955 after the latter had moved from Prisons. Of the five Approved Schools established then, all were for boys and provided vocational training and formal education, (Kenya Prison's Service Annual Report 1960). The Schools provided both vocational training and formal academic education. The Children and Young Persons Act Cap 141 of 1969 brought out a distinct categorisation of which schools admitted children of what age. However, it prescribed that children had to be detained in these facilities until they attained 18 years of age.

2. From Approved Schools to Rehabilitation Schools

The Children's Act 0f 2001 made a significant policy change on these reformatory schools starting with renaming them as Rehabilitation Schools. The reinvented schools provide accommodation, protection and are for young children. The schools are empowered to receive, maintain, train and rehabilitate children in conflict with the law as well as those requiring care and protection. At present, there are 9 rehabilitations schools

**Table 1. Juvenile Population Categorisation for Three Financial Years**

| Rehabilitation School | **2013/2014** | | | **2014/2015** | | | **2015/2016** | | |
|---|---|---|---|---|---|---|---|---|---|
| | P/C* | CR** | TOTAL | P/C | CR | TOTAL | P/C | CR | TOTAL |
| OTHAYA | 153 | 21 | **174** | 84 | 19 | **135** | 84 | 19 | **103** |
| LIKONI | 162 | 2 | **164** | 95 | 4 | **99** | 95 | 4 | **99** |
| KERICHO | 119 | 21 | **140** | 88 | 4 | **92** | 88 | 4 | **92** |
| KABETE | 113 | 58 | **171** | 48 | 12 | **60** | 48 | 12 | **60** |
| WAMUMU | 10 | 167 | **177** | 10 | 109 | **119** | 10 | 109 | **119** |
| DAGORETTI | 172 | 5 | **177** | 89 | 3 | **92** | 108 | 3 | **111** |
| KIRIGITI | 140 | 18 | **158** | 162 | 7 | **169** | 162 | 7 | **169** |
| KISUMU | 30 | - | **30** | 50 | 10 | **60** | 50 | 50 | **60** |
| KAKAMEGA | 151 | 22 | **173** | 90 | 2 | **92** | 90 | 2 | **92** |
| **TOTALS** | **937** | **314** | **1251** | **716** | **170** | **886** | **735** | **210** | **945** |

**Protection and Care, **Criminal Cases*

**B. Establishment of Juvenile Remand Homes**

The juvenile remand homes were set up just at the same time as the other reformatory schools. By 1960 there were 6 remand homes all near the major towns. The homes were built as places for temporary reception, safe custody and for keeping vagrant children. Any government official could bring in children including chiefs, police and locals with reasons for admission, mostly being vagrants, without a court order.

Presently, there are 14 Children Remand Homes in Kenya accommodating both children in conflict with the law and those in need of care and protection. Committing to and release from these facilities can only be through the court. The remand homes are run by the Department of Children Services which is responsible for the child welfare.

**C. Establishment of Borstal Institutions**

The Borstal Institution was crafted as a penal facility for juvenile offenders found guilty of offences thought to be of serious nature. Borstal institutions were first established in England in 1908 to cater for the 16 to 21-year-old juvenile adult category who by virtue of their criminal habits or association with such characters, were deemed to merit institutionalisation for purposes of reformation and repression of crime Garland (1995) cited in Newburn (2002). The first such facility was constructed in Kenya in 1963 to admit boys aged between 15 and 17 years after criminal adjudication by the courts. Unlike the Approved School which admitted boys until they attained the age of adulthood or unless there were alternative measures that could ensure care and control of the child, admission to a Borstal Institution was, and still is, up to three years. The boys admitted to Borstal Institutions had a limited chance of being released before two years were over and also had to be placed under the supervision of a probation officer for one year upon release, (Kenya Prison Service Annual Report 1960).

1. Borstal Institutions at Present

At present, the Borstal Schools are run by the Kenya Prison Service. There are three such facilities with the third having been opened in 2016 for girls. The facilities offer vocational training academic education and agricultural instruction. The staff at the school comprise both uniformed and civilian officers. No member of staff is allowed to be armed while in the facility.

Whereas the Borstal infrastructure remains relatively the same, the training and inclusion of other 'soft' programmes have been introduced. The element of assessment to precede classification has been introduced although the infrastructure may not allow for physical risk classification as would have been desired subsequent to the assessment. There has been an introduction of individualised case management unlike before where no specific personal engagement was evident. Some of the prison officers who run the institution have university training in social sciences and have acquired skills in counselling.

There is a comprehensive aftercare programme run by both the Kenya Prison Service and the Probation and Aftercare Service. Post-penal supervision is accorded to each offender by probation officers for a period determined by the Board of Licence that releases the youthful offenders mostly after they have spent a certain period in the institutions. The release licence authorises the probation officer to supervise the offenders for the purposes of reintegration and resettlement. Such release cannot be accorded an inmate unless a pre-release environment adjustment report has been filed by the Probation Service. As of July 2016 there were 339 inmates at Shilo La Tewa Borstal Institution and 384 inmates at Shikusa Borstal Institution.

**Table 2. Borstal Institutions and Offence Type**

| PENAL CODE CATEGORY | OFFENCE | 2013 | % | 2014 | % | 2015 | % | | % |
|---|---|---|---|---|---|---|---|---|---|
| I | Offences against Order & administration of lawful authority | 28 | **5.1%** | 24 | **5.0%** | 22 | **6.75%** | 74 | **5.46%** |
| III | Offences injurious to the public in general | 34 | **6.2%** | 33 | **6.85%** | 53 | **16.26%** | 120 | **8.85%** |
| III | Offences against the person | 88 | **16.1%** | 70 | **14.5%** | 27 | **8.28%** | 185 | **13.64%** |
| IV | Offences relating to property | 382 | **69.7%** | 321 | **66.6%** | 212 | **65.03%** | 915 | **67.48%** |
| V | Forgery, conning, counter-feiting | 1 | **0.18%** | 1 | **0.21%** | 2 | **0.61%** | 4 | **0.29%** |
| VI | Attempts and conspiracy to commit crimes | 1 | **0.18%** | 1 | **0.21%** | 1 | **0.31%** | 3 | **0.22%** |
| VII | Offences under narcotic Acts | 14 | **2.55%** | 30 | **6.22%** | 6 | **1.84%** | 50 | **3.69%** |
| VIII | Others | 0 | **0** | 2 | **0.41%** | 3 | **0.92%** | 5 | **0.37%** |
| | | **548** | | **482** | | **326** | | **1356** | |

**Source: Kenya Prison Service, 2016**

The two Borstal Institutions for boys in Kenya have a holding capacity of 600 inmates but are currently overpopulated by 123 inmates. The programmes which are run in the institutions include:

- Formal Education
- Vocational training (Mainly Carpentry & Tailoring)
- Agriculture
- Counselling
- Life skills training

Although accredited treatment programmes that are in vogue and meant to treat specific offence types are yet to be introduced, the authorities at the facility have embarked on a capacity-building project to introduce sex-offence and drug-and-substance-abuse treatment programmes. Already the concept of assessment of risk and needs to inform classification and treatment is well grounded.

The new Borstal Institution for girls has operated for less than three months and has had admission of 6 inmates.

**D. Youth Corrective Training Centre**

The Youth Corrective Training Centre was established in 1962 to cater for boys who were deemed to be unruly and needing 'short-sharp-shock' treatment. It was thought to fit those who were considered to be defiant to authority and could not be supervised under probation and yet did not warrant long-term confinement like the Borstal Institution. The Centre was meant for the rough undisciplined youth who needed to be detached from the family and kept in such a facility as a deterrent and corrective measure.

The Youth Corrective Training Centre (YCTC) is established under the Prisons Act. There is only one YCTC at Kamiti for boys and none for girls. Children and youth admitted to the centre must be aged between 17-21 years for a duration of four months. This institution provides an environment that facilitates short-term institutional supervision.

The institution is meant for first time offenders who may require close regimented supervision and their admission to the institutions is through the court and the advice of a probation officer. Due to the relative short time that the boys stay in this facility, there is no vocational training other than some farming, rigorous outdoor chores and hobbies.

One of the challenges with this arrangement is that there is no follow up or aftercare for purposes of reintegration upon discharge. Its efficacy has also been questioned in the wake of similar arrangements assisting in the Borstal Institution capturing almost the same age bracket.

## IV. THE JUVENILE JUSTICE PROCESS

The delivery of Juvenile Justice in Kenya is anchored on existing relevant legislation among them being the Criminal Procedure Code, the Penal Code and other statutes which specifically touch on children. This legislation is implemented by various agencies including the Police, Courts, Probation, Department of Children's Services, Prisons and the Office of the Public Prosecution. While juvenile justice has undergone tremendous changes since the enactment of the current Children's Act in 2001, there is still demand for greater efficacy in the way of improving services by the magistrates, probation officers, children officers, prison officers and police officers, all who influence the plight of children in the justice process.

Children are often arrested for committing offences and processed in similar ways as adult offenders. This is with regard to the application of the Evidence Act or the Criminal Procedure Code which are the main laws applicable in criminal trials. The Police or any authorised officer may apprehend a child for due processing. The police conduct the investigation and decide whether there is sufficient evidence to charge the juvenile if thought culpable. The law expects the police to have a separate holding facility for children in their custody. Despite limited rooms at the many police stations, the police must make arrangements to have children, boys and girls separated from each other and from adults. The police only have 23 child protection units which are child friendly.

Since 2013, the prosecution services, whether for adult or juvenile cases, was transferred from the police to the Office of the Director of Public Persecution. This means that all children are prosecuted by state lawyers working under the Office of the Director of Public Prosecution (ODPP).

**Table 3: Children Arrested in Years 2013, 2014 and 2015**

| COUNTY | | NUMBER OF CHILDREN ARRESTED | | | TOTAL |
|---|---|---|---|---|---|
| | | 2013 | 2014 | 2015 | |
| 1 | EASTERN REGION | 301 | 288 | 309 | **898** |
| 2 | CENTRAL REGION | 183 | 269 | 250 | **702** |
| 3 | WESTERN REGION | 117 | 182 | 209 | **508** |
| 4 | NAIROBI REGION | 139 | 70 | 62 | **271** |
| 5 | RIFT VALLEY REGION | 334 | 346 | 427 | **1107** |
| 6 | COAST REGION | 170 | 221 | 167 | **558** |
| 7 | NYANZA REGION | 324 | 350 | 334 | **1008** |
| 8 | NORTH EASTERN | 22 | 26 | 47 | **95** |
| | **TOTAL** | **1,590** | **1,752** | **1,805** | **5,147** |

**Source**: *National Police Service 2016*

### A. Juvenile Justice Model

The Kenyan Juvenile System does not strictly adhere to a distinct Juvenile Justice model. While the

Kenya Criminal Justice System is adversarial, the juvenile justice system is not strictly adversarial. It appears to be a mix of the models that embrace both the justice and welfare models. It is a combination of the welfare approach and the justice model and driven by the principle of the best interests of the child much as the trial process is accusatorial. This is evident in the various provisions in the Children Act No. 8 of 2001 which spells out specific procedures for handling children who come into contact with the law. For example, the procedures in court and all the other agencies in the criminal justice system are to be conducted in an informal manner and the court sitting arrangement is one that is child friendly, and safeguards on the welfare of the child are taken into consideration at every stage of the proceedings. International standards necessary to ensure the best interests of the child are emphasised.

Children Courts are manned by magistrates all who are professional lawyers. Every magistrate presiding over a children's court must be gazetted by the Chief Justice.

According to the Children Act 2001, the Children's Court shall sit in a different building or room, or at different times, from those in which sittings of courts other than Children's Courts are held, and no person shall be present at any sitting of a Children's Court except –

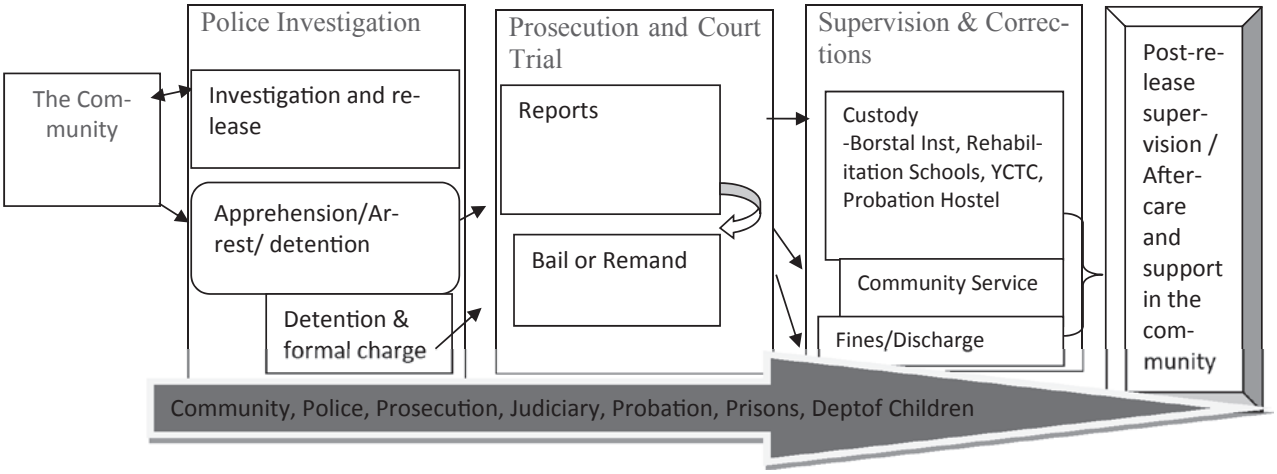
(a) Members and officers of the court;
(b) Parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case;
(c) Parents or guardians of any child brought before the court;
(d) *bona fide* registered representatives of newspapers or news agencies;
(e) Such other persons as the court may specially authorise to be present.

The probation officer's role in juvenile matters is crucial. Whereas children officers mostly handle cases of child protection including custody and care in remand and rehabilitation schools, probation officers' role is in assisting the court with regard to decision making in cases of child offenders and their supervision and rehabilitation in the community. These decisions relate to bail decisions and procedures related to disposition subsequent to trial and judgment. It is the role of a probation officer to help the court determine the most appropriate disposal method including deciding on institutional confinement, committal to correctional institutions or supervision in the community. No child can be ordered to imprisonment, death or sent to a rehabilitation school if he or she is below ten years or subjected to corporal punishment.

A children's court can make the following orders in relation to a child offender:

- discharging the offender under section 35 (1) of the Penal Code;
- discharging the offender on his entering into a recognisance, with or without sureties;
- making a probation order against the offender under the provisions of the Probation of Offenders Act;
- committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
- if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments
- ordering the offender to pay a fine, compensation or costs, or any or all of them
- in the case of a child who has attained the age of sixteen years, dealing with him in accordance with any Act which provides for the establishment and regulation of Borstal institutions
- placing the offender under the care of a qualified counselor
- ordering him to be placed in an educational institution or a vocational training programme
- ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act making a community service order

Whereas the Probation and Aftercare Service is mandated to handle cases of children in conflict with the law through advisory reports to court and other penal release organs, the Children's Department superintends all matters pertaining to child protection policy




## V. CONSTITUTIONAL PROVISIONS RELATING TO CHILDREN

For the first time in Kenya, the Bill of Rights in the Constitution (2010) incorporates child rights and child justice issues as a special category. Article 21 (3) obligates State organs and all public officers to address the needs of vulnerable groups in society including children and this is buttressed further in 21(4).

The Constitution provides for certain rights that cannot be derogated. These include the right to freedom from torture and cruel, inhumane or degrading punishment or treatment; freedom from slavery or servitude, the right to a fair trial and the right to an order of *habeas corpus*. These are rights that are core to the juvenile justice system.

Access to justice is guaranteed under Article 48 and further Article 49, 50 and 51 are most instructive in relation to the criminal justice process as they make provisions for due process rights. The provisions seek to ensure expeditious, dignified and fair process of justice. Some of the core rights worth mentioning include:

- the right to be informed promptly of reasons for arrest;
- the right to remain silent;
- the right to counsel of one's choice;
- the right against self-incrimination;
- the right to expeditious trial and particularly that a person arrested shall be arraigned in court within 24 hours of arrest;
- the right to be released on bail unless there are compelling reasons against the same and that persons charged with offences punishable by fine only on imprisonment for up to 6 months must not be remanded in custody

Article 50 guarantees the right to a fair hearing. It protects the right of the presumption of innocence until proven guilty; the right to adequate defence; the right to a public and fair trial; the right to counsel of one's choice and to have an advocate assigned to the accused person by the State and at the State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

Of significance are Articles 50(7), (8) and (9), which provide for intermediaries for the complainant or the accused to communicate with the court and for the exclusion of the press or other members of the public where the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security. This last provision is very important to child offenders, child victims and witnesses of crime. It provides the framework for a more comprehensive legislation that will give better protection for children in the justice system and that acknowledges that children may require special assistance to enable them to testify. This provision is already provided for under the Sexual Offences Act and also under the Children's Act.

**A. Constitutional Rights Relating to Children in the Justice System**

Other than the rights stipulated in the Constitution as indicated above, the Constitution in Article 52 provides for special protection for children. It provides, under Article 53 (1), the right to free and compulsory basic education, basic nutrition, shelter and health care, to be protected from abuse, neglect, all form of violence, inhumane treatment or punishment, and hazardous or exploitative labour, not to be detained, except as a measure of last resort and when detained, to be held; (i) for the shortest appropriate period of time and, (ii) separate from adults in conditions that take account of the child's sex and age. Article 53 (2), states that a child's best interests are of paramount importance in every matter concerning the child. The principle of participation is also entrenched in the Constitution. Thus, the Constitution, over and above the general provisions make very progressive provisions in relation to children in the justice system that takes into account the special circumstances of children. It will be observed that when these rights are not realised or given to the child, there are chances that the children could engage in criminality.

**B. Legislation on Children and Juvenile Justice**

The enactment of the Children's Act 2001 had similar circumstances as what Sims and Preston (2006)[5] outline on the establishment of the juvenile court in America in the early years. Other than the need to domesticate International Conventions on the Right of the Child[6] that Kenya had ratified in 1990, it was as much a product of the child saving movement as it was a matter of response to urban and social happenings of that time. These factors included increased attraction of children to urban centres, gross neglect of children resulting in many fending for themselves and in the process getting into contact with the law and dissatisfaction with rights protection and treatment measures in the juvenile correctional facilities.

The Children Act 2001 is the embodiment of child rights, protection and welfare legislation. The powers granted to various bodies entrusted with securing these rights and for provision of welfare services and correctional services are enshrined therein. Part XIII of the Act specifically deals with processing of children in the children court and the roles of both the probation officer with regard to provision of social inquiry reports. Although the regulations under the Act stipulate that children charged with misdemeanours should be tried within a period of three months and those charged with felonies should be triad within 6 months, this is not adhered to.

## VI. COORDINATION OF THE JUVENILE JUSTICE SYSTEM

As noted, responsibility to dispense justice is dispersed among various institutions working interdependently to deliver the constitutional promise. The traditional components of Kenya's justice system have been the Law Enforcement, (Police), Prosecution (the Office of the Director of Public Prosecutions), the Courts (The Judiciary) and Corrections (the Prison and Probation Services). Traditionally, these pillars of the Justice Sector have developed and pursued their own mandates, priorities, goals and strategies, usually working in competition against each other for resources and public space, and with scant regard for coordination and partnership in spite of having a shared goal of justice delivery and crime reduction.

In order to address this challenge, the government established the National Council on the Administration of Justice (NCAJ) through an amendment of the Judicial Service Act 2011. The NCAJ is established as a high-level unincorporated body concerned with policy formulation, policy review and policy implementation throughout the justice chain. Its functions are to to ensure a co-ordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system. Specifically, its functions are geared towards:

(a) Formulating policies relating to the administration of justice;
(b) Implementing, monitoring, evaluating and reviewing strategies for the administration of justice;
(c) Facilitating the establishment of court user committees at the county level;
(d) Mobilising resources for purposes of the efficient administration of justice.
(e) Liaising with the Council of the National Crime Research Centre in carrying out its mandate;
(f) Reviewing and implementing the reports of the Court users' committees; and
(g) Overseeing the operations of any other body engaged in administration of justice.

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[5] Sims, Barbara. And Preston, Pamela, Handbook of Juvenile Justice, Practice and Theory, Tailor and Francis Group.
[6] UN General Assembly Resolution 44/25 of 20. November 1989.

The NCAJ has representation from 14 key agencies in the justice sector. The coordination of juvenile justice falls under the purview of this organ which is replicated at every court station through a Court Users Committees chaired by respective heads of the judiciary at both the High Court and the lower courts.

The other organs meant for the coordinating juvenile justice services include the National Council of Children's Services established under the Children's Act, the Probation Case Committee established under the Probation of Offenders Act, the Community Service Orders Committee and the Area Children Advisory committees at the local levels

## VII. CONCLUSION

The genesis of treatment of errant juveniles has been in Kenya for over nine decades and was influenced by both the country's historical past as well as pragmatic policies brought about at independence and later at the turn of the century and more recently with the making of a new constitution in 2010 which has encapsulated issues of rights and welfare of children. The handling of child offenders in the Kenyan Justice System is still largely adversarial in spite of the provision related to access to justice especially with regard to right to legal counsel. There is need for more welfare-oriented approaches to be infused with due process models which focus more on what the law demands as opposed to what may be in the best interest of the child. This has been compounded by the system change where all prosecutions are now being handled by lawyers/state counsels whereas legal representation for children is largely weak in spite of it being a legal requirement.

The volume of children entering the justice system is rising and this may be a pointer to increasing general population or challenges related to juvenile justice polices which are weak on diversion and other alternatives to the due process of law. Although the country has retained the English models of reformatory schools, there is need to hasten the introduction of evidence-based treatment methods that encompass assessment to inform classification and intervention based on identified problem areas by skilled personnel, the present good work notwithstanding. There is plenty of room for a majority of the cases currently being committed to correctional institutions to be supervised in the community while on probation orders or community service orders unless adjudged as high risk. There is receptiveness towards juveniles which is good social capital that should be invested in.

# EFFECTIVE TREATMENT AND SOCIAL REINTEGRATION OF JUVENILES IN KENYA: PRACTICE AND LATEST DEVELOPMENTS

*Clement Okech**

## I. INTRODUCTION

Intermediary life stages from childhood upbringing experiences and before maturity can present significant challenges both to the parents, actors and the children themselves. This may be characterized, for adolescents, with conflicts and for children in difficult circumstances, with desolation. Addressing deviance and delinquency occasioned by these experiences is one of the most pressing concerns for juvenile justice practitioners and governments world over.

The development of delinquent tendencies can be apportioned to the individual (capacities to cope) and his or her interaction with the environment. There are five developmental risk domains in juveniles, according to Howell (2009)[1], that characterise and influence delinquent behaviours. These include the individual, family, peer group, school and the community. When causes of juvenile delinquency are examined, it is these areas that come out most responsible, and therefore intervention should be focused on addressing them.

The delinquency and criminal activities of Kenyan youth are not dissimilar from the rest of the world, much as there are disproportionally high poverty levels which may be a predisposing factor to criminal behaviour. This is reflected in the data from the National Police Service in Kenya (2016) and from the Kenya Prison Service (2015), which provide an indication that crimes committed by youthful offenders are more related to survival. In attending to juvenile problems, agencies respond to the negative risk factors as well as develop responses that help in reducing chances of engaging in criminality. In this regard, both the state and non-state actors share responsibility in addressing these challenges.

This paper looks at how Kenya Probation Service endeavours to assist the court towards addressing juvenile delinquency and the specific role of probation officers both in court and in community supervision of offenders. It first attempts to understand the challenge of assessing child offenders considering their developmental domains and defining possible approaches in addressing the problem behaviour. It looks into the subject of social investigations, assessment, development of supervision and treatment plans. The paper also explores promising collaborative approaches by juvenile justice agencies and also the attempts at how the Probation Service is engaging the community in the supervision of juvenile offenders in the community through volunteerism.

## II. PHILOSOPHY AND MODELS UNDERPINNING JUVENILE JUSTICE RESPONSES

Social science research tells us that, for the majority of youth who commit offences, the behaviour will desist in late adolescence or early adulthood, Farrington (2007) and Loeber, R., et al. (2002).[2]. It is the contention of these eminent researchers that only about 8 to 10% of boys who are offenders as youth who continue to offend increasingly into adulthood. Thus, most youth who commit one or more delinquent acts do not continue offending into adulthood. This means that findings of high risk during adolescence are weak predictors of long-range offending, even if they are good indicators of offending during adolescence, (Ibid). Given this notion, actors need to apply plausible approaches that are likely to stem delinquency at the adolescence stage.

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[1] Howell, C. James. Preventing and Reducing Juvenile Delinquency: A comprehensive Framework 2nd. Edition. Sage.

[2] Farrington, D. P. (2007); Loeber, R., et al. (2002); Moffitt, T. E., & Caspi, A. (2001), Moffitt, T. E., et al. (1996); Roberts, B. et al. (2001) in Gina M. Vincent, et al (2012), Models for Change, System Reforms in Juvenile Justice.

The handling of children within the juvenile justice system characterises a perceived philosophical approach in a given society. In Kenya this view has been framed by different situations, instruments and the practices shaped overtime by colonial and successive governance regimes. The philosophies are conceptual ideals that best explain the juvenile offender and the manner in which the state may respond within a defined juvenile justice parameter. The conceptualisation rests upon society's view on childhood, adolescence, maturation and social development (Howell 2009). The understanding that children are developmentally different from adults helps in shaping the juvenile justice philosophy.

According to Howell (ibid), there are three broad philosophical principles which underpin the administration of juvenile justice. These are:

- Diminished capacity/responsibility,
- Proportionality and
- Opportunity for reformation.

Howell explains that the principle of Diminished Capacity is the extent to which a juvenile has the capacity to bear blameworthiness or culpability for the offence. It considers whether the child has the ability to make full judgement in a circumstance that an adult would make better reasoning. The second principle on Proportionality springs from the first in that the child, even though he or she may have the capacity to make judgement, cannot be required to take full accountability for the omission or commission and thus should not be subject to a punishment that would have been meted out to an adult in similar circumstances. In which case the punishment should not just be proportionate to the offence but also take cognisance of the developmental stages and level of maturity. The third philosophical principle on opportunity to reform relates with the notion that adolescence and youth in general are at transitory stages in life that require safeguards and room to navigate through into adulthood.

These three principles explain the diligence required while assessing juveniles at the judgement and disposal stage of the case and the understanding required of courts and probation officers. Thus responses need to take cognisance of these at decision making. The three different philosophies on juvenile justice shape the models of responses and interventions that may be espoused by different jurisdictions. The foregoing philosophical principles have further produced different models of juvenile justice including the medical model, the Rehabilitation and Welfare Model, Community Reintegration Model, Control and Prevention Model, the Just Desert Model and The Due Process Model.

## III. PROBATION OFFICERS AND THE REHABILITATION OF JUVENILES

Probation officers as juvenile justice actors are perhaps the most central players in the rehabilitation of offenders in Kenya. This follows their role in helping in decision making as to which juvenile offender should be accorded what sentence and where it should be served and under what conditions. In other words, the probation officer plays the role of advising courts through the presentence reports or through regulator consultation on the best disposal method for a child in conflict with the law. Subsequent to this is the probation officer's role in assessing and providing the requisite supervision and intervention in the community if so granted. Although the officers do not directly work with all those sent to correctional institutions, save for probation hostels, they remain the connection between such institutions and the community and family to whom the juvenile offenders shall return. Again, it is the role of the probation officer to provide advice on the pre-release conditions that must be taken on board before an institutional release decision is made. In the context of rehabilitation, the role of a probation officer in the change process ideally starts at the point at which the decision is being made at the courts to release a juvenile to the community or not, or what other measures may be preferred. While undertaking these functions, the probation officers have to work with the community, and the Kenyan system has embraced this ideal. The foregoing is examined below in detail.

### A. Assessment for Decision Making at the Court

The court will always determine the disposal method of the child after careful consideration based on seriousness of the offence, aggravating and mitigating factors mental status, maturity, risk level, criminogenic needs, and amenability to treatment. Whereas some of these variables would have been dealt with at the trial stage, others are more personal and community oriented and as such may be hard for the

court to reach without engaging a probation officer. As noted, the juvenile trial process is more adversarial, but it is at the case disposal stage that it changes to a semblance of inquisitorial with the court's invitation of a probation officer to provide a presentence reports. While referring the case to a probation officer, the court appreciates that each child is unique, that children come from diverse social backgrounds, have experienced different problems, possess different personality traits and learn to cope in varied ways, in which case individual needs, problems and concerns should be assessed in the most effective way.

1. Social Investigation and Assessment

Social inquiry or investigation is a process of generating data and information on an offender for the purpose of documenting and understanding the attendant causes of behaviour for purposes of making decisions (at court or for interventions). Presentence reports provide advisory information to the courts with a view to the court making a sentencing verdict including decision on alternatives to imprisonment. The investigations are conducted for the purposes of generating various assessment reports including presentence reports. Social investigations help in formulating a plausible theoretical explanation of the criminal behaviour of an offender, understanding the personality of the offender beyond the crime committed, developing a basis for intervention/rehabilitation and identifying resources required to effect change.

Specifically, the aim of social investigations in light of a presentence report is to:

- Appraise the background, personality and conduct of the youthful offenders in light of the offence committed and what they perceive of their ill action
- Identify the criminogenic factors at play (using the offender Risk and Needs Assessment)
- Evaluate the seriousness of the offence and the impact on victims
- Engage families and significant others in the community about the offender
- Identify and arrange for partnership with organisations which can aid the process of eventual rehabilitation
- Gain knowledge of the culture and resources available in the local communities
- Propose cogent measures necessary to address the identified 'needs' and forestall risk of reoffending including an appropriate sentence

As noted by Howell[3], the family and the individual are essential domains that influence developmental risk factors. The role of the probation officer is therefore to gather as much verifiable information as possible that relate to the social and economic standing of the parents and how this may sway the conduct of the child; the training and discipline (or lack of it) the parents have given to the youthful offender and his siblings, an overview of the offender's developmental history noting any gaps and incidences that may help to understand the current behaviour, how he relates with other people and how they may influence his conduct, the interpersonal relationship with siblings and other peers, and the schooling and performance of the offender thereof.

The other area that is investigated is the living circumstances in which the offender has stayed and if there can make a correlation with the presented conduct behaviour. The place of residence in the offender's lifetime including any stint in criminal justice facility is a variable for investigation and if the youthful offender has been staying alone the probation officer investigates how the offender is meeting the living expenses while looking at clues that may connect the type of offence and the lifestyle he or she may be leading. Of importance is also who the offender has been living with and if there has been change of residence especially moving from living with one relative to the other frequently and why this is so. The location of where the youthful offender is staying is also examined to determine the environmental factors that may inform the errant behaviour.

As LeMarquand and Tremlay 2001[4] note, low intelligence and poor academic achievement can be connected to juvenile delinquency which if not addressed early may see the youthful offenders graduating into adult criminality. Interest in and education achievements have a connection with criminal behaviour

[3] Ibid.

[4] David LeMarquand and Richard E. Tremlay, Delinquency Prevention Programmes in Schools. Handbook of Assessment and Treatment (Edited by Clive R.Hollin) 2001, John Wiley and Sons, England.

much as the positive side of this can be useful as a positive risk factor. It is thus important for the probation officer to confirm whether the juvenile is enrolled in school and his or her academic qualifications and, if in school, the report from the school including indication as to truancy and school misconduct.

How a youthful offender spends his or her leisure time and with whom is crucial. What hobbies and interests the juvenile offender has and how he or she generates money to sustain such hobbies. The reason why youthful offenders commit a specific crime is important. The circumstances in which the offences was committed, the number of previous findings of guilt, what were the mitigating or aggravating factors, the contribution of friends, relatives, are all significant in understanding the risk factors. The probation officer will always note the offender's attitude towards the offence and previous criminal activities including whether there is any genuine repentance, tendency to blame others or any revelation about his previous criminal activities.

The decision to release or commit juvenile offenders may also be influenced by victim's and community thoughts on the offender. The probation officer must assess what they professionally think of the action of the youthful offender, whether there is any room for reconciliation or need of compensation and, the extent to which the offence has impacted on the life of the victim(s). It is imperative that any protective measures that may be necessary are noted. It is important to note that the probation officers always have access to the juvenile's court file detailing the offence and the full recorded proceedings.

2. Adoption of the Presentence Report

The presentence report generated by the probation officers is a core instrument for juvenile justice in Kenya. In all cases where a child has been found guilty and intends to make a committal or supervision order, the court has to refer the matter for advice by the probation officer. The probation report illuminates the issues above and makes a cogent recommendation on the best way of disposing the case taking cognisance of the applicable legislation and the best interest of the child. The court often adopts the recommendation and in very rare circumstances will the court divert from the suggestions of the probation officer. The recommendations in the presentence report will always adopt one or a combination of the methods listed below where admissible.

**B. Methods of Dealing with a Child Offender**

There are both custodial and non-custodial options available for dealing with child offenders found guilty of offences. Aside from a child found guilty of a capital offence (who must be held in custody at the President's pleasure), any other alternative to imprisonment may be granted. The applicable legislation in this regard includes, the Criminal Procedure Code, the Probation of Offenders Act, the Borstal Institutions Act, the Prison Act (For Committal to Youth Corrective Training Centre) and the Children's Act Of 2001.

According to the Children Act, a child offender may be dealt with:

- by discharging the offender conditionally or absolutely
- by discharging the offender on his entering into a recognisance, with or without sureties
- by making a probation order against the offender under the provisions of the Probation of Offenders Act
- by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care
- if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
- by ordering the offender to pay a fine, compensation or costs, or any or all of them;
- in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of Borstal institutions;
- by placing the offender under the care of a qualified counsellor;
- by ordering him to be placed in an educational institution or a vocational training programme;
- by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;
- by making a Community Service Order

No child offender shall be subjected to corporal punishment.

**C. Assessment for Supervision and Rehabilitation**

There are many risk factors that can be attributed to juvenile delinquency but which vary from one child to the other and from one situation to another. Some of these factors are influenced by developmental turning points in the course of upbringing, family dysfunction, education and cognitive ability, poverty as a predisposing factor, absence of social support, violence in the community and personal circumstances including special needs. Even though these factors are usually factors of inquiry by the probation officers, their in-depth examination and evaluation is significant as they inform supervision and rehabilitation plans.

Assessment is conducted in order to identify the risk/need factors, make sentencing/supervision/treatment decisions or case management decisions and providing information for a continuum of services. The essence of assessment is to enable the probation officer as a case manager to identify and document offender needs, apparent risks and strengths. It enables the officer to identify or create resources to meet the needs and to forestall risk of re-offending.

Although Kenya Probation Service has not fully adapted to the application of structured/actuarial assessment instruments, the understanding of risk and needs assessment is well grounded. As such, the Service is at a trajectory point using both the qualitative strength and needs assessment informed by in-depth social inquiries and on (pilot) structured risk-need assessment tools for juvenile offenders. Even so, the qualitative SWOT analysis method used still delves into the criminogenic needs specifically the juvenile's anti-social patterns, social support for crime, criminal attitude, substance misuse, family dysfunction, education and pro-social activities. In addition, other areas, health (including mental health) and criminal history, are examined.

1. Supervision on Probation Orders

One of the alternatives to institutionalisation that courts often use on child offenders is probation orders. The United Nations as early as 1951 described probation as:

> "*The conditional suspension of punishment while the offender is placed under supervision and is given individual guidance or treatment*"

Rule 10.1 of the United Nations Standard Minimum Rules for Non-custodial Measures[5] (the Tokyo Rules) describe the purpose of supervision as being to reduce reoffending and to assist the offender's integration into society in a way which minimises the likelihood of a return to crime. Probation orders were established in Kenya in 1943 but became operational in 1946 and have been in use for the last 11 decades. The concept of probation can best be understood by the interplay between the offender, the probation officer and the courts. Hamai et al. (1995)[4] conceives probation as a judicial function that entails supervision and therapy, and practiced in the community where the offender is helped to re-adjust and cease reoffending while at the same time be seen as a distinct discipline within the criminal justice system. The essence of the probation order is to accord an offender who is deemed not to be dangerous to the community, statutory supervision by a probation officer, in an effort to assist him to change his criminal behaviour while at the same time offering protection to the community.

Juvenile offenders cannot be convicted as per the Children Act and the Probation of Offenders Act. Supervision is between six months and three years as may be pronounced by the court upon the advice of the probation officer. Offenders are instructed to willingly commit themselves to set conditions; failure to comply may result in the order being revoked. The probation order may also entail an order to reside in a probation hostel for not more than one year. It is during this period that supervision and therapy are exercised to forestall reoffending and help the offender change his or her character.

Much of probation order supervision strives to improve on self-control, interpersonal skills, education (Shapard 1995)[6]. The officer ensures that the offender adheres to the court orders and helps the client in solving his or her problems in line with a supervision plan developed with the offender and significant others. Counselling therapy in groups and family conferencing is also used during probation order supervi-

[5] General Assembly resolution 45/110, annex.

[4] Hamai, K., Viler. Harris, R., Hough and Zvekic, U., (1995) (eds), Probation around the World: a Comprehensive Study, Routeledge.

sion.

2. Supervision on Community Service Orders

Community service order is a sentence of the court handed down to offenders guilty of an offence punishable by imprisonment for a term not exceeding three years with or without the option of a fine. It is an order of the court requiring the offender to perform unpaid public work for the benefit of the community for a period specified in the order. The sentence seeks to give a chance to non-serious offenders to reform under some form of community supervision executed by probation officers and other auxiliary community supervisors and volunteer probation officers by way of repaying the community for the offence committed through performing unpaid public work within their localities. Community service orders were established in Kenya in 1998 through the community Service Orders.

A juvenile offender can only be placed on community service order for a period between one day and up to three years, and for a child he or she must be sixteen years or above. Placement must take consideration of the offender's age, health status and the overall well-being including schooling. According to the Act, an offender can only work on public projects. All necessary case work may be given to the offender as he continues to perform community service.

**D. Assessment for the Development of Individual Supervision/Treatment Plans**

The result of the social investigation and assessment is used in developing individual supervision and treatment plans. The SWOT analysis has been adopted as a resource method for developing supervision and treatment objectives given the risk factors already identified during the interviews with the child, significant others and through case conference.

Strengths, Weaknesses/Limitations, Opportunities, and Threats (SWOT) analysis is a case planning method used to assess the individual and family strengths and needs during supervision and rehabilitation. In our circumstances, it is used by the probation officers to assess the positive risk factors and the criminogenic needs of the child and also to identify the resources necessary to help the child with problem behaviour.

The specific setting of the objective for supervision and intervention is done after the SWOT analysis has been carried out.

- Strengths: These are personal characteristics of the child that give him or her advantage. Strengths are positive aspects that are inherent or have been achieved and can be used for behaviour change.
- Weaknesses: (or Limitations): are internal characteristics that place the child at a disadvantage relative to others or it is the inhibitions within the individual child that may militate against the child's good behaviour.
- Opportunities: These are chances/resources available to improve the behaviour of the child. These are external positive factors.
- Threats: These are external elements in the environment working against the child that could cause trouble for the child leading to re-offending. Examples of threat may the criminogenic environment, negative peer influence.

[6]Shepard, J, Jr. (1995), State Pen or Playpen? Is prevention 'pork' or simply good sense? American Bar Association Journal of Criminal Justice 10: 34-37 in in Sims B, and Preston P, Handbook of Juvenile Justice, Theory and Practice, Tailor and Francis, London.

**Table 1: SWOT Analysis and Risk Factors**

| | | |
|---|---|---|
| **STRENGTHS** | Identify the child's strengths and positive attributes | Internal positive and personal attributes of the child<br>Positive Risk Factor |
| **WEAKNESSES** | Identify the child's negative attributes | Internal personal attributes of the child<br>Negative Risk Factors |
| **OPPORTUNITIES** | Identify positive opportunities within the family and community | External positive attributes from the environment including social capital<br>Positive Risk Factors |
| **THREATS** | Identify negative threats that may work against the child change process | External negative attributes from the environment including peers<br>Negative Risk Factors |

Probation officers identify and use the strengths and the opportunities to manage or address the weaknesses and the threats. All the factors identified as strengths and opportunities are used or considered in addressing the dynamic factors identified as weakness and threats. The Probation officer is then expected to set and prioritize the risk and needs assessed (setting them as problem areas and turning them into objectives) starting with the ones which can be addressed easily and then moving to the ones which pose greater challenges. The problems identified must be those that have a bearing with the crime committed or those that have a higher chance of influencing positive change.

The result of the assessment done using the SWOT method or Risk/Need Assessment (RNA) tool is then tabulated clearly where most of the weaknesses, where changeable, are classified as objectives of treatment or supervision. Appropriate intervention is then apportioned and executed accordingly. This process can be repeated several times during the period of offender supervision in the community or in the institutions.

## IV. SOCIAL REINTEGRATION OF CHILD OFFENDERS

Effective aftercare is an important component of institutionalisation for juvenile offenders (Howell, 2009)[7]. Social reintegration of those leaving correctional facilities begins with generation of a pre-release assessment report being written by a probation officer. This does not preclude the fact that there is continuous communication between the probation officers and the Borstal, rehabilitation schools or probation hostel personnel. For the Borstal, there is established a Board of Licence which exercises the function of determining premature release of youthful offenders. Although courts commit offenders to the facility for a mandatory period of three years, the Board has the power under the Act to release the offenders subject to certain conditions. The rehabilitation schools also require a pre-release report from probation officers as do the probation hostels.

### A. Purpose of the Pre-Release Reports

The purpose of the pre-release reports is to help competent authorities make more informed decisions in post-sentence dispositions. The report helps in identifying for intervention and for protection purposes both positive and negative risk factors necessary for re-entry and also for the prevention of relapse. For offenders due for pre-release disposition, the reports help in identifying key reintegration issues which are the embodiments of the risk factors. There are many of reasons why a report may be necessary, considering the type of the report and the offender in question. Nevertheless, the following are some of the general objectives of a pre-release report which must be taken cognisance of when the same is being prepared.

- To provide the competent authority or releasing organ with information regarding the home condition of the inmate
- To provide information to the competent authority about the inmate's acceptance by his family or community.

[7] Ibid.

- To provide information on the resources available for continued post-release rehabilitation depending on the needs of the offender
- To indicate potential risks, if any, and likelihood of the offender reverting to criminality
- To indicate availability of accommodation upon release
- To indicate availability of a person(s)—guardian, parent or care-giver—who is ready to take immediate charge and in accordance with release conditions if any
- To verify information on the offender, family and other circumstances already available to the holding authority
- To indicate any fears by the victim(s) about the offenders potential return
- To verify if there is objection by other authorities, e.g., the police about the offender's release on license.
- To find out if the offender had faulted/breached previous licenses
- To indicate to the holding authority of the supervision arrangements necessary for observation of the release license and thus forestall re-offending
- To prepare concerned parties of the potential return of the ex-offender
- To generate a possible reintegration case plan to be implemented upon release
- To provide a plausible suggestion or recommendation and if the offender may be subject to release, to propose any condition(s) that may be attached to the release if applicable

**B. Contents of the Pre-Release Reports**

There are many issues that the report can contain subject to the information collected during the interviews and inquires and the audience of the report. Generally they may be summarised as risk protective factors (1) Common offenders reintegration 'needs' (2) acceptance by the family or community (3) accommodation and housing (4) substance and alcohol misuse (5) healthcare including mental health and (6) employment (7) presence of alluring negative peers including previous acquaintances and those picked during confinement, (8) training acquired and how this may be used as an asset in reintegration, conclusion and recommendation. The recommendation should be tailor made to the specific authority or organ requesting the report

During the social reintegration of the youthful offender, the probation officers have to work with the family, community, government agencies, e.g., schools and colleges, county governments, volunteer probation officers and other non-governmental organisations interested in the empowerment of offenders.

**C. Aftercare**

The provision of aftercare for released youthful offenders takes more or less the same case management style like that of offenders under probation supervision. This entails assessment, social case work, empowerment, training, work placement, and educational programmes. Individual counselling is one of the most common treatment methods employed by probation officers. As noted by (Siegel 2002)[8], the purpose is not to try to change the child's personality but rather to help him or her deal with adjustment problems as changing personality is a process. Any relapse may call for breach of release licence and having the offender returned to the correctional facility for the remainder of the residue or as may be determined by the Board of Licence. Probation officers seek the empowerment of the ex-inmates especially those coming from Borstal Institutions who have acquired technical skills. Community resources including use of non-governmental organisations and Probation Volunteers is significant.

## V. COMMUNITY INVOLVEMENT WITH JUVENILE OFFENDERS THROUGH VOLUNTEER PROBATION OFFICERS PROGRAMME

The Children's Act provides avenues in which charitable non-governmental organisations can participate in the administration of juvenile justice by establishing institutions for rehabilitation and welfare support. But it is the direct involvement of the community through individual participation that is a relatively new concept in Kenya.

The Volunteer Probation Officers programme was started in 2005 as an initiative of the department in

[8]Siegel, L, (2002) Juvenile Delinquency: The Core, in Sims B, and Preston P, Handbook of Juvenile Justice, Theory and Practice, Tailor and Francis, London.

order to address shortcomings identified in the general offender supervision. In line with in the United Nations Standard Minimum Rules for Non-Custodial Measures, (Tokyo Rules) and within the scope of the departmental legal mandate, the VPO programme was commenced with the objective of providing auxiliary support to mainstream probation officers but specifically:

- To expand the departmental reach in the community in criminal justice dispensation
- To intensify offender supervision and
- To increase the capacity and speed within which probation officers can be able to provide court services.
- To increase effectiveness in service delivery

**A. VPO Management and Selection Criteria**

The head of the probation station is the programme coordinator at the station level while the county probation directors provide regional coordination and management. The policy direction and national coordination is provided from the Probation Service headquarters. Although there is still no written policy on the operations of the programme, the limited legal mandates as per the Probation of Offenders Act and Community Service Orders Act provide the instruments of engagement and work.

The programme survival depends on the calibre of persons selected who ideally should come from retired probation officers/civil servants, church leaders, social workers, and community leaders. In addition consideration is given to remote areas that provide a challenge to the probation officers in terms of reach or effectiveness. The DPOs are expected to liaise with stakeholders and identify suitable VPOs based on the following criteria.

- Must be over 30 years of age
- Have reasonable level of education
- Must be a respectable member of the community
- Must be willing to create time for volunteer work
- Must be willing to provide free service
- Must be a role model, of good virtues and with integrity

**B. The Duties of the VPO**

The duties of the VPO include:

1. Assisting line probation officers in the generation of information for social inquiry reports
2. Provide auxiliary support in the supervision of offenders in the community
3. Engaging the community to accept and provide for the offenders as a measure of resettlement/re-integration of offenders back into their communities
4. Linking up the probation officer with the community
5. Creating public awareness on issues related to delinquency
6. Serving as agents of delinquency prevention within their communities

The programme is entirely voluntary, operating on individual free will and thus does not provide an opportunity for employment. The selection is devoid of job seekers. The VPOs are trained on elementary probation work at the initial point before being advised to formally apply for engagement upon which they are provided with letter of appointment to serve for a renewable period of three years. There are over 300 VPOs enlisted but only about two/thirds are actively engaged. This is because of challenges related to funding to facilitate training and transport reimbursements.

## VI. CONCLUSION

The role of the probation officer in the supervision and rehabilitation of juvenile offenders cannot be underestimated. The salient variables underpinning the maturation of a juvenile are not factors which the court may be able to discern on its own. Thus, a comprehensive inquiry and assessment will always bring out these criminogenic needs which must be targeted for intervention. Rehabilitation of offenders in the community, whether for those on probation orders or any other community supervision order can only be effective if skilled personnel who follow professional standard procedures are the ones to work with the

offenders. This must, however, be preceded by effective inquiry and assessment of salient variables that may militate against the juvenile under supervision.

Although Kenya, like most democratic societies, has maintained institutionalisation alongside community correction of juvenile offenders, the role of the community and agencies working therein is crucial. It is only a multidimensional approach and engagement of stakeholders that will ensure effective social reintegration of offenders.

# PROFESSIONAL DECISION-MAKING AND RISK ASSESSMENT

*Dr. Kerry Baker**

## I. INTRODUCTION

Working with young offenders presents us with many questions. Which one of this group of young people will go on to commit a serious crime? How can we know? Or, what can we do to help this particular young person stop offending? Should we focus our resources on dealing with i) a young person who we know is very likely to commit many crimes that are minor but persistent or ii) a young person who might possibly commit one particularly serious crime? These kinds of difficult questions cannot be avoided if we are working in youth justice because there is a constant pressure to make decisions about what action to take. Behind these dilemmas lie even more complex questions, for example, why is this young person behaving in such a way? We need some understanding of their behaviour if we are ever going to be able to respond to it effectively.

The analogy of a maze seems relevant here. We can think of this in terms of a young person who may feel lost in the fast-changing phase of adolescence, has made some poor choices and found themselves needing help to make the transition to adulthood. We can also see how it might apply to professionals working in youth justice who are dealing with complex young people and may be unable to see how best to help them.

In these three lectures, we will consider various practice frameworks that can help with navigating these challenges. Today, I will be discussing decision-making and assessment practice, tomorrow will be about working effectively with young offenders and on Thursday we will look at desistance and social re-integration. All three topics are connected and there will be many recurring themes and links across the three lectures.

For today, we will be starting with some more general conceptual information and then moving on to more specific practice-related examples. We will briefly look at the background context of the idea of 'risk' and then think about professional decision-making. This provides the foundation for considering assessment practice, before then narrowing down further to look at risk assessment. This might seem like a long way round but it is useful to think about the principles of good decision-making more widely before getting into the details of risk assessment in the youth justice context. From this foundation, we can then look at examples of risk assessment tools and their implications for real-life practice.

I will be mostly using examples from the UK, with some from the USA. I recognise that the Western European context that I am most familiar with will be different to the settings in which many of you work, but there will be many similarities also and the differences can hopefully provide some new and thought-provoking ideas. In the UK, there is a distinction between young offenders (10-17) and young adult offenders (18-21, or sometimes 18-25) and I will explain if I am referring to one or other group at any time. However, many of the key themes are similar (e.g. working with a 17-year-old is similar to working with an 18-year-old) so the discussion will apply to all those broadly defined as 'youth'.

## II. CONTEXT

### A. History

There are many accounts of the development of the 'risk concept' which we don't have time to explore today, but I would like to highlight some key points which are most relevant to the later material on the

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practicalities of risk assessment. The first is the transition from risks being seen as unknowable and unpredictable — as fate or acts of God perhaps — to instead being viewed as something knowable and calculable. As the methods of natural science, such as observation and measurement, were applied to the study of human behaviour, confidence in the ability of social scientists to predict future behaviour also increased. Castell argues that the result of such a 'scientific' approach to the assessment of human behaviour has been a move away from the idea of 'a subject or concrete individual' towards the perception of an individual as 'a combination of factors, the factors of risk' (1991: 281). Human behaviour thus becomes more susceptible to analysis and prediction if risk is understood to be 'the effect of a combination of abstract factors which render more or less probable the occurrence of undesirable modes of behaviour' (1991: 287).

Secondly, the modernist understanding of risk originally encompassed both good and bad outcomes — it was taken to refer to the likelihood of a particular event occurring together with the size of the resulting gains or losses (Hacking 1990). The 20th century, however, saw a shift to the point where risk is viewed as primarily negative. 'The word *risk* now means danger; *high risk* means lots of danger' (Douglas 1992: 24).

Thirdly, the idea that the state has a duty to protect individual citizens from harm is still widely accepted (O'Malley 1992). The risks posed by offenders perceived as dangerous are very difficult for individuals to insure against given that they are relatively rare, difficult to predict and can lead to large, perhaps permanent, losses. Consequently, demands for state protection against these particular risks persist.

**B. Risk as an 'Organising Principle'**

Given the expectations on the state to protect people from 'danger', it is perhaps not surprising that risk has become the 'organising principle' in many public services, including criminal justice organisations such as probation and youth justice. Kemshall et al argue that risk is becoming 'embedded in organizational rationales and procedures' (1997: 214) as seen by the introduction of policies relating to risk management, risk monitoring and risk taking. The introduction of risk assessment tools for offenders is one obvious example of this.

**C. Implications**

There are many implications of this trend, but one of the key problems is that even though we know the prediction of human behaviour can never be 100% accurate, the constant focus on risk management creates an expectation that the criminal justice system should always be able to protect people from the harm caused by offenders. In the UK, there have been numerous examples of media criticism in cases where offenders under supervision have gone on to commit serious offences and this public blaming increases the pressure on staff. Another issue which we will return to in the next two lectures is the impact of the idea that 'risk is negative'. This is particularly relevant when we come to look at the questions of how to work effectively with young offenders and how to promote desistance.

## III. PROFESSIONAL DECISION-MAKING

With a topic like this, it is tempting to go straight into looking at risk assessment tools and focusing on technical questions of predictive accuracy. It might seem like a quick way to deal with some of the challenges of working with young offenders — of being in the maze of questions — but having a broader understanding of effective decision-making more widely will actually provide a better foundation for effective practice.

**A. Judgements and Decisions**

Goldstein and Hogarth differentiate between judgements and decision making. They describe judgements as 'the ways in which people integrate multiple, probabilistic, potentially conflicting cues to arrive at an understanding of the situation' whereas decision making can be viewed as the way in which 'people choose what to do next in the face of uncertain consequences and conflicting goals' (Goldstein and Hogarth, 1997, p 4). This is helpful when we think about assessing young offenders in that, firstly, we have to try to make sense of many different pieces of information from different sources — the young person, their parents/carers, school, other professionals. It is like trying to fit together different pieces of a puzzle. Once

that has been done, a decision has to be made — in the face of uncertain consequences as we do not necessarily know how the young person will react — about sentences and interventions.

**B. Errors and Biases in Decision-Making**

A common error is to confuse the *impact* of an event with the *likelihood* of it occurring which can often lead to unnecessary anxiety (for example, worrying too much about an aeroplane accident when the actual likelihood of this happening is very low). Another problem can be if assessors are reluctant to accept new information that is not directly related to the central problem being considered. Hollows calls this the 'decoy of dual pathology' (2008, p 56). For example, if a young person poses a high risk of serious harm to others it may be more difficult to see evidence that they are also at risk themselves (e.g. gang members who are violent to others but are also victims themselves).

Confirmation bias prevents a practitioner from taking account of new information. If an assessor has concluded that a young person is unmotivated, they may find it hard to spot evidence that the level of motivation is changing. On the other hand, if a young person is seen as being compliant, information that the young person is behaving problematically elsewhere may be ignored. These errors may be more likely to occur when practitioners are in situations of stress or are worried that they will be criticised by colleagues for changing their mind (Smith, McMahon and Nursten, 2003).

**C. The Importance of Professionalism**

Even when risk assessment tools are being used, it is important to keep a focus on promoting the professional expertise of staff. Professionals have been described as having 'a number of key identifiable traits, one of which is *autonomous decision making*, underscored by a distinct, theoretical, expert knowledge base' (May and Buck, 1998: 5, emphasis added). Some autonomy and flexibility will always be needed as each individual young person is different and 'the indefinite number of contingencies in individuals' circumstances requires a confident reaffirmation of the value of discretion' (Eadie and Canton, 2002: 23).

## IV. ASSESSMENT PRACTICE

As part of this introductory section on decision-making, it is useful to think about the nature of assessment — this is also part of the foundation on which we can then build a more specific discussion about *risk* assessment.

The importance of preparation for assessment is often overlooked. This requires thinking in advance about what information is needed and about the young person's perspective — for example, are they familiar with the system or is this their first time of contact with criminal justice professionals? The next stage is gathering information. This is not just about *what* questions are asked but also *how* the information is obtained. Traditionally practitioners rely on interviews, but other options such as visual and diagrammatic tools could be used. What about trying to use computer games or phone apps as a way for young people to express their views? Having collected information, it then needs to be recorded. This is often seen as not a very interesting task, but accurate recording of information is vital so that colleagues can see what is happening in a young person's case and also to show the basis for any decisions that have been made in case there is an enquiry when something goes wrong.

When it comes to the critical stage of understanding the information that has been collected — fitting together the different jigsaw pieces as mentioned earlier — the following quotation provides a helpful summary of two important processes. '...assessment is a focused collation, analysis and synthesis of relevant collected data pertaining to the presenting problems and identified needs' (Parker and Bradley, 2007, p 14). The *Oxford English Dictionary* (*OED*) defines analysis as 'the resolution or breaking up of anything complex into its various simple elements'. Synthesis, on the other hand, is defined by the *OED* as 'the putting together of parts or elements so as to make up a complex whole'. The implication for assessment practice, therefore, is that once the specific issues and problems have been considered there needs to be a process of recombining them in order to look at the picture as a whole. We will come back to this point a number of times over the course of the three lectures.

## V. RISK ASSESSMENT

### A. Definitions of Risk

As we have seen, there are two key elements of 'risk' — likelihood and impact (Kemshall et al., 2007; Carson and Bain, 2008). Both need to be included in a risk assessment:

- the likelihood of further offences happening **and**
- the outcome, should further offences occur, specifically the impact or degree of harm to others that may result.

This helps to show the importance of being clear in the way we talk about risk. Saying a young person is 'high risk' for example is not very helpful. Does it mean that that there is a high likelihood of him/her committing minor offences? Or could it mean that a young person might commit a very serious crime but there is a lower likelihood of this occurring? Or does it mean that they are at risk of suffering harm themselves? A more helpful approach is to use phrases such as: there is a low likelihood of this young person committing a sexual offence but if this did happen the impact would be severe. Or, there is a very high likelihood that the young person will commit theft offences but the impact will be small.

Being specific about the situations in which negative outcomes will occur is also important because risk is not an inherent characteristic of a young person but rather depends on particular events and circumstances. For example, a young person might not commit any offences on Mondays-Thursdays but does get into trouble on Saturday nights when in particular places with particular people. This also means that risk assessments can vary frequently and/or rapidly as a young person's circumstances and opportunities change.

### B. Approaches to Risk Assessment

A clinical assessment often involves a relatively unstructured format for obtaining information and the conclusions are based primarily on the worker's professional experience and subjective opinion. The benefits of this approach are that it takes account of specific factors for each individual and can identify issues for which professional intervention is required. The weaknesses are that it leaves the assessment process open to bias and there may be inconsistency in the assessments made by different practitioners (YJB, 2008).

In contrast, actuarial assessments are based on knowledge about groups of offenders and are mainly based on static factors such as gender and criminal history. Such tools calculate what proportion of a group of young people with similar characteristics may go on to offend further and are shown to be more accurate than clinical approaches in indicating the likelihood of further offending. They can be very useful for screening and making initial assessments about which cases to prioritise. However, they do not tell the assessor whether any given individual is an exception to the group (for example, if 7 out of 10 young people with these characteristics go on to offend, is this young person part of the 7 or part of the 3 who won't offend?). They are better at predicting familiar events than unusual but more serious situations. They do not give a full picture of the individual's circumstances and won't take account of any recent changes in a young person's behaviour.

A third approach is the middle ground of 'structured professional judgement'. Tools based on this approach set out the minimum range of risk and protective factors that should be considered. Assessors should follow the guidelines and the structure of the tool which reflect relevant theoretical, professional, and empirical knowledge about offending. Each approach has strengths and weaknesses so it is important to understand the different approaches to assessment and know which methods are best suited to particular types of situation.

## VI. RISK ASSESSMENT TOOLS

There are many risk assessment tools for young offenders, each with differences in focus, length, approach and level of detail. Rather than going through lots of technical and statistical details about the validity and reliability of specific tools, I want instead to point you to a resource that you can use after

this event to find out more information about any tools you are interested in. This resource is the Risk Assessment Tools Evaluation Directory (RATED) website from the Scottish Risk Management Authority. We can see that there are three sections on youth: general, violence, sexual offending. If we hover over a section, it shows us which tools have been validated and which are awaiting validation. From there, we can choose to look at particular tools. It tends to focus on studies from Europe/USA so may not always be applicable to different contexts but it does provide a very useful starting point.

**A. Examples of Risk Assessment Tools for Young Offenders**

There isn't time to give a complete list today, but here are a few examples.

1. Actuarial Tools

The Offender Group Reconviction Scale is an actuarial tool originally developed for use with adult offenders in the UK, but it has now been validated for use with young people (Howard et al, 2009). It consists of 6 data items and produces a percentage likelihood of proven reoffending within 1 year and 2 years. I will say more about how this is used in practice in the UK in a moment.

2. General Case Management Tools

The Youth Level of Service/Case Management Inventory (YLS/CMI) is perhaps the most well known risk assessment and case management tool for young offenders. It has been extensively tested and evaluated and more details of this can be found on RATED.

The Early Assessment Risk List for Boys (EARL-20B) and the Early Assessment Risk List for Girls (EARL-20G) are clinical assessment tools developed in Canada for the assessment of children under the age of 12. EARL assessments are intended to be completed by Youth Level of Service/Case Management Inventory (YLS/CMI) psychologists or others who have been specially trained in early behavioural problems (Levene et al, 2001) as part of a therapeutic relationship.

The Correctional Assessment and Intervention System (CAIS) is a supervision strategy model that combines a risk assessment and a needs assessment in one face-to-face assessment interview. The interview focuses on the underlying motivation for criminal behaviour and studies from five states across the USA indicate a reduction in recidivism linked to its use.

3. Other Specialist Tools

There are a number of other tools such as the Hare Psychopathy Checklist: Youth Version (PCL:YV) and the Structured Assessment of Violence Risk in Youth (SAVRY) which uses a structured professional judgement approach. There are also specialist tools for assessing the likelihood of sexual offending such as the Estimate of Risk of Adolescent Sexual Offence Recidivism (ERASOR) and Juvenile Sex Offender Protocol-II (J-SOAP-II).

**B. Features of Assessment Tools**

The RATED site will provide information about the age/gender a tool is designed for and details relating to evidence of validity and reliability. Some other factors to consider are:

1. Balance of Static and Dynamic Factors

Static factors are important because a young person's criminal history can be a useful predictor of future behaviour. However, a tool which relies too much on statics will be less useful with young people who have little offending history, or with those where rapid change has occurred (e.g. a young person who has been radicalised over the internet into adopting extremist views). In such cases there needs to be a balance of static and dynamic factors, for example, 40% weighting on statics and 60% on dynamics.

2. Balance of Risk and Protective Factors

Similarly, there should be a balance between risk factors i.e. 'prior factors that increase the risk of occurrence of events such as the onset, frequency, persistence or duration of offending' (Farrington, 2002, p 664) and protective factors which reduce, prevent or mediate risks for the onset and persistence of offending behaviour (Lösel and Bender, 2007). There is much debate over exactly how they protective factors work which there isn't space to cover today (Case and Haines 2009) but the key point here is that both need to be included.

3. 'Whole Person Perspective'

One of the limitations of tools which are structured in terms of risk domains is that '[t]he reduction of the offender's unique human story to a catalogue of components, however, offers little insight into the meaning of offending within the offender's life as a whole or into personal desires, goals and ambitions, strengths and solutions' (Hayles, 2006, p 69). As discussed earlier, the process of synthesis is important for putting all the pieces back together. A useful question to ask, therefore, is whether a risk assessment tool helps to provide a 'whole picture' of a young person that sets their behaviour in context, shows patterns over time and takes account of his/her perceptions of the choices that they face and their views of the costs/benefits associated with offending (Kemshall et al., 2006).

**C. The UK Experience: Asset and AssetPlus**

I will now talk in a little more detail about the tools used in the UK, not because they are necessarily better than other tools, but because I was involved in their development and validation so have more detailed knowledge of them.

Significant reforms were introduced to the youth justice system in England and Wales after 1998. This included setting up the Youth Justice Board to monitor the system and promote good practice. It also included the formation of multi-disciplinary Youth Offending Teams (YOTs). Previously young offenders had been primarily the responsibility of local social services departments but under the new system, all YOTs were required to have the involvement of the Police, Probation, Social Services, Health and Education. Many YOTs also including additional involvement from services such as housing or mental health.

The Youth Justice Board commissioned the development of a new assessment tool, which became known as Asset, and one of the main motivations was to provide a common tool that could be used by staff from different professional backgrounds. Consistency was a priority — the Board wanted to ensure that assessments of young people covered a comprehensive range of factors, regardless of whether the member of staff was a police officer, social worker, education specialist or from any other professional background.

It was based on this model, with the idea that if changes could be made in some of the areas on the outside of the circle — family or education or health for example — changes would then follow in terms of reducing offending behaviour (the 'target' at the centre of the diagram). It was introduced in 2000 in paper form, but was then gradually incorporated into IT systems to be completed electronically. It included a numerical scoring system, initially based only on dynamic factors, which was shown to have good predictive validity in several studies (Wilson and Hinks, 2011).

After ten years, the YJB revised the tool. One of the key criticisms of the original Asset was that it focused too much on negative problems in a young person's life. There were concerns that it did not cover some contemporary issues such as gang involvement and that practitioners were relying too much on the numeric scores and not giving enough thought to how to explain all the interconnecting factors in a young person's life (Baker, 2014).

The result of these revisions is a new tool called AssetPlus which is being introduced at the moment. Some YOTs have started using it and some will change to the new system soon. It is based on this diagram. Very briefly, the core record is the place to store key factual data and details of previous offending. The information gathering quadrant has four sections and practitioners can choose in which order to complete these, based on their view of what would be most appropriate in any specific case. Having collected all the information, the assessor then moves on to the Explanations and Conclusions section – this is where the synthesis of linking different pieces of information together occurs and some judgements are made about possible future scenarios. The Pathways and Planning section is then used to create intervention plans for working with the young person. The sections in blue at the bottom of the diagram relate to specific processes within the youth justice system in the UK and the practitioner would only use the ones relevant to each young person.

I will go into more detail about some of these processes in the next two lectures, but for now I will highlight some key features of the tool. Firstly, it is flexible in the sense that there are core questions to

answer for each young person and then additional questions that will be helpful in more complex cases or if a young person has particular needs in that area. It is up to the practitioner to decide whether to use these extra questions so a lot of emphasis is placed on the skill and professional judgement of staff. Secondly, the tool is meant to be used with all young people regardless of whether they are in custody or serving a community sentence. When the IT systems are fully functioning, staff in YOTs and staff in the prisons will both be able to see the same records about a young person and the system will be 'live' in the sense that it can be updated whenever a significant change occurs in the young person's behaviour or circumstances.

Thirdly, the tool uses both actuarial processes and skilled professional judgement. The OGRS tool described earlier is used to provide a statistical estimate of likelihood of reoffending. In addition, practitioners are asked to make their own judgements based on their knowledge of the dynamic factors in a young person's life using a matrix such as the one shown here. They can indicate their estimate of the likelihood and impact of different future events and there may be several different entries e.g. very high likelihood of the young person committing a robbery and medium likelihood of them committing an assault. This allows the practitioner to be specific about different types of behaviours. The practitioner then compares the static and dynamic indicators. If they are both high, for example, then it seems clear that the young person would need a high level of intervention. There are cases where they will differ though e.g. a high static score because of past offending but a lower dynamic score because the young person is now in employment, or a low static score due to a lack of criminal history but a high dynamic score because the young person is now spending time with friends who regularly offend. In such situations it is important to discuss the case with colleagues or a manager to work out the best course of action.

The AssetPlus tool is new and has not yet been evaluated. Some elements of it are specific to the UK and have arisen in response to feedback from UK practitioners and academics. However, I hope that some of the ideas will be useful in promoting further discussion.

## VII. IMPLICATIONS FOR YOUTH JUSTICE SERVICES

When thinking about which tools to use and how to implement a risk assessment strategy it is helpful to remember the warning that 'even the activity of risk assessment itself creates new dangers' (Beckett, 2008: 41). This is because the more time that is spent on assessing one case, the less time is available for risk assessment in other cases. If a practitioner spends so long assessing young person A, they might miss something critical about young person B due to lack of time. The tools and processes need to be appropriate to the time and resources available — practical compromises have to be made as it is not possible to assess every detail of each young person's life.

### A. Choosing Risk Assessment Tools

These questions can be helpful in deciding which tools to use:

- Will it be used for a one-off assessment or will it be repeated over time to measure change? For the former, an assessment based on static factors may be best but if it is to be used over time there needs to be more emphasis on dynamic factors.
- Will it be used for initial screening or for detailed case planning?
- Will it be used on paper or through IT (computer, phone)?
- What level of knowledge and expertise does it require?
- Is your priority: prediction of recidivism? If so, what is the evidence on validity?
- Or is promoting consistency between staff and encouraging comprehensive consideration of a wide range of risk and protective factors more of a priority?
- Is the tool just for individual practitioner use or will it be used to collect aggregate data for profiling or decisions about resource allocation?
- How with the views of young people and parents be included?
- How does it take account of factors such as gender, ethnicity, cultural background?

Sometimes there are tensions between different objectives. For example, can a structured approach encourage and enable offenders to be fully engaged in the assessment process? If practitioners perceive a tool to be too 'academic' they may be less likely to accept its use. On the other hand, if tools are

designed primarily with practitioners in mind, perhaps for example by keeping them relatively short, does this mean that their theoretical validity is compromised? Decisions need to be based on organisational priorities and the level of resources available. Different tools may also be needed for specialist areas such as young offenders with significant mental health problems or those who commit sexual offences.

**B. Using Risk Assessment Tools Appropriately**

Risk assessment tools have been criticised for giving the impression that outcomes for young people are 'pre-determined' by a statistical calculation (Case and Haines, 2009: 305) and also for reducing professionalism by creating a 'tick-box' culture rather than encouraging practitioners to think for themselves.

These need not be the case, however, if tools are used realistically and appropriately. A helpful analogy is to think about the difference between a map and a sat-nav system. As Baker and Wilkinson explain 'If it's a map, then it will be seen as providing guidance and important cues, but the responsibility for interpreting it, and for choosing which of the possible routes available to use, rests with the traveller. In the case of a sat-nav, there is typically less use of knowledge and fewer choices to make because it's more a case of following the instructions. You may get to the same destination but may not understand how you got there…or know how to do it again if you didn't have the sat-nav' (Baker and Wilkinson, 2011: 24). In thinking about risk-assessment tools, it can be more helpful to see them as maps rather than sat-navs, because this places more emphasis on applying knowledge, rather than just complying with instructions.

As Whyte argues, the real strength of standardised approaches and risk assessment tools is in their 'transparency in identifying which individual domains practitioners associate strongly with criminality, evidence that can be accepted or challenged, and the degree to which those identified "needs and risks" can then be incorporated meaningfully into an action plan which is dynamic, open to revision and for which service providers as well as service "users" are accountable' (Whyte, 2009, p 85).

**C. Organisational Culture and Management**

What can managers do to promote high quality decision making and assessment practice? There are many things but we only have space today for three brief suggestions. Firstly, to provide times when staff can discuss assessments, particularly difficult ones with a manager or more experienced colleague. Secondly, to encourage greater openness by looking at examples of assessments in team meetings to identify good practice and areas for improvement. Thirdly, to create a culture in which everyone can learn from mistakes or cases where the decisions turned out to be inappropriate (Baker et al, 2011).

## VIII. CONCLUSION

To conclude, risk assessment with young offenders is difficult! Risk assessment tools and risk management policies are important in helping to improve decision, but need to be balanced with flexibility for practitioners to respond to the circumstances of each young person. If we had to summarise the key features most conducive to the flourishing of assessment practice and highlight the essential points to make most strongly to teams and senior managers, it would be that '[t]he culture of the team or agency that practitioners work within, the expectation they have of each other and that their managers have of them, all need to allow priority to be given to *practitioners taking time to think carefully and to record this thinking usefully*' (Dalzell and Sawyer, 2007, p 6, emphasis added). This careful thinking then needs to lead to action, if it is to make a difference to young people and their communities and we will go on to look at that in the next two lectures.

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## Useful Websites

Risk Assessment Tools Evaluation Directory (RATED), Risk Management Authority (Scotland)
http://rated.rmascotland.gov.uk/risk-tools/

AssetPlus:
https://www.gov.uk/government/publications/assetplus-assessment-and-planning-in-the-youth-justice-system

Correctional Assessment and Intervention System (CAIS):
http://www.nccdglobal.org/assessment/correctional-assessment-and-intervention-system-cais

Early Assessment Risk List (EARL):
https://childdevelop.ca/snap/risk-assessment-tools

Structured Assessment of Violence Risk in Youth (SAVRY)
http://www.annarbor.co.uk/index.php?main_page=index&cPath=416_419_189

Youth Level of Service/Case Management Inventory (YLS/CMI)
http://www.mhs.com/product.aspx?gr=saf&id=overview&prod=yls-cmi

# WORKING EFFECTIVELY WITH YOUNG OFFENDERS

*Dr. Kerry Baker**

## I. INTRODUCTION

Working with young offenders is often motivated by a belief in the possibility for positive change because, as McNeill suggests, adolescence is 'a period of malleability during which there may be the opportunity to enable the development of positive identities before negative messages are internalised' (McNeill 2006, p.133). The impact of effective work with this age group may be much greater than waiting until adult offenders are entrenched in problematic patterns of behaviour.

In yesterday's lecture we looked at decision-making and risk assessment. Since the 'aim of assessment is to guide action' (Reder et al, 1993: 83) today we build on that material by looking at different tasks and the skills required by staff working with young offenders. I am adopting a broad approach in this lecture to cover many different factors, based around this model. A lot of attention and research is often focused on specific programmes for young offenders e.g. cognitive behavioural programmes, but this diagram is helpful in putting those programmes into a wider context. Here we can see that specific programmes are located within the process of case management which encompasses many different aspects of supervising young offenders. This in turn is located within the wider picture of (hopefully) a young person's desistance from crime and their integration within the community. We will look at those two aspects tomorrow, so for today's lecture we will concentrate more on the case management process.

An over-riding theme will be the importance of relationships and engaging with young people. This underpins all the other elements in the diagram, but has sometimes been an under-researched area. We will start with that and then look at the initial stages of case management. In the middle we will look a little more at programmes and then finish by looking at some other aspects of case management, including multi-agency working.

## II. ENGAGING YOUNG PEOPLE

Having an effective programme is of little help if young people don't engage with them, but what is really meant by the term 'engagement'? It is about more than compliance i.e. more than just the young person attending programme sessions or reporting to a supervising officer. If a young person takes part in a programme or activity but is not interested in learning, not motivated to change and not committed to any of the programme goals then the intervention is unlikely to be successful. Promoting engagement is therefore about using professional skills and expertise to spark young people's interest in moving forward in life and helping them reach the point of willing and meaningful participation.

McNeill and Batchelor (2002) argue that the quality of the relationship formed between professional and young person may be the most crucial factor in preventing further offending. This is illustrated in the diagram here where relationships are at the centre of all the other important work that takes place.

> *[rapport] creates the favourable conditions necessary for people to be able to discuss and reveal problems or difficulties, successes or failures, and strengths or weaknesses in ways that aid understanding and allow for a realistic plan of action to be created* (Trevithick, 2005 p.148).

One of the core components of positive professional-young person relationships is empathy, which does not mean just sympathising or condoning what a young person has done, but rather about showing a will-

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ingness to understand his/her experiences and feelings. This requires the practitioner 'to draw out the individual's story, as it has meaning for him and her, and avoid imposing an adult, impersonal, "professional" interpretation too early in the process' (Farrow et al, 2007: 59).

Other important components of engaging relationships include: showing warmth and a genuine interest; seeing the young person as individual rather than as part of a group of 'problematic youth' and creating an atmosphere of trust (YJB, 2008b). Working towards empowering the young person to make their own life changes (rather than creating dependency) will be important as the relationship develops. Working with strengths in a young person's life and focusing on positive future goals can also be important and tomorrow's lecture on desistance will look again at this. Evidence also suggests (YJB, 2008b) that creative or sports based programmes can be effective in helping young people to build relationships with staff, even if on their own they show little impact on recidivism.

It is also important to identify potential barriers to engagement. This could relate, for example, to maturity, literacy skills and lifestyle issues (e.g. drug use) all of which could influence how (and when) interventions are delivered. Some young people are also victims of crime and abuse and this will affect the way they interact with authority and professionals. Other barriers can be practical e.g. lack of transport, caring responsibilities for other siblings, health problems that might affect engagement.

## III. FOUNDATIONS FOR EFFECTIVE PRACTICE

When we think about the diversity of young people in the criminal justice system — differences in age, gender, ethnicity, maturity, life experiences, frequency and severity of offending — it is clear that a range of different approaches and strategies are required. No one programme or activity will suit them all and different methods are therefore needed. However, this does not mean that 'anything goes' and that staff should be free to work in whatever way they like.

### A. Using Appropriate Evidence Where Available

In the UK, the concept of effective practice in youth justice context has been defined as 'those programmes, processes or ways of working which have the highest level of validation from research and evaluation' (Youth Justice Board, 2003). Discussions of effectiveness or effective practice often tend to focus on the first of the three points in the list — programmes. However, we should also note the other two — processes and ways of working — which cover many other aspects of working with young people. In some areas (such as engagement discussed above) there will be less research evidence available and this might mean needing to look to related fields of practice for guidance. It is also important to look for different types of evidence, not just random control trial studies of specific programmes but also qualitative evidence from case studies for example.

### B. Core Knowledge

Practitioners need to know why they are doing what they are doing. "*Knowing*, that is, the theory, research and experiential base of work in youth justice, needs to underpin the *doing*, that is, the interventions, methods and skills employed" (Baker et al 2011: 45).

This will include, firstly, a knowledge of the wider context of child and adolescent development, for example, the formation of self-identity, the growth of cognitive skills, processes of maturing and learning to make moral choices. Secondly, it will include knowledge of patterns of offending behaviour by young people. This may sound like an obvious point but the key point is that, when dealing with an individual young person, it is helpful to see how his/her behaviour compares to that of others — is it typical or untypical for young people of that age for example? This needs to be based on some understanding of both large scale longitudinal studies and other research e.g. about specific types of offending. Thirdly, it is important to have an understanding of some of the key theoretical explanations for offending. 'The capacity to elucidate theories — frameworks of understanding, ways of making meaning — is what essentially separates the report of a person having some expertise, whose opinion should be taken seriously, from the lay person in the street' (Swain, 2005, p 46). Fourthly, knowledge of legislation and policy is required. This may again seem like a rather mundane point but it is one that can easily be overlooked. (Baker et al, 2011).

### C. Core Practice Model

This diagram provides a simple, yet helpful way of summarising an effective approach which can apply to any young person, irrespective of the frequency or seriousness of their offending. We looked at the first stage of assessment yesterday and this should then lead directly into intervention planning. Then we have the 'action' stage, which refers to whatever interventions and programmes are used during the sentence, followed by review. This should lead to changes in plans and actions if different work is needed to achieve the desired goals of rehabilitation and desistance from crime.

This might sound just like common sense, but research shows that these processes are often not joined-up. For example, a survey by Flores et al (2003) of the use of the Youth Level of Service/Case Management Inventory (YLS/CMI) in three American juvenile justice correctional agencies found that it was primarily used as an initial indicator of risk levels but was not being used to inform intervention planning or wider service delivery decisions. In the UK, research on Asset has also shown that the link between assessments and plans is weak, suggesting that YOTs are not necessarily using their resources to target the areas of young people's lives where most input is required (Baker et al, 2005).

### D. Balancing Accountability and Professional Discretion

In yesterday's lecture we noted that professional discretion will usually be needed when making complex judgements and decisions about young people. At the same time, it is necessary to have some managerial oversight of what staff are doing to help ensure fairness and consistency. It can seem as if these two factors are pulling in opposite directions. In trying to resolve this tension, the following model can be helpful (Eadie and Canton, 2002). It shows different combinations of accountability and discretion with the aim being for practice to be in quadrant A (top right hand side). Here 'best practice' occurs when there is high discretion and high accountability. Examples of how to achieve this could be through dip-sampling where a manager may look at a random selection of work to check quality; through having a culture where there is openness about the decisions that have been made and the reasons behind them; or through practitioners recording reasons for any significant departures from agreed policy or guidelines.

## IV. PLANNING FOR EFFECTIVE INTERVENTIONS

The Risk Need and Responsivity model (Andrews et al, 1990) is a well-known approach for planning interventions based on a risk assessment. It has been subject to various criticisms (e.g. Ward and Maruna, 2007) but I think it still provides a helpful framework.

### A. Intensity and Frequency of Interventions

More intensive interventions are best reserved for cases assessed as at higher risk of recidivism given that evidence indicates that '[p]rogram service delivery to the offenders who are higher risk produces larger decreases in recidivism than it does for offenders who are lower risk' (Andrews et al, 2006: 18). It is important to also note the other side of this i.e. that young people assessed as lower likelihood of reoffending should receive less intensive interventions. There is also evidence from the USA to indicate that programmes which reduce recidivism in high risk offenders may actually increase recidivism in those who are low risk (Lowenkamp and Latessa, 2004).

As an example, the AssetPlus assessment used in England and Wales leads to an indicative intervention level, based on the assessed likelihood of re-offending and risk of harm to others. This table shows the three levels of intervention — standard, enhanced, intensive — and the YJB suggested minimum number of contacts per month. This approach was criticised by a number of UK academics who argued that it was too rigid (Sutherland, 2009), but there was some flexibility built into the system. The numbers relate to minimum contacts so a YOT could decide to provide extra contact time if they wanted to. Also, there was a 'professional override' option through which a practitioner could change the level, in discussion with a manager. It wasn't a perfect system, but it is an example of trying to provide some structure and consistency whilst also allowing for staff to use professional discretion in individual cases.

### B. Focus of Interventions

The second principle of RNR is that interventions should be focused on needs or problems most closely associated with offending behaviour. This sounds straightforward but often doesn't happen in practice. A number of studies in the UK have shown that the contents of intervention plans often have weak links

with risk assessments (YJB, 2008a). For example, in the Juvenile Cohort Study it was found that practitioners tended to target plans towards factors such as cognitive thinking, attitudes and motivation. They were much less likely to set up targets relating to issues such as family relationships, housing/accommodation, or the young person's neighbourhood and community interactions, even where this had been identified during the assessment as being strongly linked to the young person's offending behaviour (Wilson, 2013)

There are many reasons why this happens, for example, practitioners may fall into the trap of 'tunnel vision … when professionals get into the habit of treating all cases with a fixed pattern of response' (Munro, 2008, p 103). Limited resources, and the difficulty of influencing some of the circumstances of young people's lives e.g. family influences or the characteristics of the young person's neighbourhood, can be a problem. Plans made in custody may focus too much on what is available within the prison rather than on planning for a young person's return to the community. All of these factors can contribute to a situation where interventions are selected to suit the worker or organisation rather than being targeted to match a young person's needs.

**C. Taking Account of Young People's Individuality**

The term 'responsivity' refers to characteristics of both offenders and interventions which can affect the impact of supervision. This can include factors such as an offender's strengths, personality, emotional needs and level of motivation. Other important factors such as gender and cultural background will affect the way a young person responds to a programme and interventions may need to be adjusted or delivered in different ways to reflect this.

An understanding of factors such as welfare needs, historic experiences, a young person's level of maturity should also inform the way in which interventions are planned and delivered in order to ensure that plans are individualised to reflect individual circumstances. For example, Lowenkamp et al (2001: 548) state that: 'It is quite possible that a history of abuse may have implications for the style and mode of the delivery of correctional treatment…Put plainly, offenders with a history of sexual or physical abuse still need to have their criminal thinking and attitudes addressed, but they may need the treatment that accomplishes this to be provided in a different form or setting than offenders who have no prior history of abuse.'

**D. Combining Constructive and Restrictive Interventions**

There can also be a balance between those interventions which are primarily aimed at changing behaviour and attitudes (such as an anger management programme) and those which are about limiting the opportunity for offending (e.g. curfews). There is different terminology for these in the UK, either internal and external controls (YJB 2005a) or constructive and restrictive interventions (HMIP 2008). An example of this can be seen in the Youth Rehabilitation Order which is the main community sentence used in the UK. As shown in this, it contains a menu of different interventions and courts can select different combinations for different young people (nobody would ever receive all of them!). Some young people will only need 1 or 2 measures, others will need more. Using the 'menu' approach in this way it is possible to combine and balance a range of constructive and (if necessary) restrictive measures.

**E. Helping Young People Understand Interventions**

A young person is more likely to comply with a programme of work/supervision if they understand what is expected of them. However, in a study of 150 completed intervention plans drawn from two YOTs, Baker et al (2005) found that the language used in plans was often unclear and confusing. Evidence shows that many young offenders in the UK have low levels of literacy (Brooks and Tarling, 2012) and therefore may not be able to understand what is written in their plan. Figures range from 52%-83% having literacy below that of Level 1 — this is regarded as the level required for 'functional literacy', that is the ability to cope with common tasks such as filling in forms or reading a newspaper. If they do not fully understand what is required of them, they are less likely to comply and may end up being in breach of their court order. Good practice guidance (Morris and Mason 1999) for improving the readability of plans includes: keep words and sentences as short as possible; avoid jargon and use words common in daily life; simplify concepts as much as possible; exclude unnecessary information; use diagrams or other visual images.

## V. DELIVERING PROGRAMMES AND INTERVENTIONS

### A. Clarifying Roles and Expectations

Correctional staff working with young offenders have two conflicting roles i.e. they have a legal enforcement role, ensuring that the client fulfils the requirements of any court order, and on the other hand they have 'a helping, therapeutic or problem-solving role' (Trotter 2006: 3). This can lead to different kinds of problems, either a young person who resents the authority figure so much that they are unable to see the help that is available or conversely a young person who only sees the helping role and expects their worker to be able to fix every problem. Dealing with this dilemma requires the practitioner to be clear about what their authority entails and setting realistic expectations about what help can or can't be provided.

### B. Features of Programmes and Interventions

There is an extensive literature on the effectiveness of different programmes and a common theme is that those which focus on developing cognitive skills seem to demonstrate a greater impact on recidivism. Another recurring theme is that programmes need to be delivered as designed i.e. based on programmes that have demonstrated they are effective and are delivered in the same way, so that they have programme integrity (YJB, 2008c).

However, I am not going to focus on these areas or look in detail today at studies on the effectiveness of particular projects. As with the RATED website that we looked at yesterday, there are good online resources available for this kind of information. Key examples include the Campbell Collaboration which provides systematic reviews of social policy interventions, including those for 'crime and justice'. Other useful resources include the Blueprints site on interventions for young people and the UK Youth Justice Resource Hub (some of which will be UK specific but some will have wider relevance). I want to take a different approach and consider some 'themes' that recur across different types of programmes and can help us to think beyond some of the more familiar material on programme design. These are not in any particular order of priority and this is not in any sense a comprehensive coverage of the topics or a full evaluation. Instead, my aim is to put forward some ideas to prompt further discussion and questions.

1. Working with Families

Many studies show the significance of families, sometimes as contributing to a young person's offending behaviour and sometimes as a positive resource for helping to stop offending. Yet many programmes and interventions focus exclusively on the young person and do not involve the families. Realistically, there will often not be resources available to work with families in every case, but it can be important particularly for young people with complex needs and/or serious offending. One example from the UK is that of Intensive Fostering which is based on the Multi-Dimensional Treatment Foster Care (MTFC) model developed in the USA. This can be used with young people who might alternatively be facing a custodial sentence. It is a community-based intervention in which a multi-disciplinary team works intensively a young person and their family during a placement with specially trained foster carers. An initial evaluation of the study, however, found that intervention with the birth parents was the least successful part of the programme, either because of parents' reluctance to engage with a therapist or because those who did engage were not satisfied with the provision (YJB, 2010). This is an area where we need to think creatively about ways to make families more involved.

2. Positive Use of Restrictive Measures

The question of whether to use restrictive measures — such as tags or curfews — can be controversial. However, there are studies which suggest it can have a positive effect in some cases. For example, the Intensive Supervision and Surveillance Programme was introduced in the UK for young offenders who were otherwise likely to go into custody. It combined an intense period of community supervision — 25 hours per week for the first three months of the programme — with some kind of surveillance (Moore, 2005). This could be electronic tagging, voice verification (where a young person's voice print could be checked over the phone to confirm they were where they were supposed to be) or tracking. This involved staff accompanying young people to appointments with other agencies (e.g. employment), following up non-attendance, and generally being involved in their everyday lives.

Interestingly, the tracking role began to develop into more of a mentoring role. One manager

commented that tracking had made a positive impact because it became a 'youth work role which is not just about tracking but putting them into positive leisure activities as well…and I think it's also been positive for parents' (Moore, 2005: 26). The possible benefits of combining electronic and human surveillance may be worth considering further.

3. Rewards

This can be another controversial area — should young offenders be given rewards for completing a programme? The argument in favour is that it encourages participation and means a young person is more likely to benefit if they complete a programme successfully. The counter-argument is that it is inappropriate to give rewards to young people for something they should be doing anyway (i.e. attending supervision) and that rewarding those who have offended is unfair on young people who have not committed crimes.

One example from the UK is a programme called TextNow which is designed to improve literacy amongst 10-18 year olds. It involves a 20-minute reading session with a trained volunteer each weekday for 10 weeks. Young people are given a small financial reward for attending sessions and completing the work. A study of 246 young offenders (Brooks and Tarling, 2012), found statistically significant improvements in standardized scores and reading ages. Positives changes were also seen in young people's responses to questions such as whether they enjoyed reading and how frequently they read. There are limitations of the study (e.g. lack of a control group) and any positive effects will be due to a number of factors (e.g. staff enthusiasm) but it does at least suggest that in some cases rewards may be beneficial in encouraging participation in appropriate programmes.

4. Reparation

Delivering 'full' or 'direct' restorative justice may not be feasible or appropriate for some young offenders but building in an element of reparation to other interventions is supported by evidence (Crawford and Newburn, 2003). To take one example from the UK, a number of youth offending teams run projects in which young offenders are taught how to repair damaged bikes. These are then given free of charge to victims of crime who have had their own bikes stolen. There are many other examples of reparation projects, but this one is interesting because there is a direct link to helping specific victims (rather than a project with a more general benefit such as clearing litter).

All of these are just single examples and obviously there are other perspectives to take into account. They are used here to provide food for thought and perhaps to prompt some discussion during the question time.

**C. Compliance and Enforcement**

Despite best efforts, sometime young people do not engage with or even comply with the basic requirements of a programme or sentence and some kind of enforcement action e.g. being resentenced, may be necessary. This is one example of there the core skill of 'using authority effectively' mentioned earlier would apply. Enforcement is necessary to maintain confidence in the youth justice system, but may conflict with the aim of ensuring maximum programme completion. Very strict enforcement may result in fewer young people successfully completing programmes and this may have a negative impact on recidivism in the longer term. Hedderman and Hough (2004) identify a range of options to help manage this process. These include:

i. a graduated response to non-compliance e.g. an initial warning first, followed by final warnings or a return to court

ii. focus on rewarding compliance as well as punishing non-compliance

iii. ensure that the ways to achieve positive rewards are clearly stated, understood by offenders, managed fairly and with consistency between all staff.

In the UK, when a young offender misses an appointment with the Youth Offending Team their supervisor decides whether the absence is acceptable (e.g. due to illness) or unacceptable (e.g. they couldn't be bothered). If the latter, a written warning will be given and if the problematic behaviour continues the

young person can be returned to court.

Practitioners have some discretion in these decisions but there is also managerial oversight, e.g., if they decide not to issue a warning they need to record the reason for this. This would be an example of the discretion-accountability balance that we considered earlier.

## VI. EVALUATING PROGRESS

This is another one of those seemingly obvious tasks that is often ignored or overlooked in real life practice, perhaps because it can be a surprisingly difficult and challenging process. In the UK, National Standards for Youth Justice Services require that both community and custody cases are regularly reviewed. The frequency of review depends on the complexity of the case with some being reviewed more often than others. Past studies (Baker et al 2005) have shown that sometimes this degenerated into just a bureaucratic process with practitioners copying assessments and simply changing the date rather than carrying out a proper review. The new AssetPlus system is intended to reduce these problems by enabling practitioners to just update sections where there has been a change, rather than having to complete the whole assessment again.

A review should look at both positive progress and negative changes in behaviour. Small steps should be acknowledged e.g. if a young person has slowed down their rate of offending, this can be an interim stage of progress on the way to more significant behavioural changes. It should lead to an updated plan and changes of intervention.

One of the most difficult professional tasks is to balance taking action with the need to remain open to new information and to change the planned actions if necessary.

> 'The social worker does not just face altering his or her belief about one item of information but has to consider changing the *whole picture* of the case. All the known evidence then needs to be reappraised and found a place in the new emerging picture. The human tendency to avoid critical reappraisals of their beliefs may in part be due to reluctance to undertake such *a challenging and arduous intellectual task*.' (Munro 1996: 800, emphasis added)

It is also difficult if an organisation has a classification system for putting young people into risk categories as this can make it difficult to see that risks and needs may change very quickly (McGhee and Waterhouse, 2007) if, for example, a young person joins a gang or becomes radicalised online. Risks and needs may also decrease if a young person enters a more stable phase of life. A balance is therefore required: some kind of classification of young offenders is necessary to enable busy teams to cope with high caseloads but systems need to be flexible enough to respond to changes in a young person's life.

## VII. MULTI-AGENCY WORKING

For young people with complex needs and/or more serious offending it is particularly important to work with a range of organisations and colleagues from different professional backgrounds. This could be a community based social worker liaising with prison staff, or a probation officer liaising with a health service regarding an offender's mental health care.

### A. Sharing Data

The ability to share data between different agencies will depend on legislation in any given context. In the UK, The Data Protection Act 1998, the Human Rights Act 1998 and Article 8 of the European Convention of Human Rights set out the principles for data sharing between public. Good practice principles stress the importance of seeking the consent of the person about whom you wish to communicate, but in the UK information sharing without the subject's consent is lawful and sometimes necessary, if the purpose is the prevention of crime. Guidance for practitioners helps to address the balance between between protecting an individual's rights to privacy and the need to share information to prevent crime or protect vulnerable people, including young offenders themselves (YJB, 2005b). Where information is disclosed, this should be proportionate and relevant, for example, it may be appropriate to only share certain information about a young person, not the whole case file.

**B. Clarity of Communication**

In the UK, reviews into serious incidents (e.g. where offenders committed serious offences whilst under statutory supervision) have highlighted problems in communication between agencies. As examples, terms such as 'risk' and 'harm' are often interpreted differently. The word 'risk' can be used in various ways — is it risk of any offence or risk of the young person causing significant harm through violent or sexual offending? Is it risk to other people or risk to the young person? Similarly, with the word 'harm' — how bad does the impact of an event have to be before it counts as 'harm'? Those from a social care background might interpret the phrase 'risk of harm' to mean a danger *to a young person*, whereas those from a criminal justice perspective might assume in means danger of the young person causing harm *to others* through offending. To avoid these problems, it is important to communicate both facts *and* meaning, making sure that key concepts are commonly understood.

## VIII. CONCLUSION

This diagram from the USA National Institute of Corrections provides a useful way to think about implementing effective practice. It suggests that reducing recidivism can be achieved in the intersection of these three areas: organisational development, evidence based principles, and collaboration. We have looked at some examples of two of these today and will look at the area of collaboration more in tomorrow's lecture.

The area of organisational development is important because individual practitioners cannot work effectively on their own. Managers need to ensure that there are appropriate resources and procedures in place to support staff in the challenging tasks of assessment, engaging young people, delivering interventions and encouraging compliance. This is a large topic that could fill up another lecture but as we don't have time for that, the key point for today is that monitoring and evaluation are crucial for working out where improvements are needed. This will require being willing to consider where mistakes have been made and to compare outcomes for different groups of young people (Baker et al, 2011).

There is always a danger, however, that monitoring comes to be seen as a bureaucratic burden and practitioners feel it is being used to criticise them. One approach that helps to get around some of these problems is Appreciative Inquiry (AI) (Cooperrider et al, 2008). A distinctive feature of AI is that all the questions asked under these headings should be positive. For example: What works well? Which approaches help young people engage more actively with supervision? How have interventions improved since this time last year? This approach can help to make staff feel more included in the process of practice improvement.

To conclude, if we return to this diagram from yesterday we have now considered the first two stages. Tomorrow we will move on to look at achieving the goal of promoting desistance and social reintegration.

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# DESISTANCE AND SOCIAL REINTEGRATION

*Dr. Kerry Baker**

## I. INTRODUCTION

Today's topics are the focus and goal of all the work that we have looked at in the last two lectures. Making assessments, building quality relationships with young people, planning and delivering diverse and effective interventions — the desired end result of all this activity is that young offenders should stop offending and be able to live constructive lives and contribute positively to their local communities. Yet at times this can seem almost impossible given what we know about the difficulties that many young people face — poverty, gangs, poor education, substance use and so on — and the often limited resources that young justice services have to work with.

We also know from experience, however, that some young offenders do succeed in changing their lives. What can we learn from their example? How is it that some young people manage to desist from offending but others don't? Yesterday we looked at the case management and programmes elements of this diagram and today we will look at the outer two components of desistance and community integration.

For a long time, criminological research and theorising focused on trying to understand why people started offending, but it is only relatively recently that more attention has been given to the equally important question of why people stop offending. The role of age and maturity in the desistance process has long been recognised but current research focuses more on the interactive effects of life experiences, self-identity, choices, social networks and opportunities (Maruna et al, 2004).

It is important because, as McNeill et al (2012) argue, 'desistance forces us away from static models of people as 'offenders', 'criminals' or 'prisoners' and encourages an understanding of change(s) in personal identities. It also brings to our attention the fact that today's 'young offender' is more likely to become tomorrow's 'new father' than tomorrow's 'habitual criminal'. As such, it implies valuing people for who they are and for what they could become, rather than judging, rejecting or containing them for what they have done'.[1]

## II. UNDERSTANDING DESISTANCE

If the onset and continuation of offending behaviour is due to a complex interaction of different factors, it is no surprise that the process of stopping offending will often be a complex process also.

### A. 'Definition' and Types of Desistance

The expanding desistance research literature contains different theories and explanations of how this process might occur (for example Farrall and Calverly, 2006) which we don't have time to fully explore today so we will focus on the core commonly agreed components.

Maruna provides a useful definition of desistance: 'the long-term abstinence from crime among individuals who had previously engaged in persistent patterns of criminal offending' (2001: 26). This highlights the need to look at a long-term perspective and it also hints at the need to be realistic about the circumstances of life — if people have previously engaged in persistent patterns of criminal offending it is likely that there are some entrenched problems that will take time to resolve.

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[1] http://www.iriss.org.uk/resources/how-and-why-people-stop-offending-discovering-desistance

It is also useful to distinguish between different types of desistance. 'Primary desistance' has been defined as 'any lull or crime-free gap in the course of a criminal career' (Maruna et al 2004: 274) and the focus here is on the young person's visible/observable behaviour — have they been arrested or charged for example? Primary desistance can refer to any time period, including short ones e.g. during a period of supervision. It may not reflect significant change in attitudes e.g. it could be due to illness or knowing they were being closely monitored. Maruna et al describe 'secondary desistance' as adopting a new 'non-offender' identity. This occurs when a young person no long seems themselves primarily as an offender but develops a new sense of self-identity e.g. as a worker, a student, a partner or a father. Tertiary desistance is a broader concept based on the recognition by others that one has changed and the development of a sense of belonging and acceptance within society.

**B. The Desistance Process**

A recurring theme in the desistance literature is that desistance should be viewed as a process rather than a one-off event. Whilst there are some offenders who manage to stop very abruptly, for many others the process will take a long time and there will be ups and downs along the way — periods of desistance, followed by relapses into offending and so on — until hopefully reaching the stage of tertiary desistance.

Understanding desistance involves taking account of both individual and social factors as illustrated in this diagram. Age and maturity will affect a young person's ability to make choices, to understand consequences, to compare costs and benefits, to empathise with victims. Social bonds refers to the relationships and networks that a young person may have with family, friends, community groups or institutions. The third section relates to a young person's self-identity (linking to the secondary desistance concept described earlier), their own narratives e.g. the stories they tell themselves about their life and their hopes and goals for the future. The final category of opportunities and resources includes the opportunities available to a young person in their community for leisure, work or training and also whether they are receiving help and support from statutory or voluntary services. Desistance can occur somewhere in the intersection of these different factors.

Farrall helpfully summarise this by referring to the 'relationships between 'objective' changes in the offender's life and his or her 'subjective' assessment of the value or significance of these changes:' . . . the desistance literature has pointed to a range of factors associated with the ending of active involvement in offending. Most of these factors are related to acquiring 'something' (most commonly employment, a life partner or a family) *which the desister values in some way* and which initiates a reevaluation of his or her own life . . .' (Farrall, 2002: 11, emphasis added)

**C. Desistance and Young People**

The literature on desistance amongst young people is not as extensive as the research relating to adult offenders, but there are some studies that help us to understand the factors that young people themselves identify as being important for stopping offending. For example, Monica Barry conducted two small-scale studies with young people in Scotland who were involved (or had previously been) with offending with a focus on asking for their views about what helped or hindered the desistance process (Barry, 2006). They identified a variety of 'push' and 'pull' factors. 'Push' factors were generally related to the negative consequences and general hassle of involvement in offending, for example, spending time in police cells, or damage to health caused by drug use. There was a sense that the young people reached a point where they were fed up with these experiences and offending just didn't seem worth the hassle any more.

> 'You could get away with it when you're under 15,16. You can get away with crime and that. But after that, you can't get away···it's not worth going to all the hassle of being in jail' (22-year-old male, Barry 2006)

'Pull' factors were to do with the positive elements/attraction of other lifestyles and ways of spending time. This could be a relationship, new leisure activities or gaining employment. Some gender differences were evident with young women more likely to cite relationship factors as being important for desistance and young men more likely to refer to work or training opportunities.

More research is needed specifically on young people, but it is already clear practitioners and organisations working with young people need to account of young people's perspectives and the interplay

between individual, social and structural factors.

## III. SOCIAL REINTEGRATION

Many criminal justice interventions are weak in this area, even though they may be effective in other areas. For example, restorative justice interventions with young people in the UK have focused on achieving the '3 Rs' — promoting responsibility, reparation and reintegration. Evidence suggests that they are generally much better at achieving the first two but weaker at enabling reintegration (Crawford and Newburn, 2003).

Some of the key building blocks for achieving reintegration will be familiar and core aspects of correctional services, such as the provision of education and skills/employment training within prisons to equip offenders for life after release. For today, however, we will look as some other important aspects of this process.

### A. Community Collaboration

In yesterday's lecture, we looked briefly at this diagram as part of the general picture of working effectively with young people and now I want to focus more specifically on this third circle of 'collaboration'. This can encompass a range of work with charities, volunteers, ex-offenders, mentors, local businesses, the public and so on.

One of the key benefits of such work is in breaking down barriers between offenders and wider society, helping to move away from the perception of 'them and us'. A small but powerful example of this in the UK is a project involving young people from a private fee-paying school (Bryanston) and young offenders from HMYOI Portland. The school pupils went into the prison and collaborated with the young offenders on creative projects e.g. poetry, drawing, writing short stories. These have been published in a very interesting collection showing both similarities and differences in their perspectives on life. One of the fruits of the project was in breaking down stereotypes about young offenders. For example, one of the school pupils writes about how he was nervous of meeting the prisoners but after working together with them he said '...there were many similarities in our ambitions, aspirations and desire for success. I guess they are just 'normal' people after all. We all desire to reach our full potential and live peaceful, fulfilling lives. It's just how we achieve it that differs.' (p90). Another example would be a relatively new charity operating in Scotland (Vox Liminis) that uses the creative arts to assist with reintegration by helping people to build new relationships through collaborative music-making.

Some of the most innovative approaches to rehabilitation and reintegration in the UK have come from charities. One of the most well-known is The Clink, a charity that works in partnership with HM Prison Service to provide training for prisoners in catering and hospitality. They run restaurants at four prisons (two are inside the prison walls and two are just outside) which are fully staffed by prisoners i.e. they do all the cooking, serving and front of house roles. It is different from some other prison training programmes in that, not only do the prisoners learn new skills, but they also obtain experience of working in a restaurant. There is an option for employers to sponsor a prisoner to complete the training and then to offer them a job once they are released. The public can also be involved by booking a table at the restaurant for a meal. So far, evidence suggests that the projects are successful in reducing reoffending rates. At the moment, these particular opportunities are for over 18s only, but it is a great example of how charities can bring fresh ideas, energy and new approaches to rehabilitation.

An area now receiving an increasing amount of attention is the role of faith based organisations. This has been a relatively neglected area of research in the UK until recently (compared to the USA where there is much more evidence and debate about the role of faith based services) but is now attracting more attention. One significant example in the UK is that of Community Chaplaincy. These are organisations that draw on volunteers from different faith communities who can act as mentors to offenders on their release from prison. They seek to complement the work of statutory services (but not replace it) and will work with offenders of any faith or none. There are now over 20 community chaplaincy schemes operating around the UK — they vary in size and in the services offered but all aim to provide both emotional and practical support to offenders as they re-settle into the community. An example of a project working specifically with young people would be the Feltham Community Chaplaincy. Feltham is a Young

Offender's Institution in west London. It can hold 210 young men aged 15-18 and 340 in the 18-21 age group. The Chaplaincy team recruit volunteers from churches, mosques and other faith groups who start to build a relationship with the offenders whilst they are still in prison and then act as mentors after release for as long as is needed/the young person wants to continue.

There are controversies and debates around the role of faith based groups in the criminal justice system (O'Connor and Pallone, 2002) which we don't have time to really explore today, except to say that obviously great care needs to be taken in areas such as recruitment and training of volunteers. There have been initial evaluations of Community Chaplaincy projects although much more research is needed. A recent interim report from the University of Cambridge[2], however, explores how the projects contribute to the desistance process. The report highlights key factors such as:

- The focus on authentic relationships
- Building trust and hope
- Ability to provide a flexible and individualised service

The role that faith groups can play will obviously vary across different countries and cultures, but it is a useful example to think about how statutory services can collaborate with different groups to help offenders establish and maintain links in the community.

**B. Criminal Records — Wiping the Slate Clean?**

One of the key obstacles young offenders face when trying to move on if their lives is that having a criminal record makes it very much more difficult to obtain employment. In the UK, the Rehabilitation of Offenders Act 1974 specified the length of time after which an offence becomes 'spent' i.e. after that time it does not need to be declared on many job applications (although it would still need to be declared for certain roles e.g. working with children or vulnerable adults, the police, prisons, security services etc).

These timescales have recently been amended by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) which allows offences to become spent more quickly. This slide shows the significant effect of the changes for young people under 18, for example, a short prison sentence of less than 6 months now becomes spent after 18 months whereas previously it would have taken 3.5 years.

For adults, including young offenders in the 18-25 age group, the timescales are longer but the 2012 legislation has also led to significant changes (as shown by this next slide). There is a careful balance between keeping some information on record to protect the public whilst also needed to allow offenders to move on with their lives. Overall, the recent changes in the UK are viewed as a positive development which should help to promote rehabilitation and reintegration.

## IV. POSITIVE RISK TAKING

In the lecture on Tuesday we looked at how risk has come to be seen in predominantly negative terms, particularly in criminal justice, even though there are examples where it is viewed more positively in society (e.g. entrepreneurs, some sports). There is now a developing literature, however, on the concept of positive risk taking which challenges us to think in different ways (Titterton, 2011).

Titterton argues that the typical negative focus on risk assumes overlooks the importance of 'competence, coping, capacity and capital' (p 33). He argues that we need to give more attention to people's different reactions to difficulties and seek to develop plans that empower them to take more responsibility for their own lives and decisions. He is writing primarily about health and social care settings are but some of the ideas can be transferred to criminal justice.

This concept can be applied to the decisions that professionals take, but also to the choices that young people make. For example, 'many young people seen as 'at risk' quite often tend to be 'risk averse', in the sense that they can be unwilling or unable to take the risk of leaving their present situation, their immediate networks of family and friends and the locale in which they live. Being able to take actions to

[2] https://drive.google.com/file/d/0B0JgMrOj7EUpYkhvdldLUVRZUzA/view?pref=2&pli=1

loosen such ties can be crucial for 'pathways out of crime" (Boeck and Fleming, 2011). This suggests a need for youth justice workers to help young people take positive risks in order to reduce future offending.

There may be a reluctance to try such an approach as it seems as if you are asking people to 'trust the untrustworthy'. Is this realistic? It can be if we use this definition of risk taking as 'a course of purposeful action based on informed decisions concerning the possibility of positive and negative outcomes of types and levels of risk appropriate in certain situations' (Titterton, 2005: 25, emphasis added).

One example from the UK (similar schemes exist in other countries) is Release on Temporary Licence. This allows an offender to be released from prison for a short temporary period to help prepare for their resettlement into the community once their sentence is completed. It provides an opportunity to do practical tasks, such as looking for accommodation, opening a bank account, attending training or looking for employment, as well as to help strengthen family connections. It fits with Titterton's definition in that it will be based on an informed decision — it is only open to those who are assessed as suitable and not posing a security risk — and there is a clear purpose of preparing for reintegration after release.

A different example from the UK would be a scheme run by this company, Timpson's. Earlier we looked at the role of charities and faith based groups, but there are also innovative projects coming from the business sector. Timpson's provide a shoe repair and key cutting service. They run workshops in prisons and then employ selected offenders on day release schemes in the months leading up to release. If this goes well, the offender can be offered a job immediately on release. One of the key features of the schemes is trust as the Chief Executive commented: "One of the first things we do is give them the money to bank. If you give someone £2,500, it's a sign we trust them." The scheme has been running for over 12 years and currently has 400 ex-offenders working at all levels of the business, including 10 shop managers. Other businesses are also now developing schemes to give ex-offenders a second chance i.e. take a deliberate and positive risk with them.[3]

## V. DESISTANCE-FOCUSED WORK WITH YOUNG OFFENDERS

What implications does all this have for the practicalities of day-to-day working with young offenders?

### A. General Practice Principles

Weaver and McNeill (2007) suggest the following general principles which I will quote in full as they are so clear and helpful:

1. Be realistic: it takes time to change entrenched behaviours and the problems that underlie them, so lapses and relapses should be expected and effectively managed.

2. Favour informal approaches: labelling and stigmatising children and young people as 'offenders' runs the serious risk of establishing criminal identities rather than diminishing then, so it should be avoided as much as possible by favouring informal measures.

3. Use prisons sparingly: stopping offending is aided by strong and positive social ties, by seeing beyond the label 'offender' and by reducing or avoiding contacts with other 'offenders'. Prison makes all of these things much more difficult.

4. Build positive relationships: like everyone else, offenders are most influenced to change (and not to change) by those whose advice they respect and whose support they value. Personal and professional relationships are key to change.

5. Respect individuality: since the process of giving up crime is different for each person, criminal justice responses need to be properly individualised. One size fits all approaches runs the risk of fitting no one.

6. Recognise the significance of social context: giving up crime requires new networks of support and

[3] http://www.telegraph.co.uk/finance/festival-of-business/11512614/Giving-ex-offenders-a-second-chance.html

opportunity in local communities *and* a new attitude towards the integration of offenders.

7. Mind our language: if the language we use in policy and practice causes both individuals and communities to give up on offenders, if it confirms and cements the negative perceptions of *people* who have offended as risky, dangerous, feckless, hopeless or helpless, then it will be harder for those people to give up crime.

8. Promote redemption: criminal justice policy and practice has to recognise and reward efforts to give up crime. For ex-offenders, there has to be an ending to their punishment and some means of signalling their redemption and re-inclusion within their communities.

**B. Pathways Out of Offending**

There is an increasing focus on using 'strengths' in a young person's life to help create pathways out of offending. There is some debate as to how exactly strengths or protective factors operate but some agreement that they can work either by:

- helping to prevent offending or anti-social behaviour — for example, reducing sensitivity to risk factors or reducing the impact of risk factors;

- helping to achieve positive outcomes — for example promoting self-efficacy or providing new opportunities (YJB, 2008).

One approach for developing pathways out of offending for young people is the Good Lives Model (GLM) (Ward and Brown, 2004). This suggests that everyone has a need to obtain primary human goods such as a sense of belonging or knowledge and skills (Ward and Maruna, 2007). The GLM also suggests that people pursue secondary goals — such as friendships or work, for example - as means to achieve these primary goods. If young people find it difficult to achieve these goods through pro-social means they may try to obtain them through offending or antisocial behaviour (McNeill, 2009). The GLM is a relatively new approach and there is a need for more research as to its effectiveness with young people in particular, but it does provide a useful perspective for thinking about intervention planning.

In applying this to practice, McNeill argues that practitioners should aim to 'balance the promotion of personal goods (for the offender) with the reduction of risk (for society). Too strong a focus on personal goods may produce a happy but dangerous offender; but equally too strong a focus on risk may produce a dangerously defiant or disengaged offender' (McNeill, 2009: 85).

**C. Implications for Assessment and Intervention Planning**

We can now add some more points to the material covered in the previous two lectures on assessment and intervention planning.

- Assessment is not a one-off event but needs to be ongoing to reflect the fact that desistance process takes time;

- Need to assess 'desistance-readiness' (McNeill and Weaver, 2010: 8).

We need to recognise that at the point of intervention, some young people won't be ready and so it may be better to avoid putting them into programmes. In such cases, working on awareness-raising or building motivation may need to come first.

- Need to have a clear focus on the aims and aspirations of an intervention (Farrall and Maruna, 2004) and understand how it will contribute to desistance and reintegration;

- Understand young people's perspectives on the change process

Desistance is difficult because it may involve a young person going in the opposite direction in life to their friends and this is particularly challenging at an age when the influence of peer groups is so strong. Therefore, it is important to try to understand their hopes and fears, their view of the costs and benefits,

and the barriers to change which they identify.

**D. Managing Transitions**

Transition points can be one of the key times for promoting desistance but they can also be times at which things go wrong. For example, a young person may leave prison with good intentions to avoid offending, but without adequate support they may drift back into old patterns of behaviour. These are points at which careful planning is required to help a young person maintain a path to progress. It also requires practical steps such as sharing information. Studies in the UK (e.g. Cooper et al 2007) have found that the transfer of data about young people between different parts of the criminal justice system is often poor and more needs to be done to ensure that information is shared between prison and community settings or between youth and young adult services.

## VI. DESISTANCE AND ASSETPLUS

One of the aims in the design of the new AssetPlus assessment framework used in England and Wales was to incorporate desistance principles into each stage of the assessment and interventions cycle. This is done in a number of ways, but I will focus on some key points.

**A. Information Collection**

The first part of the information gathering quadrant covers many areas of a young person's life — family, education, friends, substance use, mental health and so on. A key point here is that practitioners are encouraged to record positive aspects of the young person's life, not just problems. Also, there are prompts to record significant life events and again these can be positive or negative (e.g. getting a qualification or experiencing a relationship breakdown). I will come back to these in a moment to show how this information is used.

The second section focuses on offending behaviour and the emphasis is on looking at patterns of offending over time. There will be specific detailed information about the current offence/s and then there are questions that prompt the assessor to compare this with other instances — more or less serious? Different or same type? More or less frequent?

The software programmes will automatically generate a visual timeline showing this pattern. The real version that practitioners will see looks much better than this prototype draft! However, it illustrates that a young person's offending goes up and down over time.

The Foundations for Change section, as the name suggests, is a key part of assessing 'desistance-readiness' (McNeill and Weaver, 2010). This is the place in AssetPlus to record things such as a young person's coping ability and coping strategies, what meaning they attach to relationships or education, whether they are aware of opportunities available to them and how motivated they are.

In the previous two lectures, we have looked at the principle of including the voices of young people and parents in decision-making processes through self-assessment. There are some questions in AssetPlus for young people that clearly link to the desistance concept, such as 'what things will make it hard to for you avoid offending?', 'who can help you avoid offending?'.

**B. Synthesis and Understanding**

Having done the analysis and broken down all the specific components, the next stage is to put together picture of the young person as a whole. One of the key features of AssetPlus designed to help practitioners with this is the young person's timeline or story. The software systems will overlay additional information onto the basic timeline that we saw earlier — where significant life events (the red flags) have been recorded these will be located on the timeline at the relevant points and it will also show up any previous recorded interventions by criminal justice or social care services. As already mentioned, this diagram is just an example and the real ones look much more sophisticated.

So, for example, here we see that there was an intervention and a period of stability (albeit with some minor offending), then a negative life event (e.g. bereavement) and the upward spike shows that the young person reacted to this stress by further offending. Then there is a drop and a period of desistance linked

to a positive life event and a further period of intervention. After the intervention ends, there is a further increase in offending and so. Having a visual display is helpful not only for the practitioner, but also to talk through with the young person and perhaps a parent or carer. It might help them to see patterns that they were not previously aware of. It can also be used as a creative way of working with the young person during supervision e.g. if this is your story so far, what happens next? What do you want the ending to be? If this is the journey, where do you want to go? What needs to be done to get there?

Very briefly, other examples are that there are sections where practitioners are specifically asked to explain the interconnections between different factors in a young person's life. There is a table where they can rate the relative strength of different factors in terms of whether they help or hinder desistance. The aim of these questions is to help staff develop 'individualised theories of change' about each young person.

**C. Planning and Interventions**

The specific desistance related points built into this section included questions asking practitioners to identify which of the young person's needs could be addressed through involvement with a community or voluntary group. Rather than statutory services delivering everything, the aim is to get young people linked into wider networks as much as possible to promote reintegration. There are also specific sections for preparing for the transition from custody to community and for developing an 'exit plan' so that there is a phased reduction of support rather than a sudden cut-off point at the end of the sentence.

## VII. CONCLUSION

AssetPlus is by no means a perfect example. It is currently being implemented and has not yet been evaluated. There may well be problems that need to be dealt with and changes to the tool required. This was our best attempt at designing a framework with more emphasis on desistance and social reintegration based on the evidence and resources available at the time, but there will be other ways of doing similar things with different tools. My aim in outlining AssetPlus today, however, has been to give an example that will hopefully prompt further discussion about incorporating these important issues into practice.

Over these lectures, we have spent quite a lot of time thinking about the work of individual practitioners and the tools they use. Effective work by staff usually depends on also having organisations committed to developing high quality practice and we looked at some aspects of this yesterday. As we have seen today, achieving desistance and reintegration also relies on wider circles of local communities, the media, politicians and governments in developing a culture that allows offenders to have a second chance. Some of this is outside our control but developing links with charities, businesses and faith groups as in today's examples can be part of the process of changing social attitudes towards young offenders.

To conclude, there have been recurring themes across the three lectures and we can see how some seemingly mundane or technical tasks around assessment, planning and delivering programmes all contribute to the overall goal of enabling and empowering young people to move towards tertiary desistance and make positive contributions to society.

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Mr. David PRESCOTT
(Director of Professional Development
and Quality Improvement,
Becket Family of Services)
The Good Lives Model: From Theory to Practice

# THE GOOD LIVES MODEL: FROM THEORY TO PRACTICE

David S. Prescott, LICSW
September 2016,
Tokyo UNAFEI


# WORKSHOP OVERVIEW

- What/who works in sexual offending treatment
- GLM approach & core principles
  - Application in your life
  - Application to case study
- The GLM in treatment, supervision & beyond
- GLM research overview

4

# GRATITUDE

Tony Ward

Pamela Yates

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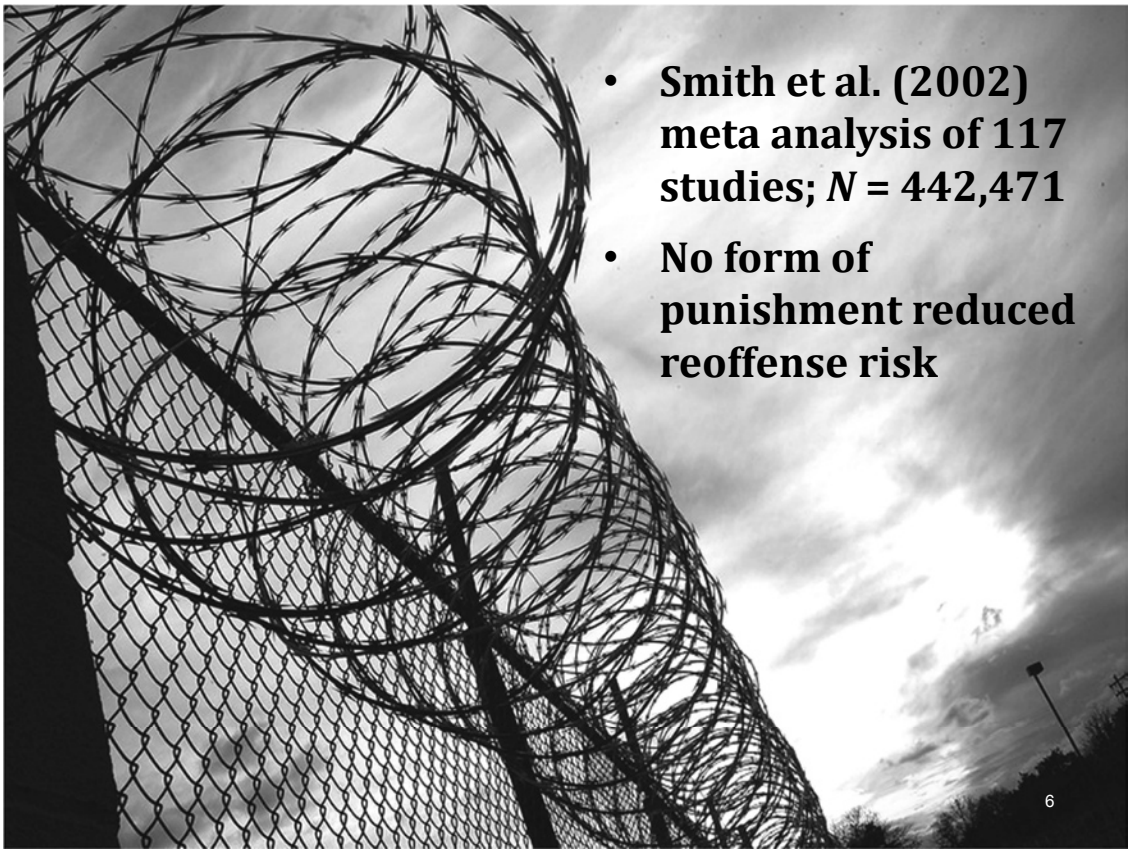

- **Smith et al. (2002) meta analysis of 117 studies; *N* = 442,471**
- **No form of punishment reduced reoffense risk**

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## SEXUAL OFFENDING TREATMENT CONTEXT: WHAT WORKS?

- **Risk:** Match level of services to level of risk
- **Need:** Target dynamic risk factors/criminogenic needs
- **Responsivity:** Use empirically supported approaches; also *specific* responsivity

(Andrews & Bonta, 2010; Hanson et al., 2009)

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## DYNAMIC RISK FACTORS (CRIMINOGENIC NEEDS)

- Deviant sexual interest/preference
- Hostility towards women
- Emotional identification with children
- Negative (and/or lack of positive) social influences
- Intimacy deficits
- Poor sexual self-regulation
- General self-regulation difficulties

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## SEXUAL OFFENDING TREATMENT CONTEXT: WHAT WORKS?

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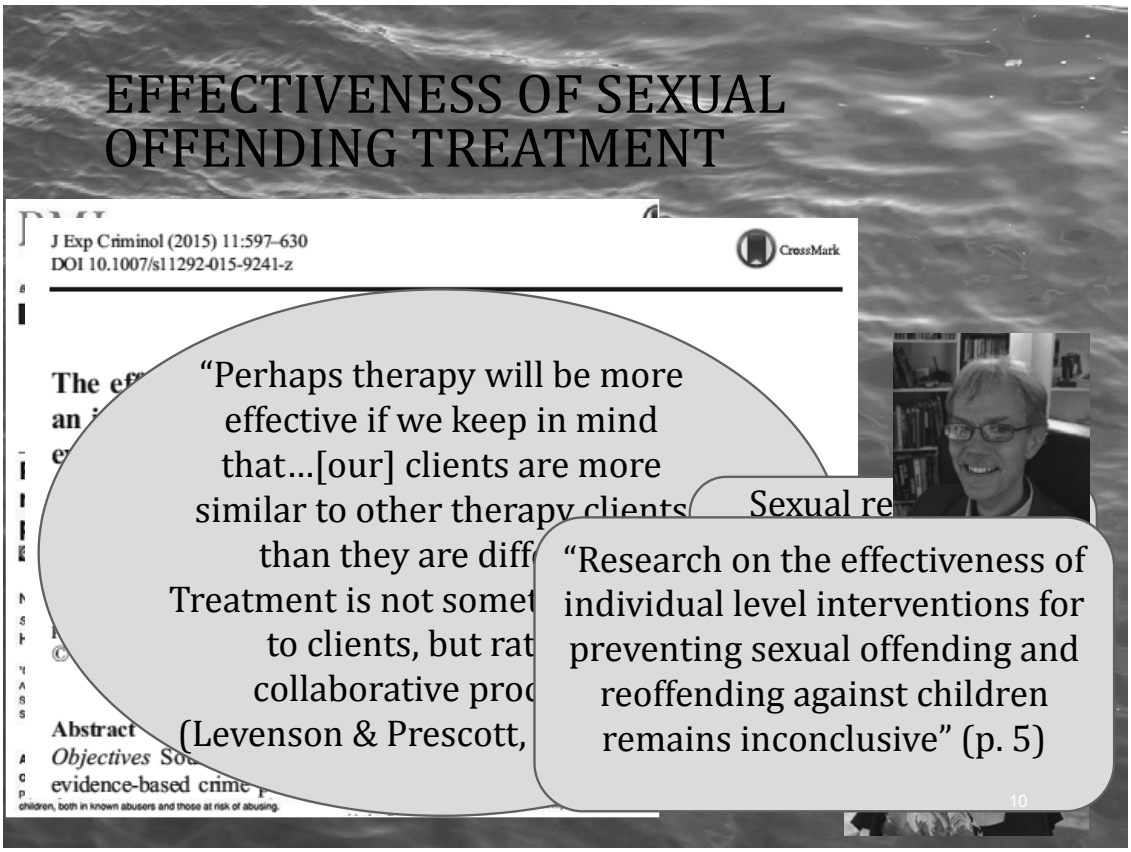
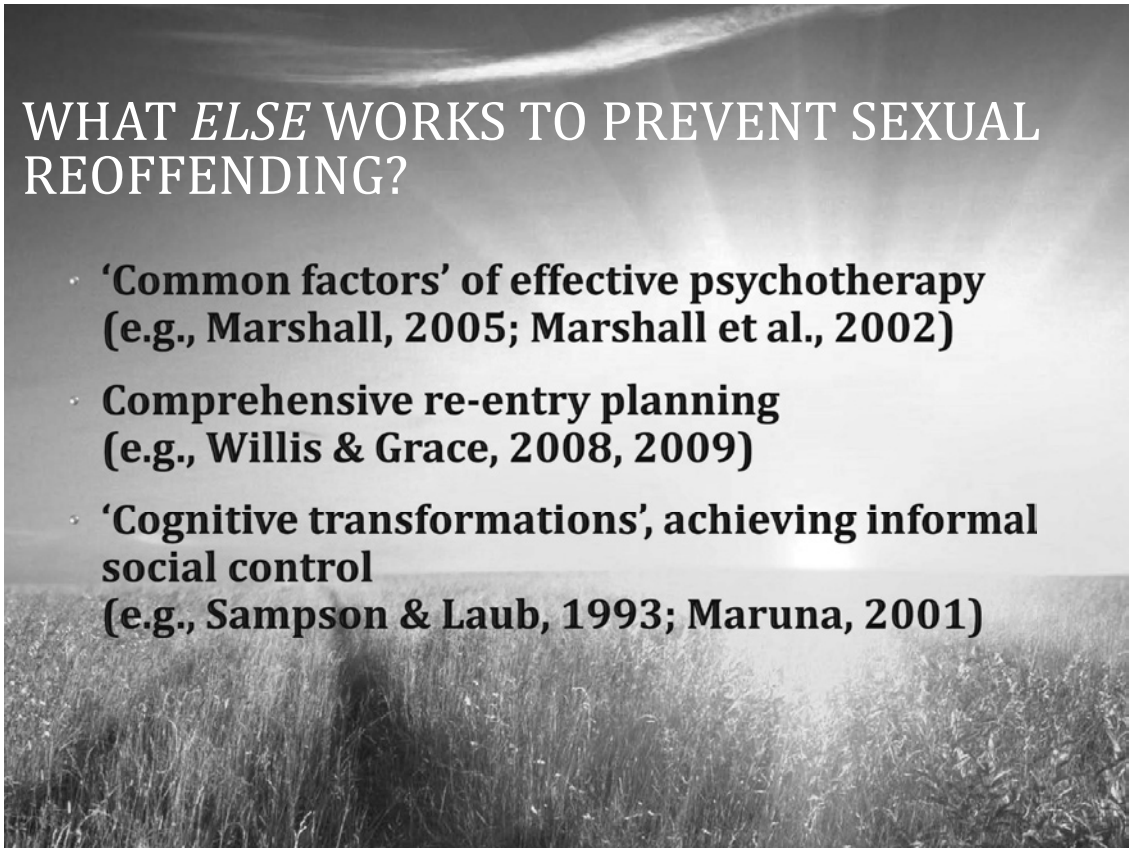
- **Need:** Target dynamic risk factors/criminogenic needs
- **Responsivity:** Use empirically supported approaches; also *specific* responsivity

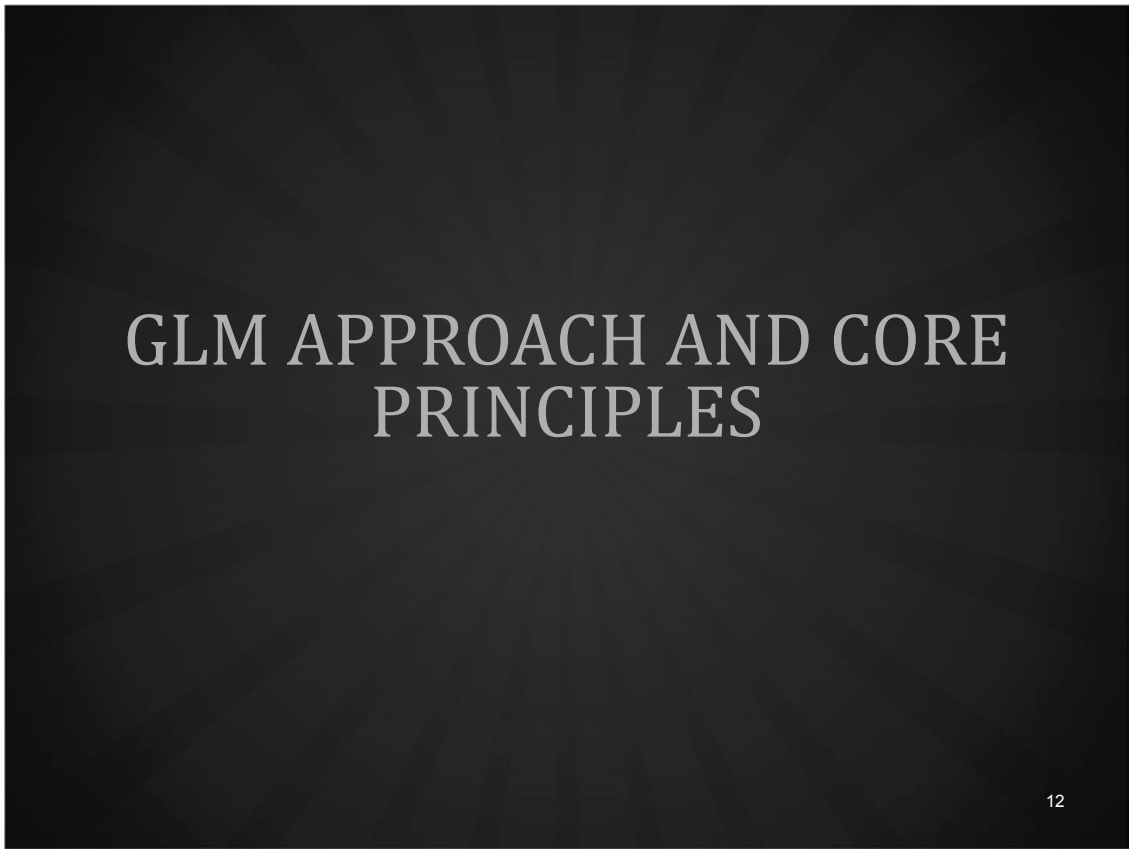
(Andrews & Bonta, 2010; Hanson et al., 2009)

9

## EFFECTIVENESS OF SEXUAL OFFENDING TREATMENT




WHAT *ELSE* WORKS TO PREVENT SEXUAL REOFFENDING?
'Common factors' of effective psychotherapy (e.g., Marshall, 2005; Marshall et al., 2002)
Comprehensive re-entry planning (e.g., Willis & Grace, 2008, 2009)
'Cognitive transformations', achieving informal social control (e.g., Sampson & Laub, 1993; Maruna, 2001)


GLM APPROACH AND CORE PRINCIPLES
12

# THE GOOD LIVES MODEL (GLM)


"…[our clients] want better lives, not simply the promise of less harmful ones"
(Ward, Mann, & Gannon, 2006)

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"As a kid I had lots of examples of what I didn't want to be. I spent my life trying not to be those things. Then when an aide asked me about 5 years ago what I wanted to be I had no idea."

40 y/o male
in civil commitment (USA)

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## GLM APPROACH

- Strengths-based, positive approach
- Collaborative, motivational approach
- Focuses on how treatment will benefit client / what client will gain from treatment
- Two goals:
  - Reducing/managing risk
  - Attaining fulfilling life, psychological well-being
- GLM integrated with RNR

## GLM APPROACH

- Offending = pursuit of legitimate goals via inappropriate means
- All human beings are goal-directed and predisposed to seek *primary human goods*
- Primary human goods = actions, experiences, circumstances, states of being, etc., that individuals seek to attain for their own sake

## GLM APPROACH

- Secondary goods = concrete ways (means) to secure primary goods (also called instrumental goods)
- Dynamic risk factors = internal or external obstacles that block achieving primary goods in pro-social ways in addition to creating risk

## PRIMARY HUMAN GOODS

- GLM proposes at least 10 primary human goods
- Value/importance placed on various goods determines individual's conceptualisation of a "good life"; reflected in good life plan (GLP)
- Primary goods related to offending by their presence or absence
- Assumption: Pro-social attainment of goods will help reduce or manage risk to re-offend (alongside targeting criminogenic needs)

## PRIMARY HUMAN GOODS & NEW NAMES
(YATES & PRESCOTT, 2011)

| **Primary Good** | → | **Common Life Goal** |
|---|---|---|
| Life | → | Life: Living and Surviving |
| Knowledge | → | Knowledge: Learning and Knowing |
| Excellence in Work & Play | → | Being Good at Work & Play |
| Excellence in Agency | → | Personal Choice and Independence |
| Inner Peace | → | Peace of Mind |
| Friendship/Relatedness | → | Relationships and Friendships |
| Community | → | Community: Being Part of a Group |
| Spirituality | → | Spirituality: Having Meaning in Life |
| Happiness | → | Happiness |
| Creativity | → | Creativity |

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## PRIMARY GOODS: DEFINITIONS

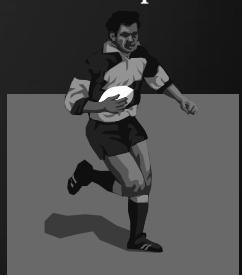
- Life: Living & Surviving
  - Healthy living and functioning
  - Basic needs
- Instrumental (secondary) goods:
  - Acquiring income to meet basic needs
  - Physical activity
  - Healthy nutrition
  - Health care
  - Physical survival

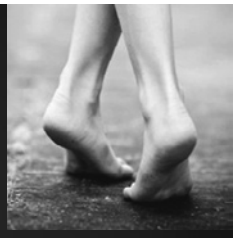
## PRIMARY GOODS: DEFINITIONS

- Knowledge: Learning & Knowing
  - Desire for information and understanding about oneself and the world
- Instrumental (secondary) goods:
  - Attending school, training, vocational courses
  - Self-study, informal activities
  - Attending treatment, self-help activity

## PRIMARY GOODS: DEFINITIONS

- Being Good at Play / Being Good and Work
  - Mastery in work / leisure
- Instrumental (secondary) goods:
  - Participation in sport or other leisure activities; hobbies
  - Participation in training, certification, apprenticeships
  - Meaningful paid or voluntary work



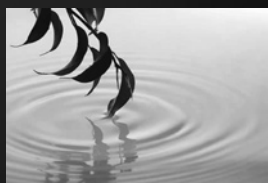


## PRIMARY GOODS: DEFINITIONS

- Personal Choice and Independence
  - Desire for independence, autonomy, choice
- Instrumental (secondary) goods:
  - Formulates and implements plans to achieve a specific end or objective
  - Engages in activities to ensure self-sufficiency
  - Asserts self and needs with others, communicates needs and desires to others
  - Controls, dominates, abuses, or manipulates others in order to establish personal control

## PRIMARY GOODS: DEFINITIONS

- Peace of Mind
  - Emotion regulation, equilibrium
  - Freedom from emotional turmoil and stress
- Instrumental (secondary) goods:
  - Strategies, specific activities to minimize emotional distress/achieve equilibrium (e.g., exercise, meditation)
  - Strategies to manage impulsivity
  - Substance use or sexual activity to regulate mood/cope with emotional stimuli/events



## PRIMARY GOODS: DEFINITIONS

- Relationships and Friendships
  - Desire to establish bonds with others
  - Intimate, romantic, family relationships
- Instrumental (secondary) goods:
  - Engages in social or other activities that facilitate meeting new people and maintaining relationships
  - Spends time with friends
  - Gives and receives support (e.g., emotional, practical)
  - Intimate relationships

## PRIMARY GOODS: DEFINITIONS

- Community: Being Part of a Group
  - Desire to be connected to similar social groups
- Instrumental (secondary) goods:
  - Participates in community activities (e.g., social service groups, special interest groups)
  - Participates in volunteer activities, groups
  - Membership in groups sharing common interests, values, concerns
  - Provides practical assistance to others in times of need (e.g., neighbours)

## PRIMARY GOODS: DEFINITIONS

- Spirituality: Having Meaning in Life
  - Desire for meaning and purpose in life
  - Sense that is part of larger whole
- Instrumental (secondary) goods:
  - Attends formal religious/spiritual events (e.g., church)
  - Participates in activities such as meditation/prayer
  - Involved in spiritual community/group
  - Studies/reads spiritual materials

## PRIMARY GOODS: DEFINITIONS

- Creativity
  - Desire for novelty or innovation
- Instrumental (secondary) goods:
  - Engages in new/novel experiences that has not attempted previously
  - Engages in artistic, creative activities
  - Desire/need for novel sexual practices

## PRIMARY GOODS: DEFINITIONS

- Happiness
  - State of being happy/content
  - Pleasure in life
- Instrumental (secondary) goods:
  - Activities that result in sense of satisfaction, contentment, fulfillment
  - Activities that result in sense of pleasure (e.g., leisure activities, sports, sex)
  - Activities intended to achieve sense of purpose, direction in life (e.g., work, friendships, family)

## CASE EXAMPLE: JIM

Jim is a 38-year-old man convicted for three counts of sexual touching. The victim was a 10-year-old boy who was Jim's neighbour whose family Jim knew very well. At the time of the offense, Jim was participating in a "sex offender treatment maintenance group" and, up to that time, had been doing very well. Jim had learned to accept his sexual attraction to males, and to fill his time with activities that would not bring him into contact with boys. Prior to his offense, Jim had started dating a man he met through his church. However, after a few dates, Jim learned that his feelings weren't reciprocated. Jim was left feeling rejected, lonely and depressed. He started isolating himself from family and friends, and stopped going to church. When he realised he was in a high risk situation with his neighbour, he ignored his sexual and other feelings and shut himself off in his house. Jim is shocked and depressed that he committed another sexual offense.

## JIM'S PRIORITISED PRIMARY HUMAN GOODS

- Relationships & Friendships
- Happiness
- ?Peace of Mind
- ?Spirituality: Having Meaning in Life
- ?Community: Being Part of a Group

## WHEN THINGS GO WRONG: GOOD LIFE PLAN FLAWS

- GLM proposes that offending and life problems result from flaws implementing good life plan
- Four types of flaws:
  - Means
  - Lack of scope
  - Conflict among goods/means
  - Lack of capacity (internal and external)

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## HARMFUL/PROBLEMATIC MEANS

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## NARROW SCOPE: PUTTING ALL THE EGGS IN ONE BASKET

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## CONFLICT: PURSUIT OF ONE GOOD INTERFERES WITH PURSUIT OF ANOTHER GOOD

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## LACK OF CAPACITY

Internal


External

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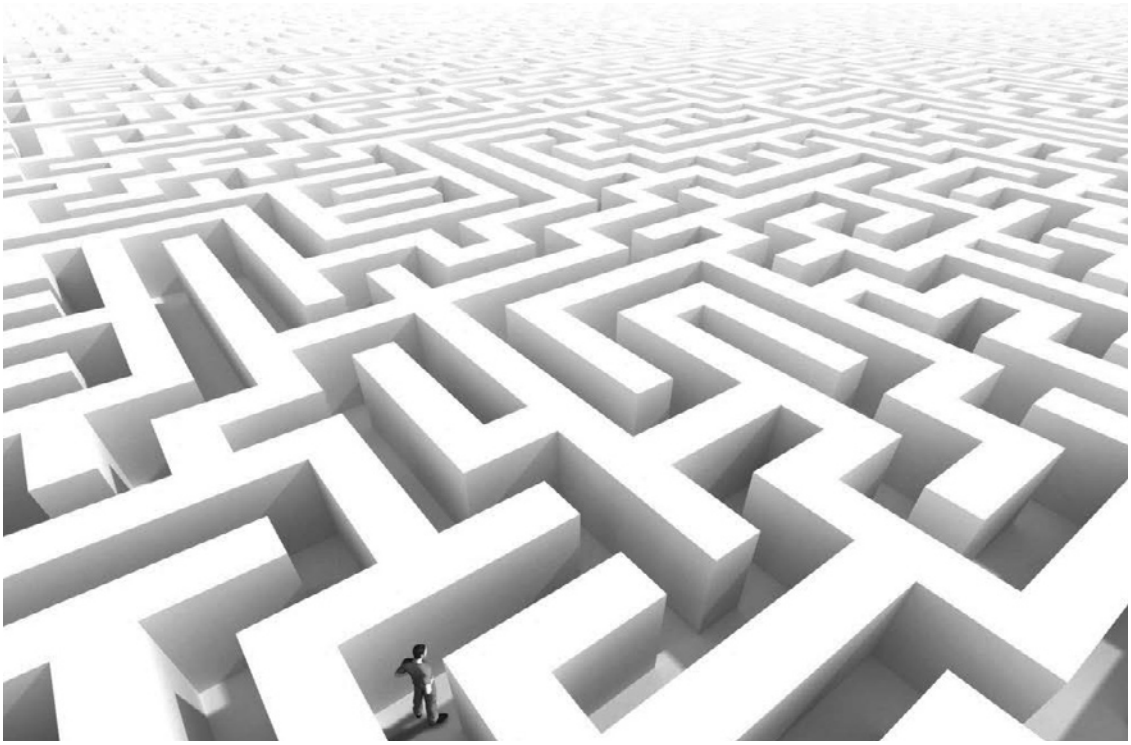
# Implementing a Good Life Plan



WHAT FLAWS HAVE YOU EXPERIENCED SEEKING PRIMARY GOODS?

WHAT HELPS YOU OVERCOME THESE FLAWS?

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## CASE ANALYSIS: JIM

- **Primary Goods Important to Jim:**
  - Relationships & Friendships
  - Happiness
  - ?Peace of Mind
  - ?Spirituality: Having Meaning in Life
  - ?Community: Being Part of a Group
- **Flaws in Good Life Plan:**
  - Means
  - Capacity (internal)
  - Scope (probable)
- **Probable Dynamic Risk Factors:**
  - Sexual self-regulation (deviant sexual arousal/preference)
  - Emotion regulation
  - General self-regulation (problem-solving)
  - Intimacy deficits
  - Lack of social supports

# GLM APPLICATION IN TREATMENT, SUPERVISION AND BEYOND

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# WHAT'S YOUR ROLE? GOOD LIFE PLAN DEVELOPMENT AND EXECUTION

- Psychologist/primary therapist: collaborate with client to develop initial plan, assist client build internal capacity to achieve PHGs, ensure plan shared with other professionals
- Prison/probation officer or case manager: assist build external capacity to achieve PHGs, monitor implementation of plan
- All – encourage implementation of plan, reinforce progress, update as necessary

E.g., Yates et al., 2010

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## COLLABORATION IS KEY!

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## INTEGRATED GOOD LIFE AND RISK MANAGEMENT PLAN

- Includes all goods important to individual
  - Sufficient scope
- Includes non-offending, practical ways to attain goods
  - Build on client strengths
  - SMART goals
- Identifies threats/obstacles to goods attainment and strategies for managing
- Includes risk management plan

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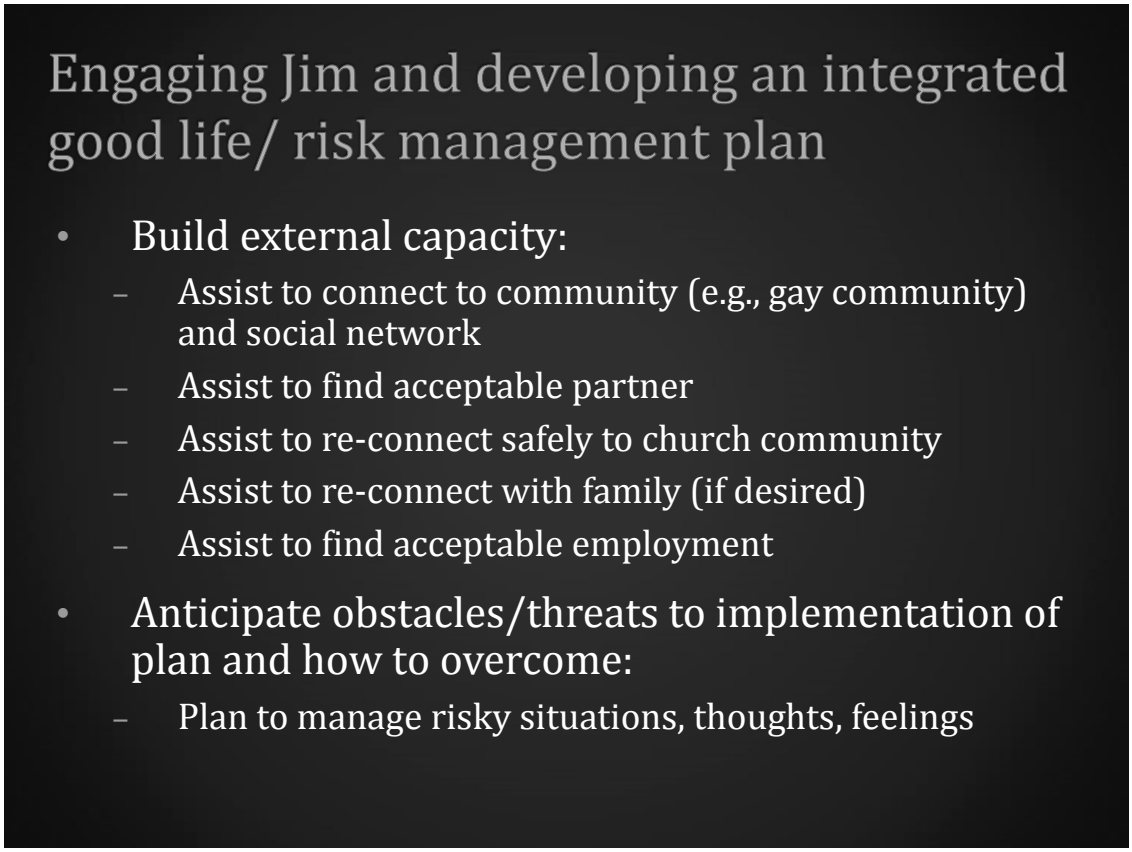
## JIM'S PREVIOUS RISK MANAGEMENT PLAN

- Avoid being in areas that children congregate (e.g., outside schools, parks)
- Avoid any media (e.g., magazines, television) depicting prepubescent boys
- Do not join church or other community groups in which children are present
- Avoid isolating especially when experiencing low mood
- Constantly monitor environment for new high risk situations/warning signs
- Phone a nominated support person in event of warning signs (low mood, deviant arousal, sexual preoccupation) or high risk situations which I cannot escape

## ENGAGING JIM AND DEVELOPING AN INTEGRATED GOOD LIFE/ RISK MANAGEMENT PLAN

- Build identity that he is worthwhile
- Validate valued primary human goods
- Reinforce goal to avoid offending
- Identify new means to achieve primary goods (e.g., relationships/intimacy, happiness, etc)
- Build internal capacity:
  - Self-regulation skills (problem-solving, emotion regulation sexual self-regulation)
  - Skills to attain and maintain relationships


Engaging Jim and developing an integrated good life/ risk management plan
• Build external capacity:
– Assist to connect to community (e.g., gay community) and social network
– Assist to find acceptable partner
– Assist to re-connect safely to church community
– Assist to re-connect with family (if desired)
– Assist to find acceptable employment
• Anticipate obstacles/threats to implementation of plan and how to overcome:
– Plan to manage risky situations, thoughts, feelings

# KEY STRATEGIES FOR WORKING WITH JUVENILE OFFENDERS

**David S. Prescott, LICSW**
**Welcome!**

## CONTACT

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**Clinical Director and Director of Professional Development and Quality Improvement,**
**Becket Family of Services**

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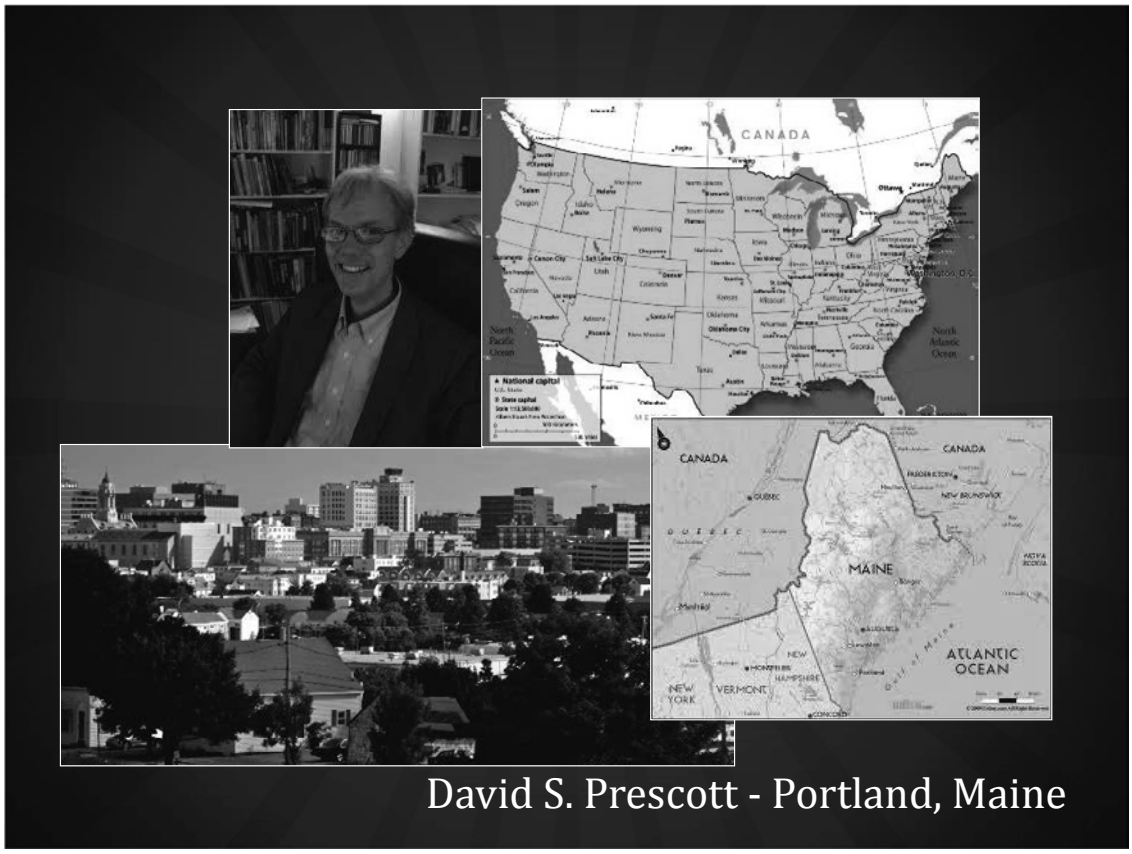
www.davidprescott.net
www.becket.org

***Healthy lives,***

***Safe communities***




# INTRODUCTORY REMARKS

And the responsivity principle

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## WHAT'S OUR GOAL?

- Stopping the behavior?
- Justice for the victim?
- Preventing re-offense?


## WHAT WORKS?

- Do we want them to re-offend or not?
- What can we do?
- Who should we be?
- Is that enough?

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# BEFORE YOU PAINT YOUR HOME…

- This is the first step to change

This is awakening motivation

- This is treatment

This is maintaining motivation

# REALITY

- We need to …
  - build willing partners in change
  - build treatment completers
  - build responsivity

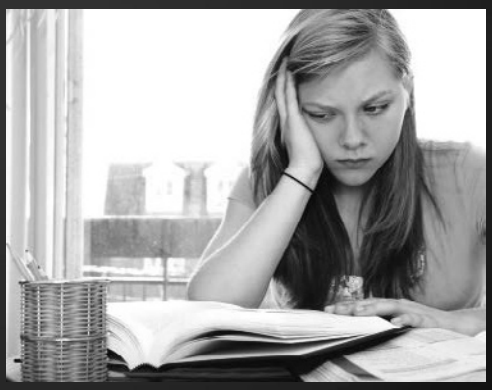
# EFFECTIVE PROGRAMS

**RESPONSIVITY principle**

- effective programs are those which are responsive to client characteristics
  - cognitive abilities
  - maturity
  - motivation
  - mode of intervention
  - scheduling concerns
  - neurological impact of trauma


# RELATIONSHIP PROBLEMS

# LEARNING DIFFICULTIES



# HYPERACTIVITY

## COMMUNICATION DIFFICULTIES

## COGNITIVE RIGIDITY

# AMBIVALENCE

- I want to work with you, and I don't want to sacrifice myself
- I want to change, and I want to be respected
- I want to be in treatment, and I don't want to be in a one-down position
- I want to look at myself, and I don't want to feel less of a man
- etc. etc. etc. etc. etc.

MARSHALL, 2005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## MARSHALL, 2005

- Warm
- Empathic
- Rewarding
- Directive

Problem: Many people think they have these qualities, but don't

## Telling "The Hard Truth"

- Feedback Sandwich
  - Affirm => Feedback => Affirm
- Elicit => Provide => Elicit
  - Ask permission to give feedback, give the feedback, then elicit the client's thoughts about your feedback
- Motivational approaches are not necessarily warm and fuzzy

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# USE APPROACH GOALS

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## APPROACH/AVOIDANCE (FROM PRESCOTT/WILSON)

- I don't want any more victims.
- I don't want to smoke anymore.
- I don't want any more trouble with the law.
- I don't want any more violence towards my partner.
- I don't want to use drugs or alcohol to excess any more.
- I don't want to gamble any more.
- I have been ordered to stay away from the victim of my crime.
- I don't want to be on probation.
- I don't want to look stupid.
- I want people to be able to trust me.
- I want to be clean and sober.
- I want to get my health back.
- I want a respectful relationship with my partner.
- I want to save money.
- I want to complete all my obligations to the court.
- I want to be good at my job or good in school.
- I want to be able to keep myself calm.
- I want activities in my life that I'm good at (like hobbies).

## FROM MY CASELOAD

- Mr. X will demonstrate to others that he has changed
- Mr. X will become the person he wants to be
- Mr. X will improve his relationships with others
- Mr. X will work to prevent further allegations

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## BE TRAUMA-INFORMED

And I mean <u>really</u> trauma-informed

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## WHAT IS TRAUMA?

- PTSD
- Complex PTSD
- DESNOS
- Complex trauma
- Developmental Trauma Disorder

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## WHAT IS TRAUMA?

- Trauma is the desperate hope that the past was somehow different.
  - -- Jan Hindman

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## WHAT IS TRAUMA?

- APA:
- **Trauma** is an emotional response to a terrible event like an accident, rape or natural disaster. Immediately after the event, shock and denial are typical. Longer term reactions include unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea. While these feelings are normal, some people have difficulty moving on with their lives. Psychologists can help these individuals find constructive ways of managing their emotions.

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## TRAUMA (FORD ET AL., 2012)

- Approximately 90% of youth in juvenile detention facilities reported at least one potentially traumatic event in two independent surveys.
  - E.g., being threatened with a weapon (58%), traumatic loss (48%), and physical assault (35%)

## TRAUMA (FORD ET AL., 2012)

- Two complex trauma sub-groups:
- 20% reported some combination of sexual or physical abuse or family violence
- 15% emotional abuse and family violence but not physical or sexual abuse
- 35% for complex trauma history
  - about three times higher than the 10-13% estimates of other children and adolescents

## REAVIS ET AL., 2013

- 9.3% of the sample reported no adverse events in childhood,
- compared with 38% of the male sample in the ACE study.
- As well, 48% reported four or more adverse experiences, compared with 9% of the men in the ACE study.

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## LEVENSON, PRESCOTT, & WILLIS, 2014

- 679 Adult male sex offenders
- ACE questionnaire
- Compared with males in the general population:
  - Three times the odds of child sexual abuse
  - nearly twice the odds of physical abuse
  - 13 times the odds of verbal abuse
  - > 4 times the odds of emotional neglect/broken home

  16% endorsed no ACEs, and nearly half endorsed four or more

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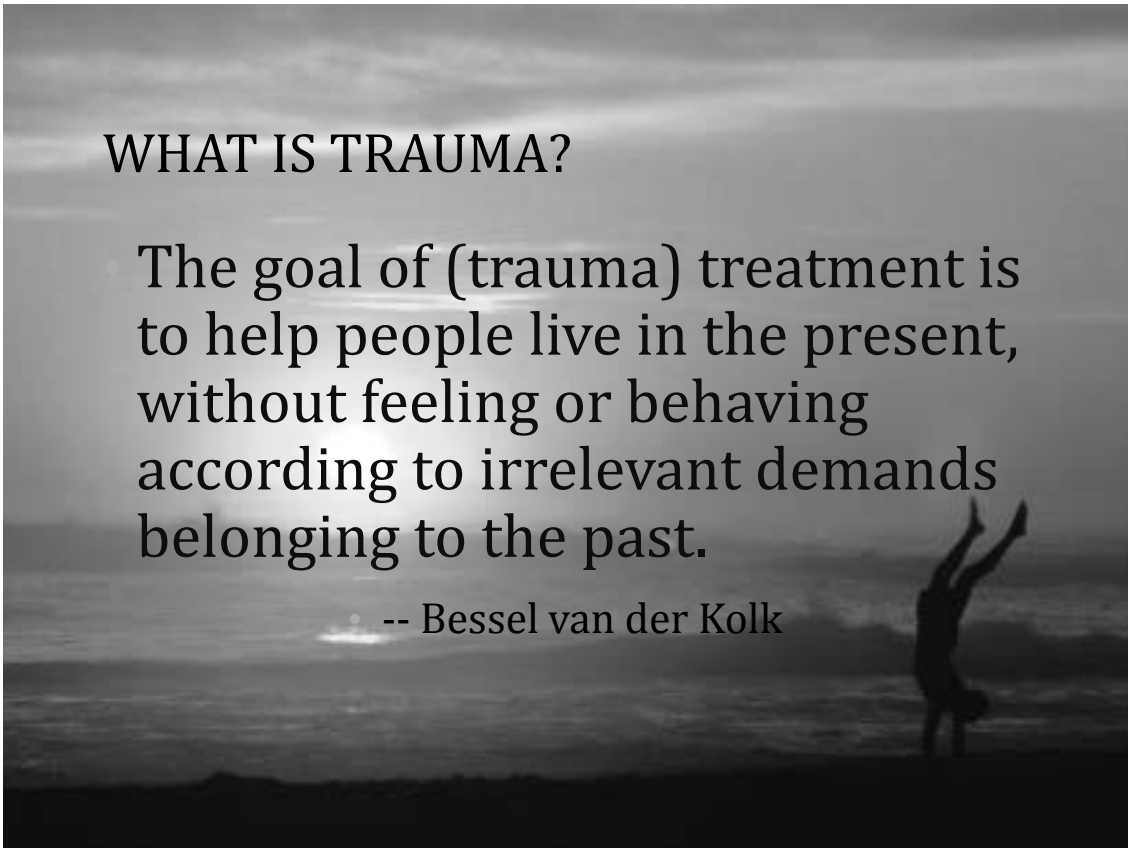
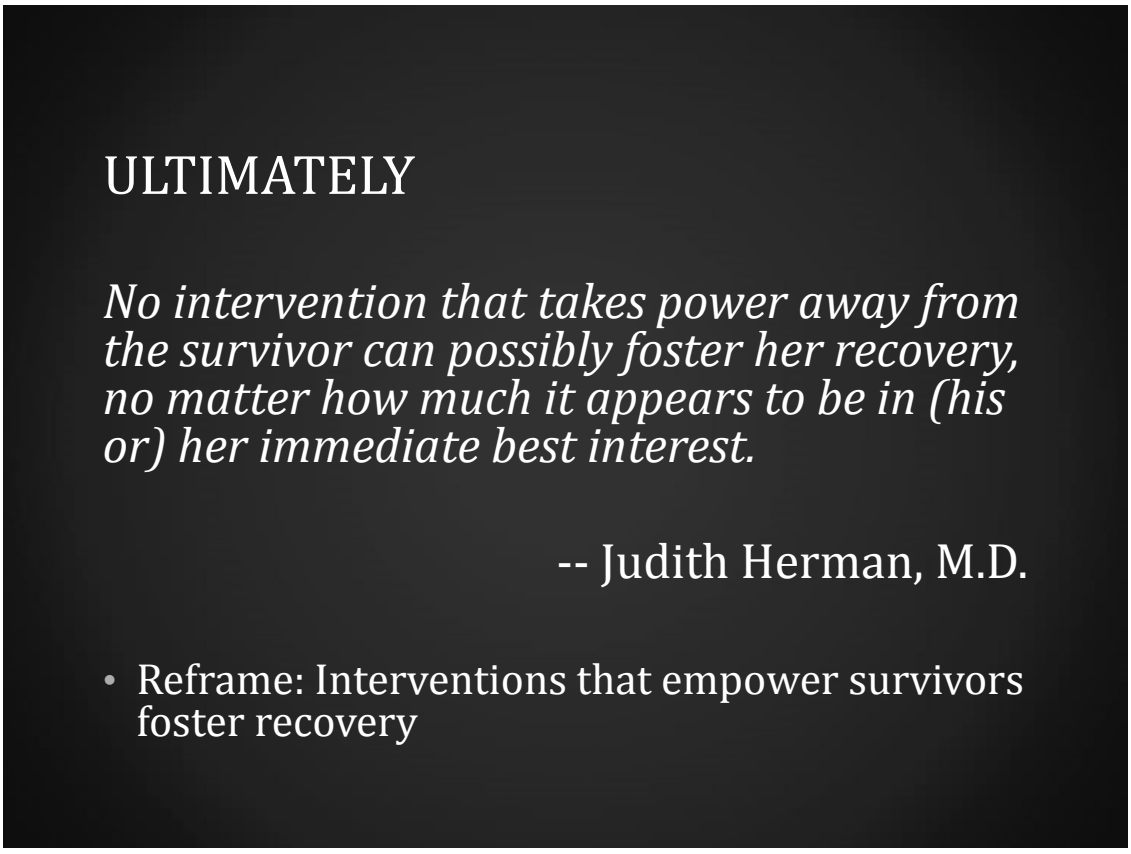
## ABSENCE OF CURIOSITY

## TRAUMA

- Relational issues
- Somatic challenges


WHAT IS TRAUMA?
The goal of (trauma) treatment is to help people live in the present, without feeling or behaving according to irrelevant demands belonging to the past.
-- Bessel van der Kolk


ULTIMATELY
No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in (his or) her immediate best interest.
-- Judith Herman, M.D.
• Reframe: Interventions that empower survivors foster recovery

# POST-TRAUMATIC STRESS DISORDER

# POST-TRAUMATIC STRESS DISORDER

- Traumatic event including
  - Actual or threat of death or serious injury
  - Threat to physical integrity
  - Response of intense fear, helplessness, horror
- Persistent re-experiencing of events
- Persistent avoidance of associated stimuli & numbing of responsiveness
- Persistent symptoms of increased arousal
- Duration >1 month, significant disturbance in functioning

## POST-TRAUMATIC STRESS DISORDER

- Re-experiencing distress
  - Recollections, images, thoughts, perceptions
  - Dreams
  - Flashbacks, illusions, hallucinations
- Avoidance of related stimuli
  - Thoughts, feelings, conversations
  - Activities, places or people

## POST-TRAUMATIC STRESS DISORDER

- Numbing of general responsiveness
  - Inability to recall important aspects of event
  - Diminished interest/participation in activities
  - Detachment/estrangement from others
  - Restricted range of emotions (e.g., love)
  - Sense of foreshortened future
- Arousal symptoms
  - Insomnia, anger, hypervigilance, difficulty concentrating, exaggerated startle response

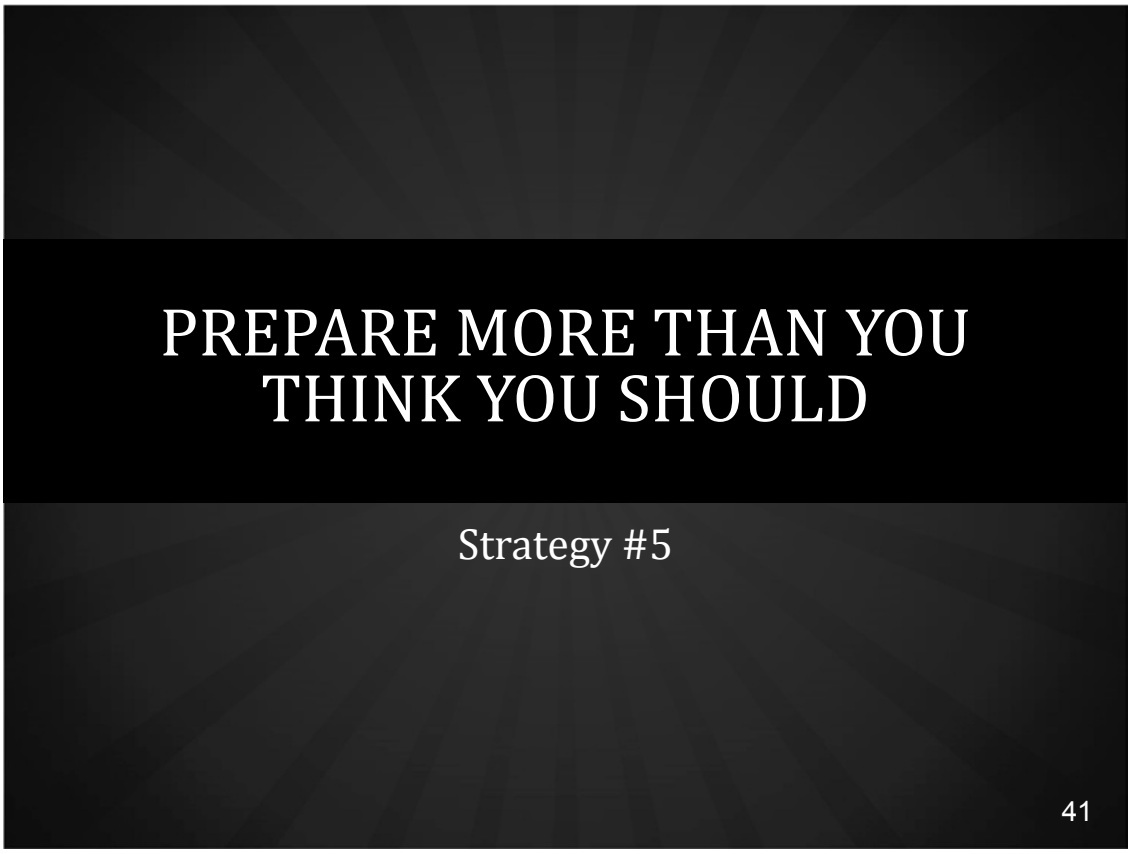
## POST-TRAUMATIC STRESS DISORDER

- Events
  - Military combat
  - Violent personal assault (physical, sexual, mugging)
  - Kidnapping, terrorism, torture, incarceration, disasters, auto accidents, terminal diagnosis)
  - Witnessing fatal accident, body parts
- Typically worse when event is of human design
- Typically worse when stressor is repeated, chronic

## IMPORTANT

- Not all trauma results in PTSD

  Trauma can have a devastating effect on life outside of PTSD


PREPARE MORE THAN YOU THINK YOU SHOULD
Strategy #5
41


SPECIFIC STEPS
1. Get into the mindset that you are creating new mindsets
2. 10,000 foot rule
3. Relax your body
4. Lower your shoulders
5. Slow your breathing
6. Reject all distractions
7. Spend 1st 20% of every interaction engaging
8. It's hard to argue with a relaxed person

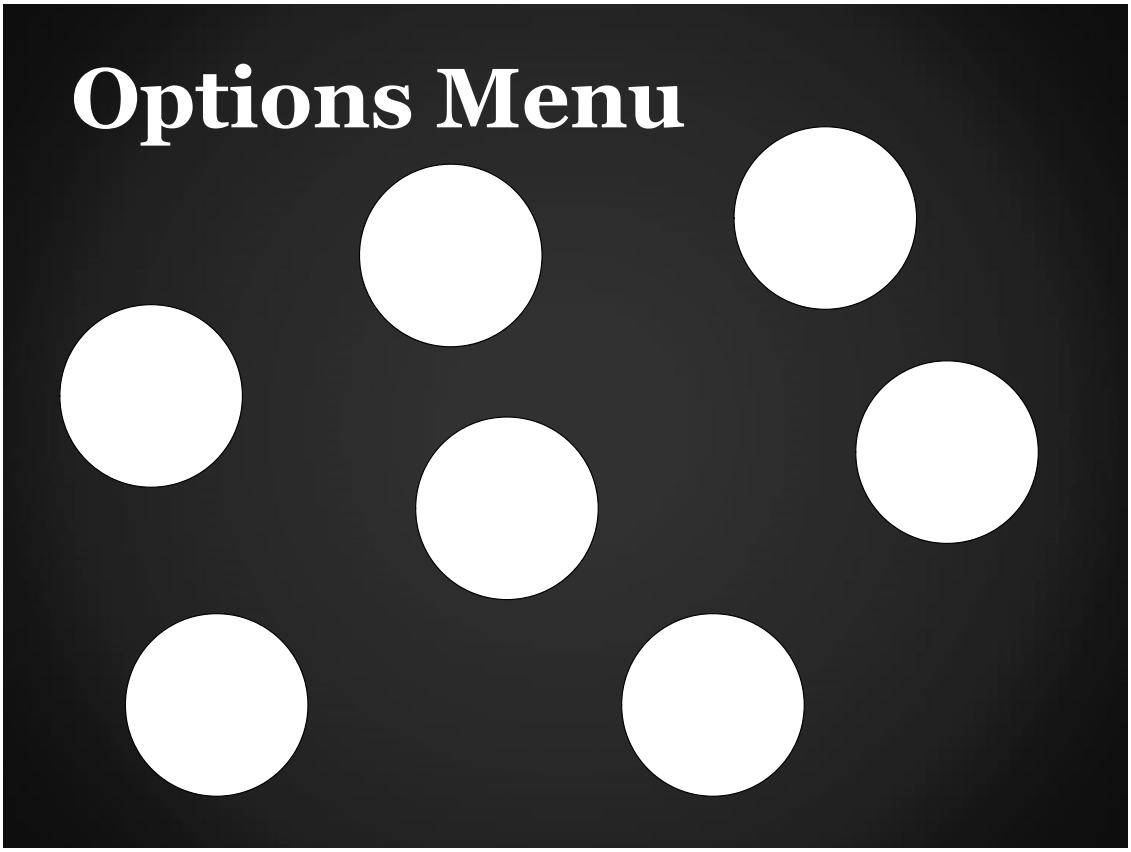
# PRACTICE SPECIFIC MOTIVATIONAL TECHNIQUES

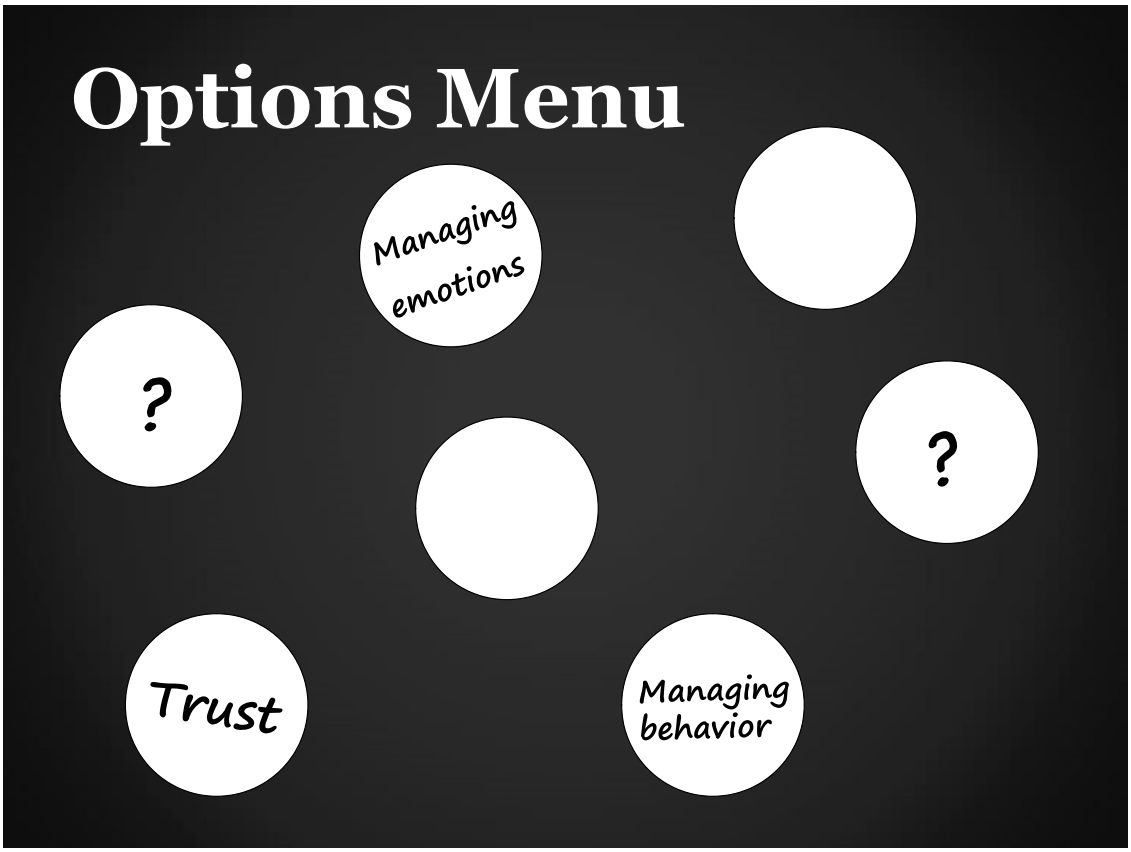
Strategy #6

43

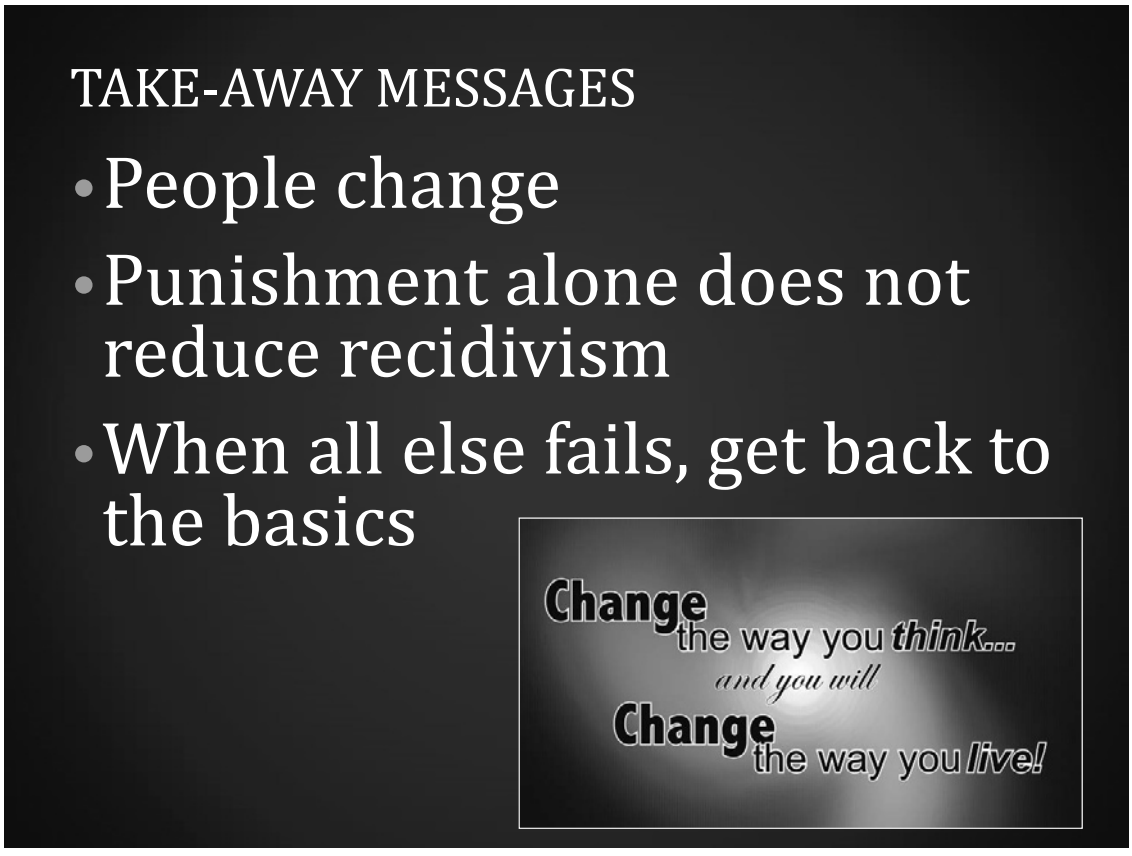
# WHEN YOU'RE WITH ME…

**You always have options**


Options Menu


Options Menu
Managing emotions
?
?
Trust
Managing behavior


ARE WE READY?
0 1 2 3 4 5 6 7 8 9 10
MOTIVATION = IMPORTANCE + CONFIDENCE
Backwards Questions


TAKE-AWAY MESSAGES
• People change
• Punishment alone does not reduce recidivism
• When all else fails, get back to the basics
Change the way you think...
and you will
Change the way you live!

## TAKE-HOME MESSAGES

- Change Talk

"No, no, no…"

## TAKE-HOME MESSAGES

- Change Talk
- Acceptance
- Less Is More
- Righting Reflex
- Michelangelo Belief
- Autonomy and Choice

# LET'S START WITH STRENGTHS

## STRENGTHS

- CASE SUMMARY A
- 46, female, 2 children, second marriage; grossly obese for many years; leads an inactive life. Moderate to heavy drinker, smokes 15+ a day, and has a diet that is high in fried food, with little fruit or vegetables.

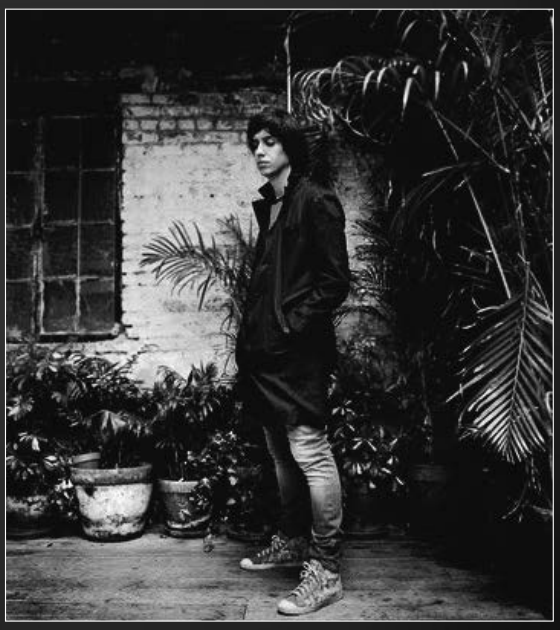
## STRENGTHS

- CASE SUMMARY B
- 46, account manager and mother of two; very determined person. Its her second marriage, and she keeps a keen eye on her children's well-being. It's a happy house. They work and play hard. She has lots of friends, smokes and drinks in the pub, and gets little exercise. She likes to make sure everyone has a good filling meal, and this often means fried food.

## FIND THE STRENGTH

# FIND THE STRENGTH

# FIND THE STRENGTH



# FIND THE STRENGTH

# FIND THE STRENGTH

# FIND THE STRENGTH

## UP TO THIS POINT…

- Options menu
- Readiness ruler
- Basic MI concepts
- Importance of finding strengths

## PRACTITIONER'S DEFINITION

- Motivational interviewing is a person-centered counseling style for addressing the common problem of ambivalence about change.

## THE SPIRIT OF MOTIVATIONAL INTERVIEWING

- Partnership
- Acceptance
- Compassion
- Evocation

FOUR PROCESSES

- Engaging
- Focusing
- Evoking
- Planning

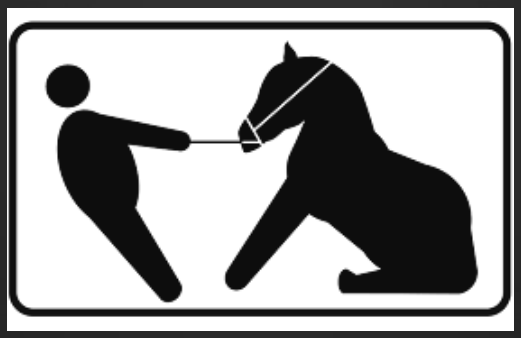
THESE PROCESSES ARE…

- Somewhat linear
- And also recursive

# TALK

←----------→

Sustain Change Commit



**There is no such thing as "resistance"**

## CHANGE TALK

- Desire *"I want to…"*
- Ability *"I can…"*
- Reason *"There are good reasons to…"*
- Need *"I need to"*

## RESPONDING TO CHANGE TALK

- ***When you hear change talk, don't just stand there!***
- Elaborate (tell me more)
- Affirm
- Reflect
- Summarize


## GETTING MOVING: OARS

- Open questions
- Affirmations
- Reflections
- Summaries

## REFLECTIVE LISTENING

- Simple Reflection
  - Exact words
  - Closely related words
- Complex Reflection
  - Continuing the paragraph
  - Reflecting emotion

## TO BE CONTINUED…

- By you

# PARTICIPANTS' PAPERS

## JUVENILE JUSTICE IN BANGLADESH

*Md. Shafayet Hossen Talucder**

### I. PUBLIC PARTICIPATION IN COMMUNITY CORRECTIONS

#### A. Introduction

Bangladesh is the most densely populated country in the world. We have about 150 million people in a 147,570 sq. kilometer area. There are over 68 million (six-crore eighty-lac) children below the age of 18 years in this country. Perhaps children are the most vital part of a nation. Today's children are tomorrow's civilians, leaders, professionals, workers, or possibly thieves, vagabonds or criminals of the highest category. Juveniles are our future citizens, and they will lead us in the various activities of our social as well as state life in the future. Bangladesh is a newly born state. We achieved sovereignty on 16 December 1971, so we have just passed 43 years of independence. As a newly born independent country we have a constitution and have many laws, acts, policies that can help us to run our lives smoothly and on the other hand it is our safeguard and as well as our rights. The Ministry of Social Welfare has announced the National Social Welfare Policy 2005 for the citizens of Bangladesh; in the policy, article 5.0 incorporated a clause where children in contact and conflict with the laws are given safeguards, that is *Correction and rehabilitation of the delinquents and offenders.* The Children Act 2013 is a unique law for the children, where the custody, care, trial and treatment of children and punishment of youthful offenders who might be in conflict with the law of the country. Probation is a lawful provision where adults and juvenile have the opportunity to correct his unlawful activities as a first offender and minor offence. In addition, there is a lawful option to receive conditional discharge where a person not proved to have been previously convicted is convicted of an offence punishable with imprisonment for not more than 2 years, having regard to age, character, antecedents, or physical or mental condition of the offender and nature of offence. The urban population of Bangladesh is rising fast and is currently in the early stages of its own urban transition. The experiences of Bangladesh's children are becoming increasingly urbanized, and it will change the negative dimensions of urbanization, especially for those children. In Bangladesh, we have not experienced any counter youth culture like Teds, Mods, Rock'n'Roll, Hippy or Punk of Britain or any young gang culture of the U.S.A. outraging moral and social concern. But the process of urbanization (which started from the 1960s), migration from village to city (which started at a large scale from the 1980s), vulnerable economic conditions and impact of globalization caused social transformation, though slow, of Bangladesh. The large joint families started to break into segments and single parent families gained prominence. Economic deprivation, unemployment, poverty, flimsy family ties, media influence and criminalized politics made a fertile ground for increased rate of juvenile delinquency. There are three correctional centres in Bangladesh for rectification and rehabilitation of juveniles: two (one is in Tongi, and other in Jessore) for male children, and one (it is in Konabari) for female children. Two categories of children are kept there. The first category constitutes uncontrollable children and those referred by parents and the second category comes to the correction centres after committing offences and being referred by courts.

#### B. Causes of Juvenile Delinquency

A considerable segment of people of this country are very poor. They live below the poverty line in terms of the true indicators of poverty. According to recent statistics, around 6.5 million people of Bangladesh are living below the poverty line. Due to poor economic conditions, parents cannot get their children to go to educational institutions and assist them in developing good educational or vocational careers. Parents want their children to assist them in field work instead of going to educational institutions. *Sometimes parents cannot provide their children with all basic necessities of human life, specifically food and clothing.* **Then the poor children set their legs out towards criminal activities.** The children do not

*Principal (Deputy Director), Department of Social Services, Ministry of Social Welfare, Bangladesh.

know which activities are lawful and which are not. They require some work which can provide their food and clothing. Organized gangs deploy poor children in criminal activities by taking advantage of their vulnerable economic condition. Recent statistics show that a huge number of poor children (under 18 years of age) of Jessore and Khulna have been deployed in carrying Phensydil and other contraband drugs. Some poor children become members of pick pocket gangs and petty thievery. Problematic family is a crucial cause for the deviation of the juveniles. Absence of father or mother due to death or divorce, lack of parental control, lack of home discipline, bad relations between father and mother, and the presence of criminals among the members of family are the principal indications of a problematic family. Due to these problems the mental growth of a child takes an abnormal course. In slum areas, adult males and females get married several times. They have children of their first and second marriages. These children are not usually taken care of. These neglected children become notorious criminals of different organized gangs. The juveniles of a well-off family having a father residing abroad derails due to lack of the father's guidance. They get huge amounts of money from their father. Affluence and the father's absence makes the juvenile get involved with a vicious circle.

Due to poverty, loss of land by river erosion, and unemployment lots of people have been migrating from different parts of the country to Dhaka and other metropolitan cities. Large scale migration from village to city started from the 1980s. Many women of rural areas came to the city and started working in garment factories. This titanic migration had a degenerating affect on city life destroying the social equilibrium of Dhaka, Chittagong and some other metropolitan cities. The people coming from villages usually take shelter in slum areas, on the pavement and streets. They are deprived of basic necessities and basic amenities of life. Father and mother of the family go out of their abode at the very first hour of the day for earning money, leaving their children uncared for and uncontrolled. In this situation (popularly known as *tokai*), children are used by the politicians in their political activities, which include picketing and ransacking cars and shops. They are also utilized by the organized gangs in their criminal activities. Surrounding environment of slum area, smuggling zone and crime prone areas are very vulnerable for the juveniles. When residing in such areas juveniles come in contact with criminal patterns and learn criminal techniques, then they become notorious criminals. Action movies and obscene pictures have a negative impact on the mind set of the juveniles. The violence and sexuality visualized in the movies make the juvenile to go brothel and involve them with violent activities.

**C. The Legal Response (National Legal Framework)**

1. The Constitution

The Constitution of the Peoples Republic of Bangladesh, although being one of the best Constitutions in the world, does not include any direct article regarding juvenile justice. However, few articles indirectly describe the issue of child's rights, safety and protection. Article 15 reveals the fundamental responsibility of the state to ensure the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans … Article 17 says that the state shall adopt effective measures for the purpose of extending free and compulsory education to all children. Article 28(4) empowered the state to make special provision in favour of women and children (Govt., 2011). Besides, some other articles indirectly facilitate the process of children welfare.

2. The Penal Code

In the Penal Code 1860, there are a number of sections which include penal measures for offence done to child and also done by the children.

Section 82: Nothing is an offence which is done by a child under nine years old.

Section 83: Nothing is an offence which is done by a child above nine years of age and under 12, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

Section 89: Nothing which is done in good faith for the benefit of a person under 12 years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person: provided…

Section 90: A consent is not such a consent as is intended by any section of this Code, unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Section 305: If any person under 18 years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide shall be punished with death, or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Section 375: Offence of rape is committed when the women are under fourteen years of age even though she had consent (Govt., 1984).

3. The Code of Criminal Procedure 1898

The most important provision in the Code of Criminal Procedure 1898 (Cr.P.C) is section 497 which provides that an accused under the age of sixteen years may be released on bail even in the cases of non-bailable offences.

4. The Children Act 2013

The Children Act 2013 was enacted to consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders. The act is one of the most important and beneficial which includes unique, innovative, diversified and tailored provisions to address the hydra-headed necessities of children. Some of the important features of the act are provision of separate trial arrangement for children, withdrawal of persons from court, special consideration during passing order by the court, restriction on disclosure of identity of a child, establishment and management of certified institutes and remand homes, appointment of Chief Inspector and POs, penal measures for cruelty to children. On the other hand, the government has made the Children Rules to facilitate the proper implementation of the act.

5. The Probation of Offenders Act 1964

The act contains sections regarding PO and Probation Orders. The provisions of the act are mainly to assist the first-time offenders of particular offences issuing probation orders for a certain period of time instead of imprisonment. For proper implementation of the act The Probation of Offenders Rules 1971 have been made. The act facilitates among others, the process of issuing Probation Orders under the Children Act 2013.

6. The *Nari O Shishu Nirjaton Domon Ain* 2000

The *Nari O Shishu Nirjaton Domon Ain* 2000, meaning the 'Suppression of Violence Against Children and Women Act 2000', rightly focused on the offences against women and children. This is an important act as it includes some provisions with major punishment for offences committed against children. Among others, the offences are impairment of eyesight or hearing capacity of children by inflammable, corrosive or poisonous substances, trafficking in children, engaging children in prostitution, kidnapping of children, selling and buying of children, detaining children for ransom, rape, sexual harassment, dissection of limbs of children etc.

7. The Children Policy 2011 and the Youth Policy 2003

The National Youth Policy 2003 has been made to engage the youths in society and nation building activities. The policy also firmly aimed at making an environment congenial to abstaining youths from offensive activities. In the Children Policy 2011, determination is expressed among others, to apply the provisions of the Children Act 2013 while addressing the issue of children in conflict with law, children in contact with the law and children's rights in judicial procedure. The policy also contains the commitment of enactment of different acts, rules and guidelines to ensure the children rights.

**D. The Role of the Court: Establishment of the Children's Court and its Functions**

The Children Act 2013 provides that, for the purpose of the Act and for trial of offences thereunder, at least one court is to be established in every district headquarters and in every metropolitan area as the case may be. Such court shall be called "Children's Court". Pursuant to **section 16(1),** the Department of Law and Justice in consultation with the Supreme Court is mandated to declare, by notification in the official Gazette, one or more court of Additional Sessions Judge in a district or metropolitan area, as the

case may be, as the Children's Court. If there is no Additional Sessions Judge in any district, then the District and Sessions Judge shall discharge the responsibilities of a Children's Court in addition to his own responsibilities.

1. Participation of Child in Court Proceedings

In consonance with article 12 of the Convention on the Rights of the Child (CRC), the Children Act 2013 Section 22 provides that to participate in person at all stages of the trial shall be considered as a right of the child. It is also provided that the presence of the child may be dispensed with at any stage during the trial if his presence is not necessary in his best interest, subject to his consent and the trial or proceeding shall continue in his absence. Provided that the presence of the child's parents or, in their absence, foster parent or the guardian or members of his extended family and also the Probation Officer and his lawyer shall be ensured. The child shall be informed of the steps taken during the proceedings and those to be taken. It is the duty of the lawyer engaged on behalf of the child and the Probation Officer to explain to the child in easy language any decision or order of the court and also the nature and consequence of the proceedings.

2. Arrest, Investigation, Diversion and Bail

No children below the age of 9 years may be arrested under any circumstances. If necessary to arrest, they will send to safe custody or alternative care according to the Children Act 2013. This provision is now incorporated in the Children Act 2013, which provides that notwithstanding anything contained in any other law or the Code of Criminal Procedure, if the case of any child is not dealt with by way of diversion, the court may release the child on bail with or without surety, whether or not the offence alleged is bailable or non-bailable. Instead of formal trial or any stage of trial the court shall decide on diversion.

3. Social Inquiry Report

This is another elaborated provision of the previous law relating to a report to be produced before the Court by the Probation Officer. Within 21 days of production of the child before the Children's Court the Probation Officer is mandated to submit before the court a social inquiry report in the manner prescribed by Rules and a copy of the same shall be submitted to the nearest Board and Department 33. The matters to be included in the social welfare report are detailed in section 31(2), and include a description of the child's family, social, cultural, financial, psychological, ethnic and educational background and also regarding the condition and locality in which the child lives, as well as the circumstances under which the offence took place. The enquiry report shall be deemed to be confidential.

There is a prohibition on reporting any matters relating to any case or proceeding involving a child. In any case under trial before the Children's Court where a child is involved in the case or as a witness, no photograph or description of the child shall be published in any print or electronic media or through the internet which may directly or indirectly identify the child unless it is apparent to the court that such publicity will not be harmful to the interest of the child in which case the court may permit the publication of the child's photograph, description, news or report.

**E. Institutional Correction Process in Bangladesh**

The offender treatment process is not so effective in Bangladesh. The juvenile correction process run through the Ministry of Social Welfare and the adult prisoner jail authority try to make them free from contaminating other heinous offenders or criminals. That means they are trying to categorize the offenders according to their behaviour, the nature of the crime and psychological condition. On the other hand, every jail authority has taken vocational training programmes for woman prisoners, who can easily participate in training like sewing, stitching, handicraft making and others kinds of vocational training for them. Every male prisoner can participate in various type of vocational training and other training activities. Our Jail authority is trying to ensure vocational programmes for every prisoner. But these types of programmes have not been available for all prisoners. Our corrections programme for the prisoners has not been introduced earlier in Bangladesh and it depends on court or administrative support for crime prevention. According to the Probation of Offenders Act, 1964 and Probation Rules 1971, first offenders and minor offences should be considered for bail at any time during trial. So it is remarkable for justice.

On the other hand, Juvenile Delinquency and correctional programme has its individual specialty in

Bangladesh. The Ministry of Social Welfare has been running three juvenile development centres for below 18 age prisoners. One is for girls and two for boys. According to the Children Act 2013, the children who are in contact and conflict with the laws have special treatment for them including arrest, detention, prosecution, correction in every stage.

After arrest they will go to the Juvenile Development Centre, not to jail. Juvenile Development Centres have various programmes for their physical, psychological, educational or intellectual and vocational knowledge development.

The three centres are:

(i) Juvenile Development Centre, Tongi, Gazipur for boys.
(ii) Juvenile Development Centre, Konabari, Gazipur for girls.
(iii) Juvenile Development Centre, Jessore for boys.

In the Juvenile Development Centres there are primary schools, big playgrounds, and health check facilities, vocational training for rehabilitation and counselling facilities for juvenile delinquents. The only objective of the Juvenile Development Centre is to create a congenial atmosphere and give them all dimensions of protection, survival and development of the children who are in contact with the laws. The Government has given due attention to consider the special needs of the juvenile offenders in terms of ethics and human rights. A Juvenile Development Centre extends its every effort to eliminate the adverse effects which make children delinquent through recognized methods of correction.

After release from juvenile development centres, they go to their family/extended family or community and they lead their lives normally. This offender is treated as a responsible member of the society. We try to engage them in vocational work for their survival if they have vocational training in juvenile development centres. Sometimes it should be self-employment by their own arrangement or with the help of government officials. In our experience, juveniles are always going through our correctional process and they develop themselves. So, the institutional correctional process is going smoothly and successfully.

**F. Probation Services for Social Reintegration**

Probation is a type of suspended sentence, a release of the offenders without imprisonment. It is a non-institutionalized method of psycho-social treatment of the criminal defendant buttressed with legal restrictions implying careful study and supervision by a probation officer. Juvenile justice procedure has been introduced in the Children Act 2013 or Probation of Offenders Act 1964.

Under this category, correctional services are mainly provided through the Probation of Offenders Ordinance 1960, amendment as Act in 1964. The Act provides granting probation under section 05 for not less than *one* year and not more than *three* years with some conditions determined by the trial court. Under this Ordinance and Act, probation is granted to the juveniles generally to the first and minor offenders irrespective of age, character, antecedent or physical or mental condition of the offenders. Therefore, probation services ensure social correction or social reintegration arrangement for the first and minor offences of the offenders. Juvenile delinquents or offenders will be corrected by social correction in the probation system and supervised by a probation officer. Two basic duties of the probation officer are: (i) Pre-sentence investigation (ii) Correctional treatment of offenders in the community. Therefore, probation is a period of treatment, where a probationer can prove him or herself as a perfect member of the society.

In Bangladesh, the Department of Social Services appointed probation officers in 64 districts. Besides this, Social services officers 487 Upazila Social Services officer and 85 Urban Community Development Officers (UCD) including 8 of Dhaka city area have also been appointed to perform as a probation officer in their respective jurisdictions in addition to their regular duties. As a result, the probation services network seems to be very sound and rigorous in Bangladesh.

An individualized, community-based treatment programme has its own specialization that is we can use the family as an institution, Religion, educational institution, society and community. It is a natural institution which we can use for correctional programme. In order to provide necessary services to correct,

protect and safeguard the rights, interests and the welfare of the children in Bangladesh, the Department of Social Services (DSS) started implementing correctional services initially in the form of probation and after care services. Since then the Department of Social Services has been implementing correctional services particularly for the juveniles in the country. Correctional services are divided into two broad categories. These are (1) Community-based and (2) Institutional-based Correctional Services.

## II. CONCLUSION

Juveniles are the future of any society. They require special care and attention in all aspects. Due to various causes of juvenile delinquency, some of the juveniles respond to social malfunctioning and other anomalies against the social norms and values. Therefore, it is required to establish more child friendly social institutions and also spatial attention being given to promote the juveniles.

## III. REFERENCES

1. www.minlaw.gov.bd
2. www.msw.gov.bd
3. www.dss.gov.bd
4. www.police.gov.bd
5. www.bbs.gov.bd

**Report on Probation from July 2015 to April 2016**

| Division | Probation Cases (Running) | Probation Cases (**April 2016**) | Total Cases | Release & Discharge | Remaining Probation cases | Total Release or Discharge | Total Probation Cases | Home Visits |
|---|---|---|---|---|---|---|---|---|
| Dhaka | 48 | 01 | 49 | 37 | 4 | 37 | 43 | 52 |
| Rajshahi | 04 | 00 | 04 | 00 | 04 | 07 | 11 | 20 |
| Rangpur | 20 | 00 | 20 | 07 | 13 | 12 | 25 | 27 |
| Chittagonj | 26 | 00 | 26 | 01 | 25 | 07 | 32 | 36 |
| Khulna | 28 | 01 | 29 | 01 | 28 | 10 | 38 | 31 |
| Barishal | 40 | 05 | 45 | 03 | 42 | 84 | 126 | 18 |
| Sylhet | 54 | 04 | 58 | 17 | 41 | 23 | 64 | 11 |
| Total | 210 | 11 | 221 | 29 | 192 | 157 | 349 | 176 |

Data source: monthly report of DDS

**Report on Arrest, Detention and Release of Children in April 2016**

| Division | Number of Children in Jail | | | Release and Reintegration on the Supervision of District Taskforce Committee | | | Number children from Police Station, Court and Jail (March 2016) | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Under 16 years | 16 to 18 years | Total | Release | Re-inte-gration | Total | Vagrants Home | J D C | Safe home | Total |
| Dhaka | 08 | 01 | 09 | 04 | 01 | 05 | | | | |
| Rajshahi | 15 | 00 | 15 | 31 | 00 | 31 | | | | |
| Rangpur | 00 | 00 | 00 | 02 | 00 | 02 | | | | |
| Chittagonj | 02 | 02 | 04 | 03 | 00 | 03 | | | | |
| Khulna | 00 | 00 | 00 | 10 | 08 | 18 | | | | |
| Barishal | 00 | 00 | 00 | 08 | 00 | 08 | | | | |
| Sylhet | 00 | 00 | 00 | 03 | 06 | 09 | | | | |
| Total | 25 | 03 | 28 | 61 | 15 | 76 | 458 | 766 | 380 | 1604 |

Data source: monthly report of DDS

**Conclusion**: The situation of frustrated juveniles and their anti–social activities have already aggravated and increased alarmingly in the country. This has called the immediate attention of sociologists, psychologists, social workers and the correctional personnel and public leaders as well. The Government of Bangladesh has also put due emphasis on the issue and has prioritized to take effective measures to streamline the Juvenile Justice Administration in the country.

# AN OVERVIEW OF JUVENILE OFFENCES IN BRAZIL

*Jean Cler Brugnerotto**

## I. INTRODUTION

In Brazilian law, the term "minor offender" is not a suitable word to refer to juveniles under the age of criminal responsibility, according to the Law 8.069 of 07/13/1990, the Statute of Children and Adolescents. This statute deleted the word "minor" and figured "children and adolescents" as "subjects of rights", considering them as central in the building of a democratic society, and not "mini adults". The correct term is, therefore, juvenile in infraction situation (or in conflict with law), that is not something permanent, but that may change (after social reintegration).

The term "minor offender" is of legal origin and gained widespread use in the media. The problem is that the term "minor offender" is that the word "minor", in Brazil, is already loaded with prejudices and accentuates the repression to the treatment of children and adolescents. According to the Statute of Children and Adolescents, the crimes committed by such juveniles are called offences or "infringement acts", in conflict with law, and the penalties are called "socio-educational measures".

## II. JUVENILES AND JUVENILE OFFENCES

The Statute of Children and Adolescents (1990) aims, in the Brazilian legal system, for the integral protection of children and adolescents, by implementing specific measures. It is, in Brazil, the legal and regulatory initiation of juvenile rights.

The juvenile offence is a condemnable act because it disrespects laws, public order, citizens' rights or property. There is only an offence if that corresponds to conduct that legally determines sanctions against its author. In the case of offences committed by children (under 12), protective measures applied. In this case, the responsibility to follow this situation is the Guardianship Council. But if the offence is committed by adolescents (12-18 years old), it should be sent to the Police for Juveniles, who must refer the case to the Public Prosecutor, who may apply one of the socio-educational measures provided in the Statute of Children and Adolescents.

## III. LEGISLATION

The Brazilian Federal Constitution of 1988[1] establishes the principle of "untouchable status of the child", thus, penalties cannot be applied, requiring the creation of a specific law to regulate the situation[2]. A specific law was created: Law number 8.069/1990, the above-mentioned statute.

The statute makes a distinction between children in infringement situations, defined as individuals under 12 years of age and adolescents in infringement situations who are from 12 to 18 years old.

Children in infringement situations are susceptible to protective measures and cannot be imprisoned. According to Articles 101 and 105 of the Statute, such measures include, among others:

---

*Federal Prison Agent (Officer), Federal Prison Department, Brazil.

[1] After 24 years of military dictatorship, this Constitution is known as "The Citizen" , because it respects all necessary and minimum rights for the people.

[2] As mentioned in the article 228 of the Brazilian Constitution: It is not penalty imputable under of 18 years, subject to the rules of a special law.

- forward to the parents;
- orientation;
- enrollment and compulsory attendance at public school;
- inclusion in a Community programme;
- request for medical, psychological or psychiatric treatment;
- inclusion in alcoholics and drug addicts' treatment programmes;
- shelter;
- placement in a foster family.

Adolescents (12-18 years old) in infringement situations are susceptible to socio-educational measures listed in Chapter IV of the statute, among which, is forced imprisonment (physical detention) for a period of up to three (3) years, according to article 121, § 3, of the statute.

In addition to imprisonment, other possible socio-educational measures are listed in Article 112 of the statute:

- warning is the verbal reprimand and signature of a term (art. 115);
- obligation to repair the damage if the teen has the ability to pay (art. 116);
- provision of services to the community — free tasks of general interest, with institutions, hospitals, schools etc., for a maximum time of six months and up to eight hours per week (art. 117);
- probation — offender monitoring by a supervisor for at least six months to oversee the social development of the teen and his family; their enrollment, attendance and school progress; and its professionalization and insertion in the labour market (arts. 118 and 119);
- regime of parole — no fixed term, but with obligatory release after 21 years old. The regime allows the realization of external tasks without judicial authorization. Juveniles are required to study and participate in vocational training. Juvenile parole can also be used as a transition phase between the detention procedure (closed system) and complete freedom (art. 120).

In all cities (or when small, in the larger towns nearby), there are Judicial Courts of Children and Youth to monitor and (try to)[3] apply the measures written in the statutes. For adolescents, there's a recent Law from 01/18/2012, in complement to the statute, that establishes the National System of Educational Service (number 12594) that regulates the enforcement of socio-educational measures for those juvenile offenders who commit an offence.

**A. The Brazilian Discussion About Lowering the Age of Criminal Responsibility**

In Brazil, the age of criminal responsibility is a contemporary theme and quite controversial among legislators, jurists and Brazilians in general. Due to the fact of increased crime in Brazil, the media explores these crimes, even those of juvenile offences, which causes the Brazilian population (87%[4]) to support lowering the age of criminal responsibility from 18 to 16 years old. Debates arise in all spheres of power. It is also a problem that the government machine has no such structural capacity, as to house

[3] There are not enough professionals to monitor all the juvenile offenders properly. Also, these juveniles normally keep living in inappropriate places (families, neighbours, unemployed etc.).

[4] Brazilian Pole Institute Data Folha, *Pole of June/2016*, (São Paulo, SP, Brazil, 2015). <http://brasil.elpais.com/brasil/2015/06/24/politica/1435122043_792635.html>Accessed 27 May 2016.

many juveniles in adult prisons — and socio-educational conditions are precarious in those facilities.

In August 2016, after being approved by the House of Representatives to lower the age of criminal responsibility to 16 years old for some crimes, such as assault and battery followed by death, intentional murder and heinous crime[5], in November of last year it was, in the second stage of approval, disapproved by the Senate. Currently the debate is halted due the discussions of Brazil's presidential impeachment. Even so, the discussion remains.

## IV. BRAZILIAN JUVENILE PROTECTION AND INTERNATIONAL STANDARDS

The Statute of Child and Adolescent was established by Brazilian Law 8.069 on 07/13/1990. It regulates the rights of children and adolescents inspired by the guidelines provided in the Brazilian Federal Constitution of 1988 and internalizes a series of international standards: the Declaration of the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the United Nations Guidelines for Prevention of Juvenile Delinquency.

The Beijing Rules were adopted by a resolution of the General Assembly of the United Nations on treatment of young people who commit offences, or to which is alleged to have committed an offence. The Beijing Rules were adopted by the UN General Assembly on 11/29/1985, through Resolution number 40/33.

The Declaration of Children's Rights was proclaimed by the General Assembly resolution number 1386 of 11/20/1959. Its basis is that the rights of freedom, study, play and social interaction of children must be respected, and these rights are stated in ten principles.

Brazil, as a UN member since 1945, adopted the Beijing Rules and Declaration of Children's Rights and enforced them by the Statute of Children and Adolescent (from 1990). Thus, the various characteristics found in the Brazilian Statute of Children and Adolescent consider the peculiar situation of juveniles who are still in physical, social and psychological development. The Law 12594/2012, complementing the Statute in the socio-educational measures, also considers these aspects.

## V. JUDICIAL PROCEDURE

We cannot treat adults and juveniles in the same way, as they are subject to various legal systems. The Statute, with the rights of Children and Youth, has its own and unique legal framework derived from the nature and relationships that it aims to protect.

Considering juveniles, criminal laws (Brazilian Penal Code etc.) are only a reference for verifying if the juvenile's conduct is characterized in an offence, so that they may be held responsible. The juvenile "does not commit crimes" (as adults); juvenile commit "offences" (or "infringement acts"). And the condemnation is enforced by one or more "socio-educational measures", while the adult receives a "penalty".

This means that a juvenile of only twelve (12) years of age who committed a crime or misdemeanour, called an offence (or infringement acts), may be arrested under the act, suffer an accusation by a prosecutor and have a lawyer (a free Public Defender) to defend him. The juvenile will be judged by a judge, whose decision (condemnation) to recognize the facts of the offence will authorize the application of one or more socio-educational measures (called the juvenile's penalties, as written above), noting that condemnation in his criminal record.

## VI. COMPARISON WITH THE ADULT PRISON SYSTEM

Of the total of 607,000 offenders and criminals imprisoned in Brazil[6], 3.6 % are juveniles (almost 22,000)

[5] According to Brazilian law number 8.072/1990, like aggravated robbery; vulnerable rape (like child); torture; terrorism, genocide, drug trafficking etc.

[6] Federal Prison Department, *INFOPEN Report* (Brasília, DF, Brazil, 2014). <http://www.justica.gov.br/noticias/mj-divulgara-novo-relatorio-do-infopen-nesta-terca-feira/relatorio-depen-versao-web.pdf>Accessed 30 May 2016.

under 18 who are imprisoned in a Juvenile Protection House (Brazilian juvenile "prisons") or are released on parole socio-educational measures.

Among juveniles who have committed offences, most are not confined: they receive sentences of probation, community service, repair damage or just a warning. Even among the 22,000 inmates, three thousand are placed on parole. According to the Brazilian National Council of Justice[7], about 43% of these juveniles end up becoming repeat offenders, i.e., committing new crimes while living in Juvenile Protection Houses. Regarding the adult prison system, the recurrence is about 70%.

The juveniles who committed the most serious crimes such as murder, robbery or armed robbery are imprisoned. In such cases, according to data from the Council, the average imprisonment time of juvenile offenders is a year and a half (the limit is three years).

Brazilian state prisons (for adults), in most cases, are overcrowded and do not have a proper rehabilitation structure even for adults. On the other hand, the Juvenile Houses, even not being the appropriate spaces for rehabilitation of juvenile, it is still a better structure for a juvenile in psychological and physical development. At these Houses, the juvenile has access to doctors, psychologists, dentists, regular visits from their families, regular food, etc. Of course, in some exceptions, these Juvenile Houses are real adult prisons, and it can be observed that "real adult offenders" are being made in these places. In this case, there are failures of government policies.

## VII. PROFILE OF JUVENILE OFFENDERS IN BRAZIL

In Brazil, due to historical aspects, mainly slavery and racial prejudice, marginalized social groups can be observed in the country. Usually with black skin, poor, with Africans' religions etc. Consequently, by being marginalized, people migrate and move to peripheral regions of the cities. Normally, by being poor, with bad access to public services, it can be noticed that the citizen is removed from society, and this may create a social environment that leads to violence.

Sociologists point out two main aspects to juvenile violence in Brazil. One is poor education. Since good education is paid (and expensive), the juveniles do not prepare themselves for the labour market. And the second aspect is a consequence of the first: "the juvenile offenders did not become robbers because they don't have a shoe, but because you want to have a designer shoes", says Michel Misse, sociologist at Federal University of Rio de Janeiro. The juvenile just wants to participate in the world around him.

According to the IPEA, there are about 60,000 juveniles under socio-educational measures in Brazil, and almost 22,000 are imprisoned and about 12,000 are on parole or probation.

### A. Some Numbers

Statistics from June 2015 show that juvenile offenders are black males, 16 to 18 years of age who do not attend school and live in poverty. This is the profile outlined by IPEA[8] (Brazilian Institute of Applied Economic Research).

Continuing, 95% are male; 66% live in extremely poor families; 60% are black; 60% are 16 to 18 years old and 51% did not attend school at the time of the offence.

The main offences committed by juveniles are theft and drug trafficking. Less than 10% commit murder or theft followed by death.

Infractions are distributed as follows: 40% of them are deprived of liberty for aggravated robbery (with violence against persons); 23,5% for drug trafficking; 8,75% for murder; 5,6% for death threats; 3% for

[7] National Council of Justice, *National Overview of the Socio-Educational Measures Implementing and Imprisonment* (Brasília, DF, Brazil, 2015) <http://www.cnj.jus.br/noticias/cnj/62380-modelo-inovador-garante-menor-indice-de-reincidencia-criminal-de-jovens-em-pernambuco>Accessed 29 May 2016.

[8] Institute of Applied Economic Research, *Technique Note* (São Paulo, SP, Brazil, 2015). <http://www.ipea.gov.br/portal/images/stories/PDFs/nota_tecnica/150616_ntdisoc_n20> Accessed 29 May 2016.

attempted murder; 3,4% for theft without violence; 2,3% for firearm possession; 1,9% for assault and battery followed by death; 1,1% for rape; 0,9% for personal injury and 0,1% for kidnapping.

In 2015, there were 22,000 juveniles imprisoned, "the most severe of the socio-educational measures", according to IPEA.

Thus, what is intended with the above is to understand that is not enough for the law to be more severe to punish the offenders, neither justifying the actions of these juvenile offenders with their poverty and social pathologies (social environment), but, what is important, is to know the origin of the causes that stimulate the offences of these juveniles.

## VIII. REINTEGRATION: COMMUNITY INVOLVEMENT

The social and educational measures, as provided in the statute, aim to reintegrate the juvenile offender in social cohesion, wishing that they satisfactorily complete the measures by inserting them in society with new ideas and perspectives, in order to become an adult able to live together productively in their social and family environment.

The rehabilitation that is desired through socio-educational measures is the integration of the juvenile in the social, family and school world. On the other hand, it should not be forgotten that often criminality is produced by society itself.

As wrote the Italian professor Alessandro Baratta:

> (...) before speaking in education and social rehabilitation is necessary, therefore, to do an examination of the value system and the behaviour models present in the society in which is wanted to insert the juvenile after the imprisonment. Such an examination only lead to the conclusion that the real re-education should begin with the society, than before with the condemned. Before you want to change the excluded, you must modify the exclusionary society, thus reaching the root of the exclusion mechanism [the real problem]. [9]

Thus, to achieve social reintegration, society has an important role, by the time those who have committed an offence, that were away from social living, will reenter in this social environment.

Therefore, it is necessary for the enforcement of the law connected to the public policies for a participatory society, because the problems of the juvenile offenders exceeded the sphere of family and are in the scope of all society. It is important to gather all social control instruments and implement public policies with the objective of social progress, thus respecting the basic rights that the Brazilian Constitution (and Statute of Child and Adolescent) guarantees to the child and adolescent.

## IX. CONCLUSION

The Statute of the Child and Adolescent conceives all social and educational measures from a rehabilitation perspective for a juvenile offender. Thus, Juvenile Houses that perform socio-educational measures are required to observe this law.

The socio-educational measures, specifically imprisonment, reinforce social exclusion and maintain values for deviated conduct.

Thus, such issue should be analyzed with caution and meticulous studies for the implementation of measures to benefit the entire society and attenuate the problem of juvenile offenders, and with time allow them to be reintegrated in this society. This will be only possible with an effective socio-educational policy, the collaboration of government, restructuring the Juvenile Protection Houses, educational programmes, professional training for low-income youth, increase access to health (psychologists and psychiatrists),

[9] BARATTA, Alessandro. *Criminologia Crítica e Crítica do Direito Penal: Introdução à Sociologia do Direito Penal*. Tradução Juarez Cirino dos Santos. Rio de Janeiro, Brazil, 2002.

improve the process of the enforcement of the measures against the juveniles offenders, better judicial service to juveniles, an improvement of projects that consider probation as social reintegration of the juvenile and, finally, a more effective participation of society in partnership with government and non-government agencies, seeking effective solutions with less consequences and less harmful to society and to the juvenile offender.

# THE JUVENILE JUSTICE SYSTEM IN MALAYSIA

*Muhammad Razmee Abd Razak**

## I. BACKGROUND

Every day, throughout the world, children come into conflict with law enforcement officials because they are alleged or accused of having committed a criminal offence. How these children are handled can have a profound impact on their future prospects, and may be determinative of whether they grow up to become productive citizens or fall into a life of crime. For this reason, the Convention on the Rights of the Child (CRC) requires States parties to develop specialized responses for dealing with children in conflict with the law that take into account their young age and are aimed at promoting their reintegration and development as productive citizens.

In December 2006, Malaysia submitted its first periodic Country Report to the UN Committee on the Rights of the Child outlining the progress made in implementing the CRC. In its Concluding Observation regarding Malaysia's report, the Committee acknowledged the positive measures that the country has taken to promote children's rights and to comply with international standards regarding juvenile justice. However, it also highlighted some areas of concern with respect to the handling of children in conflict with the law and strongly encouraged the Government of Malaysia to seek technical assistance from UN agencies, including UNICEF, to address these issues.

In response to the Committee's recommendations, the Ministry of Women, Family and Community Development sought assistance from UNICEF to undertake a comprehensive study of the juvenile justice system. The objectives of the study are to: a) present an overview of the nature and extent of juvenile offending in Malaysia; and b) take stock of current practices and identify opportunities to apply innovative new approaches based on international best practices. The study includes an analysis of the legal and normative framework for juvenile justice; the government structures, processes and procedures for responding to child offending; and the measures and services available to promote children's rehabilitation and prevent reoffending.

In broad terms the study considered:

- The nature and extent of and trends in youth offending in Malaysia;
- National laws, policies and standards pertaining to children in conflict with the law at all stages of the criminal justice process;
- The structures, processes and procedures in place to put these laws into practice; and
- Programmes and services to support children in conflict with the law, including institution-based rehabilitation programmes, as well as community-based alternatives.

## II. NATURE AND EXTENT OF JUVENILE OFFENDING

Malaysia has a fairly young population, with 60 percent of its population below 30 years of age. The general perception amongst stakeholders is that child offending has increased in recent years and that the types of crimes that children are committing have become more serious. However, assessing patterns of offending is difficult due to gaps in data collection and inconsistencies in statistics collected by the different

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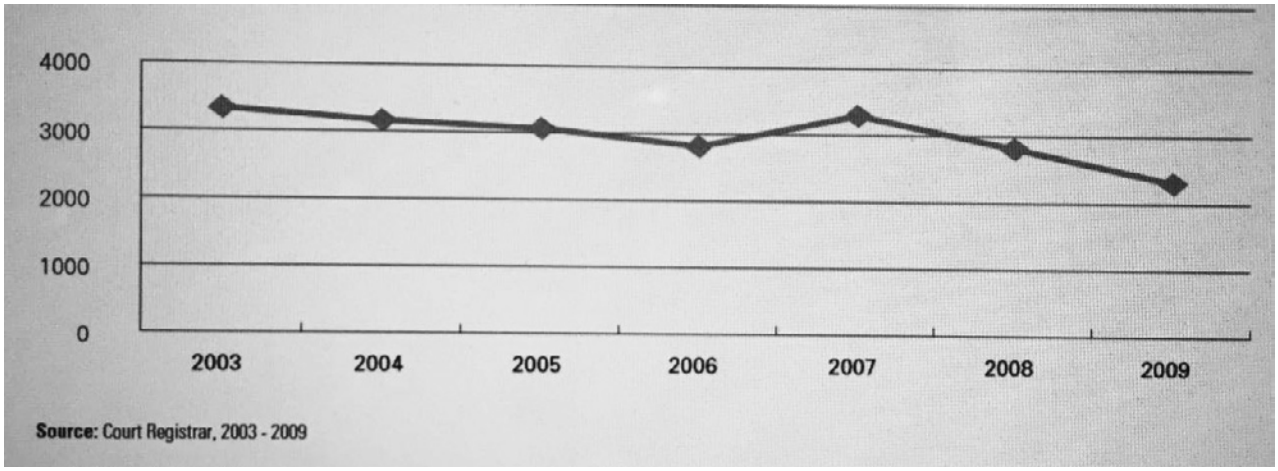
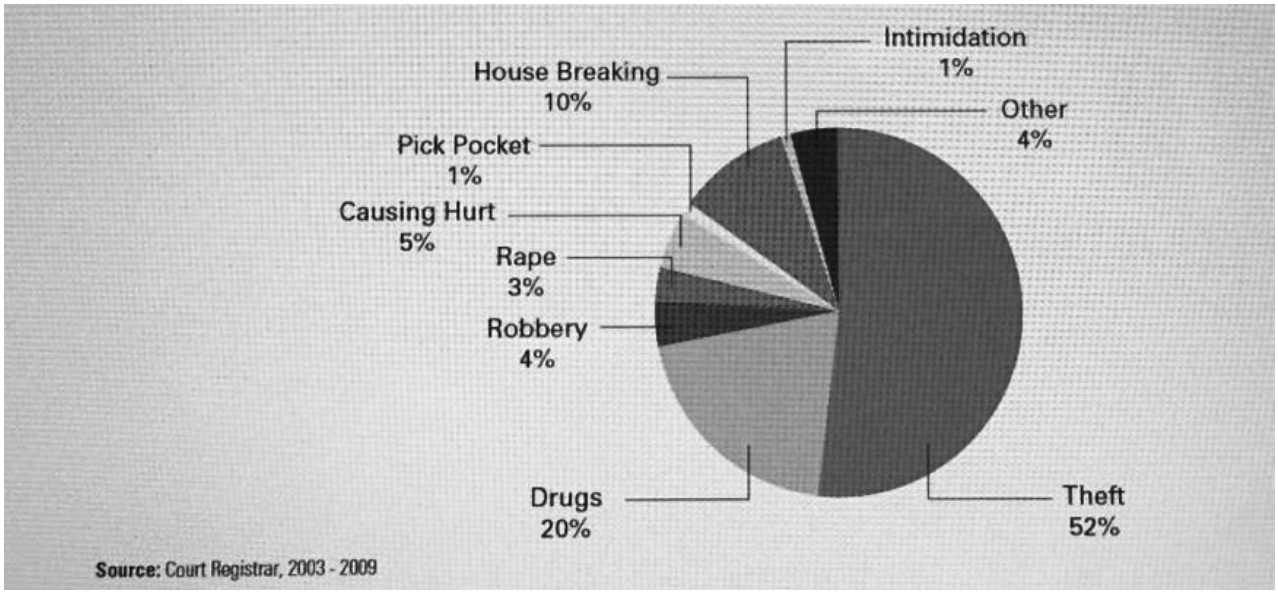
agencies. It is also difficult to measure the extent to which changes in child crime statistics reflect an actual change in rates of child offending, or merely changes in policing and data collection practices.

**Picture 1: Number of Children's Cases Registered with the Court (2003 - 2009)**




Data from the Court reveals that the majority of children convicted by the court have committed petty crimes such as theft, rather than crimes of violence. The percentage of children who have committed violent crimes such as rape and causing harm is very low.

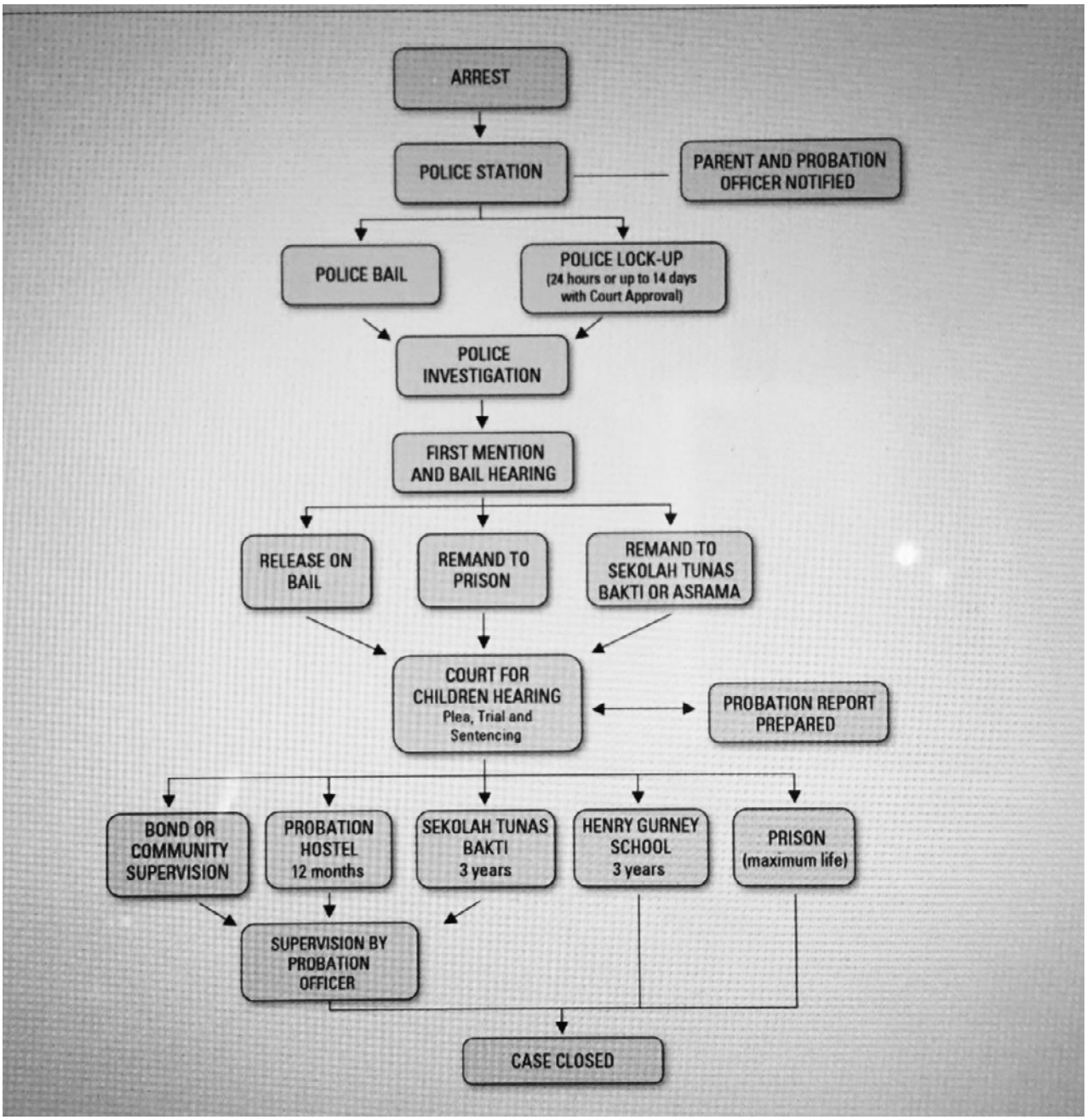
**Picture 2: Percentage of Children Convicted by the Court, by Type of Offence (2003 – 2009)**



## III. THE JUVENILE JUSTICE SYSTEM: LAWS, STRUCTURES AND PROCESSES

The principal act governing the handling of children in conflict with the law is the Child Act 20017, which came into force in August 2002. This Act consolidated three former Acts: the Juvenile Courts Act 1947; the Child Protection Act 1999; and the Women and Girls' Protection Act 1973. The current Child Act governs four main categories of children: 1) children in need of care and protection; 2) children in need of protection and rehabilitation; 3) children "beyond control"; and 4) children in conflict with the law. This study focuses mainly on the fourth category, i.e. children in conflict with the law, with some reference to children beyond control. The other categories of children are being addressed under a separate study of the child protection system being undertaken jointly by the Ministry of Women, Family and Community Development and UNICEF.

**Picture 3: General Process for Handling a Child in Conflict with the Law:**



The Child Act outlines the main structure, processes and procedures for responding to children who commit criminal offences. Part X of the Act stipulates special procedures for arrest, bail or remand, trial, and sentencing of children, as well as defines the roles and responsibilities of police, probation officers, the Court for Children, and various institutions handling child offenders. Pursuant to section 83(1) of the Act, a child who is arrested, detained and tried for any offence (subject to certain specified limitations) must be handled in accordance with the provisions of the Child Act, rather than the normal procedures applicable to adults. The special procedures under the Child Act modify and take precedent over any written laws relating to procedures for arrest, detention and trial. However, where the Child Act does not address a specific issue, then reference may be made to the standard procedures under the Criminal Procedure Code. The above chart (Picture 3) presents the general process for handling a child in conflict with the law. Each stage of the process is discussed in more detail in the section below.

## IV. MALAYSIAN LAWS AND POLICIES

The definition section of the Child Act 2001 states that a "child" means a person under the age of eighteen years and, in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code. The Penal Code states that children under the age of 10 years are not criminally responsible for their actions. It also includes a *doli incapax* provision, which states that any act of a child who is above 10 and less than 12 years of age is not an offence if the child has insufficient maturity to understand and judge the nature and consequences of his/her conduct. Where the Court for Children is in doubt as to the age of the child, an opinion should be sought from a medical officer.

In general, the special protections for child offenders under the Child Act apply to all child offenders under the age of 18, with some exceptions:

- Children who turn 18 while the proceedings are ongoing: If a child turns 18 while the proceedings are ongoing, the Court for Children must continue to hear the case. However, it is up to the discretion of the Court whether it applies the special sentencing provisions available for children under the Child Act or imposes an adult term of imprisonment.

- Children who are only formally charged after they turn 18: If a child commits an offence while under 18 but turn 18 before being formally charged, then the trial is heard by the regular adult criminal courts. The court may choose to apply the special sentencing provisions available for children under the Child Act or impose an adult term of imprisonment.

- Children charged with adults: If a child commits a crime together with an adult, the trial will be heard in the adult criminal court, rather than the Court for Children. However, the Court must "exercise in respect of the child all the powers which may be exercised under this Act by a Court for Children" and must consider a probation report before sentencing the child.

- Children charged with very serious crimes: The Court for Children does not have jurisdiction over children charged with an offence punishable with death (murder, certain terrorism offences, hostage taking, waging war, mutiny, kidnapping in order to murder, gang robbery with murder, drug trafficking). However, while the Child Act does not state so explicitly, the special protection for children relating to procedures for arrest, detention, trial, and sentencing should still apply equally, regardless of whether the case is before the High Court rather than the Court for Children.

The Child Act also includes provisions for certain status offences, including being "beyond control" and being subject to, or at risk of, sexual exploitation ("moral danger"). Although not classified as offenders, these children are nonetheless subject to similar treatment as children who commit crimes, including temporary detention and the possibility of being deprived of their liberty in a social welfare institution for up to three years. For child victims of sexual exploitation, the law states that the maximum duration a child may be sent to an institution is three years and allows for a reduction in the period of detention by the Board of Visitors. However, the period for detaining "beyond control" children in an Approved School is not specified, nor is it clear whether they may be entitled to early release by the Board of Visitors. As

such, there is no clear statutory direction with respect to how long children classified as beyond control can be detained in an Approved School and whether they are entitled to the same process of periodic review and early release as child offenders.

## V. CONCLUSION

Many Malaysian academics and policy-makers have begun to highlight the need to move towards internationally recognised practices such as restorative justice and diversion, particularly for children committing minor offences. Stakeholders from all agencies who participated in the study were generally quite frank and concerned about of the shortcomings in existing approaches and eager to learn from international models and best practices. Support for reform was high across all relevant agencies, including amongst the police, magistrates, probation officers, lawyers, and institutional staff.

# JUVENILE JUSTICE: A NAMIBIAN OVERVIEW

*Mariana Martin**

## I. COUNTRY PROFILE: NAMIBIA

Located in South-West Africa, Namibia is an immense country of 825,615 square kilometres (Southern African Development Community, 2012). According to the National Planning Commission (2012), Namibia had a population of approximately 2.1 million in 2011. An average population density of less than three (about 2.77) people per square kilometre was reported by the World Bank for Namibia for 2010. This positions Namibia as the world's fifth least densely populated country after Greenland, the Falkland Islands, the Pitcairn Islands and Mongolia respectively (Worldatlas, 2015). Considering the country's small population, it is relatively diverse in language. While English is the official language in the country, about 30 languages are spoken in Namibia.

Economically, the country is making strides. However, major struggles are experienced with high rates of unemployment, especially amongst young people. Defining youth as individuals aged 15 to 34 years, the Namibia Statistics Agency (2015) identified the youth unemployment rate for 2014 as 39.2 percent. This is much higher than the overall unemployment rate of 28.1 percent, which takes into account all individuals from the age of 15. These estimates are based on a restrictive definition of unemployment, which is strictly limited to persons either actively in the hunt for work or those available for work during the reference period (Namibia Statistics Agency). The broad unemployment rate, which is inclusive of individuals not actively seeking work is, naturally, expected to be significantly higher.

The unemployment rate in the country is disconcerting, particularly in view of perceptions that persistent unemployment among the youth in the country is a contributing factor to the high crime rate in the country. A report by a local newspaper implied that the high unemployment rate amongst the youth serves as a motive for them to engage in offences such as house-breaking, armed robberies, car theft, stock theft and money laundering (Sinvula, 2014).

This idea seems to be corroborated by findings by the Namibian Correctional Service that "Education, Training and Employability" is the Dynamic Risk Factor most associated with offending in the country. Using a sample size of 619 that was drawn in March 2016 from offenders incarcerated at correctional facilities where the country's Offender Risk Management Correctional Strategy is implemented, the Service was able to establish that 70 percent of the sample had Education Training and Employability as a high risk factor, which means that lack of opportunity for employment disposed those offenders to offending (Namibian Correctional Service, 2016).

Similarly, the Namibian Correctional Service (2016) was able to identify that House Breaking with Intent to Steal and Stock Theft were respectively the offences mostly committed by offenders under its care. Both these classes of offenders can be linked to lack of employment. A synopsis of young offenders aged 14 to 17 identifies that their offences were largely economic in nature (Feris, 2013). Hence, it can be theorised that offences committed by the youth in Namibia seem to be primarily of a social nature.

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***Figure 1*: Location of Namibia on Map of Africa**


The crime rates in the country unfortunately continue to escalate, particularly those of a violent nature. According to the United Nations Office on Drugs and Crime (2013), the country's homicide rates have unremittingly increased during the observed period of 2008 to 2012. The average total of offenders in Namibian Correctional institutions stands at approximately 4,200 annually, which represents an incarceration rate of about 267 per hundred thousand. During the last financial year alone (April 2015-March 2016) a total of 3,637 offenders were admitted into custody countrywide, of which only 117 were juveniles, with juveniles identified to be individuals under the age of 18 (Namibian Correctional Service, 2016). These figures exclude individuals admitted to police holding cells.

The national crime statistics indicate that for the years 2014 and 2015 a total of 93 juvenile arrests were made countrywide and an additional 45 arrests were made from January to March 2016. Offences committed by juveniles during this period varied in severity. Most arrests related to house-breaking of residential premises, assault with the intent to do grievous bodily harm, theft, rape and common assault. Arrests made for those cases during the last three years were 23, 17, 16, 12 and 10, respectively (Namibian Police Force, 2016).

## II. THE NAMIBIAN JUVENILE JUSTICE SYSTEM

Children that come into conflict with the law in Namibia are, first and foremost, protected by the Constitution of the Republic of Namibia (amended 1998), which is the supreme law of the country. Provision is, for example, made by that instrument under Article 15 for children "not to be detained in terms of any law authorising preventative detention, if they are under the age of 16".

However, there is no specific legislation for children caught up in the mashes of the criminal justice system. The Criminal Procedure Act (51 of 1977), which generally makes provision for procedures and

related matters in criminal proceedings is also applicable in the case of juveniles. Nevertheless, there is legislation which gives effect to the rights of children in general (as contained in the Namibian Constitution and international agreements binding on Namibia): There is a newly instituted Child Care and Protection Act (3 of 2015), but that legislation has not yet been brought into force.

As prescribed in the Child Care and Protection Act (3 of 2015), a child is defined as "a person who has not attained the age of 18 years" (Child Care and Protection Act, 2015, s 1). Amongst others, the Child Care and Protection Act (2015) makes provision for child protection centres, children's courts, children's commissioners and children's court assistants, which points towards some consideration made for the needs of juvenile offenders.

While this statute is still to be instituted, concern for the protection of juvenile offenders has a long history in Namibia and can be traced back to earlier eras through the Criminal Procedure Act (s, 254 (1)) where, as a case in point, reference is made to the need to try accused persons under the age of 18 in a children's court and in accordance with the Children's Act, 1960 (Act 33 of 1960). The Children's Act 33 of 1960 is the legislation presently in force while awaiting enactment of the new Child Care and Protection Act (3 of 2015).

Some of the measures put in place since Namibia's independence to address the unsatisfactory conditions under which juvenile offenders were confined particularly prior to the country's independence include a screening programme of children throughout the criminal justice system as well as life skills diversion programmes, which were aimed at warranting that juvenile offenders received appropriate interventions in line with their needs (Kamwanyah, 2013).

Schemes such as incorporating Juvenile Justice Training in the training of police officers, the establishment of an Inter-Ministerial Committee on Juvenile Justice, the segregation of juveniles from adults at police holding cells, the development of diversion programmes, amongst others, are further brought to attention (Kamwanyah, 2013). While some effort has evidently been made over the years to address issues relating to juvenile justice, progress seems to occur at a marginal pace. The extent to which the newly established Child Care and Protection Act 3 of 2015 will be enacted remains to be seen as various challenges are encountered in the implementation of interventions targeted at young offenders.

## III. MEASURES FOR JUVENILE OFFENDERS

In principle, pre-trial diversion for juvenile offenders occurs at three levels in Namibia: 1. Diversion from arrest and pre-trial detention through mediation between victims and offenders and also through the avoidance of detention by linking up children in conflict with the law with family members; 2. Diversion from court procedures by linking juveniles into a life skills programme; 3. Diversion from incarceration in the form of community-based alternative sentencing options (such as Community Service Orders and probation). Additionally, certain orders can be issued as a form of diversion such as an order for the child to spend a certain number of hours with his/her family, an order for the child to associate with people who can act as a positive influence on the child, an order for the child to attend school every day for a specified period, and an order obligating a child to comply with certain standards of behaviour set out in terms of an agreement between the child and his/her family (Legal Assistance Centre, 2002).

The extent to which these diversion programmes are, however, presently implemented is sketchy. As cited from Hoff (2009), Feris (2013) reveals that owing to a lack of skilled personnel, diversion programmes for juveniles are currently only conducted in the capital city of Namibia, Windhoek, whereas the vastness of the country is alluded to as the reason screening of juveniles only occurs on a weekly basis in areas outside of Windhoek.

During the period of April 2015 to March 2016 alone, 729 juveniles participated in a life skills diversion programme, while a total of 1,038 went through the screening process (Ministry of Gender Equality and Child Welfare, 2016.) On the other hand, 948 Community Service Orders were issued since the introduction of the programme in the country in 2006 to December 2015. Although Community Service in Namibia targets young offenders, it should be noted that the sentencing scheme is extended to other individuals meeting set criteria (Namibian Correctional Service, 2003). As much as this reflects that there has been an

increase in the number of youthful offenders that have participated in the country's diversion programmes over the last number of years, not enough appears to be done to ensure that incarceration is restricted to the most deserving cases.

According to the Namibia Community Service Orders Manual (Namibian Correctional Service, 2003), an offender's sentence length is the starting point for the issuing of a Community Service Order. As is explained, Community Service Orders can be considered for any individual with an effective prison term of one year or less as such a person is perceived to be a non-serious offender, although this is subject to the individual meeting the other laid down criteria such as whether the offender is employed, is a first offender, has a fixed residential address, has family dependants, is unable to pay a fine, amongst others.

Almost half (44 %) of the offenders incarcerated during the financial year April 2015-March 2016 were meted sentences of less than 6 months. Despite these statistics not being limited to individuals under the age of 18, this statistic is suggestive of the country's reluctance to employ the least restrictive measures for those finding themselves in conflict with the legal system.

Feris (2013) corroborates this with her observation that a substantial number of juvenile offenders in Namibia end up under confinement, whereas other services earmarked to protect that population group either are totally lacking or are inadequately implemented. A case in point is the reported absence of minimum guidelines for the treatment of juvenile offenders particularly during the pre-trial and pre-detention/diversion processes. She continues to highlight that hiccups are experienced with the operations of the country's Inter-Ministerial Committee on Child Justice that was put in place to coordinate related activities.

Thus, while notable strides have been made in the systems dealing with children in conflict with the law, the country still has a lot of ground to cover to ensure that it has a criminal justice system that truly meets the needs of the young offender.

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# IMPLEMENTING JUVENILE JUSTICE AND RESTORATIVE APPROACHES IN PAPUA NEW GUINEA

*Linda Dentana**

## I. INTRODUCTION

The issue of crime amongst juvenile offenders continues to rise. Much of the rise is attributed to the fact that Papua New Guinea (PNG) for the past decade has seen a rapid change of development from the rural to urban drift. In most or nearly all developing countries during the course of the rapid transformation and development to meet the demands of the global standards, delinquency in adult and juvenile offenders occurs at an ever-increasing rate. Papua New Guinea after forty-one years of independence is still generally a young county. Efforts made by the government to address and improve law and justice over the years have been noted, however, more needs to be done.

In my paper, I will firstly give a brief background of Community Based Corrections (CBC). Then highlight the issue of crime in the capital city of Papua New Guinea, Port Moresby. Thirdly, touch on efforts made to address juvenile justice using restorative approaches in the field office. Also, highlight issues and challenges faced sighting the underlying problems. Finally noting possible solutions such as the use of other law and justice agencies to address law and justice in PNG.

### A. Background

PNG is for the most part is made up of average-income earners with a population of over 7,275,324 people according to the last census of 2011.[1] A country endowed with people from the Melanesian race from the highlands to the coastal areas. Culturally diverse, traditional values are still respected. Although there has been much development in the urban area, the vast majority of the population is widely dispersed, and the constantly challenging geographical environment makes service delivery difficult and expensive.

### B. Community-Based Corrections (Parole, Probation & Juvenile Justice Services)

A branch located within the structure of the Department of Justice & Attorney General, Community Based Corrections (CBC) provides the services of Parole, Probation and Juvenile Justice Services to everyone through the 22 field offices located around the country. Established since the 1980s, the function of CBC is mandated by four parliamentary laws, these are:

1. Probation Act

The Probation Act 1991 is the basis of the community corrections system. Under the Act, there are provisions that allow the courts to tailor orders to fit most offenders and situations.[2] Furthermore, the Probation Act provides for both juvenile and adult offenders. The Court can impose probation for a minimum of six months to a maximum of five years. The Court can further impose any additional conditions necessary under the circumstances of the case to ensure compliance by the Probationer for his or her good conduct and welfare.

2. Parole Act

Under the Parole Act 1991, all prisoners are eligible for parole consideration after serving one third of their sentence. Parole is similar to probation, except that parolees are subjected to a higher level of supervision. The transition from incarceration to returning to live in the community is for many detainees a difficult one. Detainees released under parole supervision have a better or greater chance of rehabilitation

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[1] National Statistical Office. National Population & Housing Census 2011-Final Figures, PNG (2011).

[2] Probation Act 1991 (PNG), sections 16-21

than those released on remission with little or no support.[3]

3. Criminal Law Compensation Act

Under the Criminal Compensation Act 1991, an offender can be ordered by the court to pay compensation below K5,000.00 in monetary value or in kind.[4]

4. Juvenile Justice Act

The final major act that CBC is responsible for is the Juvenile Justice Act (2014). Formally the Juvenile Courts Act (1991), recent reviews were made to incorporate internationals treaties and protocols of juvenile justice. The act has been repealed and is currently the Juvenile Justice Act 2014. The JJA covers all young persons aged between 10 to 18 years for all offences except for murder, rape or offences punishable by death or life imprisonment.[5]

## II. CURRENT SITUATION OF CRIMINAL BEHAVIOUR IN AN URBAN AREA

Due to the high influx of people in the rural areas migrating to urban areas such as Port Moresby, to access basis services that they are unable to in their local areas has caused an ingestion of these services in the quickest possible time. Moreover, the infrastructure of service providers has deteriorated.

Many citizens may have their reasons for the migration, however, the underlying cause tends to be the lack of access of basic services in the rural area; such as, inadequate if not the lack of medical supplies at the local health centre or aid posts, educational materials for schools, or employment opportunities for the young and productive population. Therefore, this has led to the increased influx of the rural to urban drift. Hence this has caused the creation of many informal squatter settlements and has become evident in the recent times in the country's capital. Thus, crime and ethnic conflicts have become prevalent in the city. Children who are born in squatter settlements are commonly seen to come into conflict with the law.

## III. IMPEMENTING JUVENILE JUSTICE PROGRAMMES USING RESTORATIVE APPROACHES IN THE FIELD OFFICE NCD

### A. Assisting Juveniles through Court Process

Juvenile Justice Officers (JJO) or Voluntary Juvenile Justice Officers (VJJO) work closely with police and the courts to ensure that juvenile's rights and issues are given their time in court. In the National Capital Provincial Office there is an officer designated for juvenile duties alone. However, in other provinces a probation or parole officer also carries out juvenile court duties.[6] The JJO attends weekly court hearings and also visits and performs diversions within the cells if the offender is found to be held for a less serious offence and placed in the custody of parents. Apart from that, a JJO or VJJO must always be present during juvenile court without the presence of a JJO or VJJO the court is unable to proceed.

A JJO or VJJO means a person appointed to the Juvenile Justice Services under section 8 of the JJA. These persons are officers or employees of the public service and officers of the court. They are designated to perform juvenile work only. Unlike a JJO a Probation Officer deals with adult cases, however, can also deal with juvenile matters in the absence of a JJO/VJJO.

### B. Appropriate Imprisonment Alternatives

Juveniles who are sentenced to a non-custodial sentence are either placed on Probation or receive a Good Behaviour Bond. If a juvenile is placed on probation, then CBC is responsible for the juvenile until he or she is discharged. During the period of his probation the juvenile is supervised and rehabilitation programmes through the arrangement of the officer are carried out through the community with proper supervision.

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[3] Parole Act 1991 (PNG), sections 17-24.
[4] Criminal Law (Compensation) Act 1991 (PNG), sections 2-7.
[5] Juvenile Justice Act, 2014 (PNG) part II-XI.
[6] National Juvenile Justice Report 2015. DJAG, PNG.

**C. Restorative Justice Based Approach and Diversion Programmes**

Using other mediation processes and approaches to handle juvenile offenders while in detention is also used as an alternative: Counselling — derived from the Royal Papua New Guinea Constabulary (RPNGC) Principles and Guidelines — tends to be the next alternative to a warning. This is because the juvenile can be taken to the police station or home to his/her parents, to be spoken to more officially. However, the juveniles should not be threatened or placed in a police cell to scare them.[7]

Diversion means diverting or referring a juvenile away from the formal court system to a more informal resolution in the community. It is one way of promoting restorative justice, in accordance with the National Law and Justice Policy, by allowing minor juvenile crimes to be dealt with informally by the community, rather than formally through the courts. Diversion is already being done in practice by both the police and the courts, for example, by giving juveniles warnings or mediating a dispute instead of charging the juvenile. The courts are operating under a Juvenile Court Protocol issued by the Chief Magistrate, and the police pursuant to the diversion programme under the RPNGC Juvenile Principles and Guidelines for Police.[8]

**D. Management of Juvenile Institutions and Remand Centres**

Juveniles who are sentenced to custodial sentences are placed in juvenile institutions apart from the corrective facilities. The environment and setting of the institutions is one different from the corrective institutions.

The Director for Juvenile Justice is responsible for overseeing and supervision of six (6) Juvenile Institutions. The Institutions which provide rehabilitation programmes are as follows:

- Erap Boys Town in Lae, Morobe Province
- Wewak Boys Town in Wewak, East Sepik Province
- Jegarata Male Juvenile Centre in Popondetta, Oro Province
- Hetune Female Institution in Popondetta, Oro Province
- Hohola Remand Centre in Port Moresby, NCD
- Mabiri Juvenile Rehabilitation Centre, Buka, Autonomous Region of Bougainville (AROB)

**E. Working with other Stakeholders**

Working together with other key agencies has drawn the message of restorative approach in assisting juveniles throughout the system. UNICEF works closely with all the other governmental law and justice sector agencies to improve the juvenile justice system by conducting workshops, trainings and the creation and publication of policies, handbooks, regulations.

## IV. CHALLENGES FACED

As with achievements come challenges and issues, at the field level to improve rehabilitation and reintegration of offender's. Most constraints are faced due to lack of resources. Below are some of the challenges faced in the CBC NCD Provincial Field Office:

**A. Awareness**

There is still a great deal of awareness that needs to be carried out to the general public about the functions of Community Based Corrections. Many people are unaware of the service and are unable to utilise it when they are caught in the justice system. In turn we are unable to perform our duties to service the general public.

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[7] Ibid.
[8] Ibid.

**B. Capacity-Building, Infrastructure and Assets**

Resources are another major setback for a field office. Infrastructure and office assets play a vital role in administering service delivery. Human capacity is also a challenge. The national capital has a population of over one million; however, the provincial office has a full-time staff of nine at the moment. Due to budgets cuts at the national level the office is lacking the capacity to provide a quality service. Therefore, stakeholder partnerships are vital in ensuring that justice is served to all persons regardless of background.

**C. Coordination among Courts, Police and Corrective Institutions**

Implementing law and justice outcomes is a collaborative initiative. One major setback is when key stakeholders are unable to cooperate. This may be due to a number of reasons, but most of the time human capacity is the setback.

## V. IDENTIFY UNDERLYING PROBLEMS

Nonetheless there have been overall issues and challenges faced in providing the service. These are three of the notable points the administrative continues to work towards improving the accessibility and effectiveness of the service.

**A. Staffing Capacity**

Juvenile Justice Structure, in recent years, has been streamlined from the overall Community Based Corrections (CBC) branch under the Department of Justice and Attorney General (DJAG). While certain administration arrangements have been clearly separated to effectively implement mandated roles and functions of Juvenile Justice, human resource capacity including other operational aspects, particularly at the provincial level, still remain as Community Based Corrections. Community Based Corrections officers will continue to perform all CBC functions on Probation, Parole and Juvenile Justice, until such time the Juvenile Justice Structure becomes fully funded and specific reporting systems streamlined to Branch Heads under the three main functions at CBC headquarters.[9]

**B. Integrated Information System**

While individual agencies collect and record their own statistical information and data, there is no integrated sectoral information system to evaluate and analyse trends in crimes committed in urban areas. The lack of 'real time' data has contributed to poor planning and disbursement of scarce resources in the law and justice sector.

**C. Stakeholder Cooperation**

The lack of inter-agency cooperation has been a major hindrance to the successful working of the law and justice sector. The better coordination of sector planning and budgeting is essential and would go a long way towards improving the deterrence system in the country.

## VI. EXPLORING POSSIBLE SOLUTIONS

The establishing of Provincial Juvenile Justice Working Groups is important. This is a way to improve coordination and collaboration in dealing with juvenile issues in provinces to promptly and effectively process juveniles.[10]

There exist a number of community-based institutions that provide effective means of diverting juveniles away from the more formal state procedures. The most common is village courts, which are able to adjudicate disputes through reliance on custom and may hear minor civil and criminal matters but must have District Court approval to jail juveniles. Village Court Act 1989 (PNG), section 69-70. While community-based mechanisms are subordinate to official state justice regimes, it has been suggested that their ability to deliver swift justice, often more restorative in nature, within their immediate communities may be a valuable solution to the problem of diverting youths away from the potential harms of the formal State system.[11]

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[9] Ibid.
[10] Ibid.

Village Courts are also one of the services provided by the government, and they have a big role to play in the community setting. Most people respect the village court and see its usefulness and the role it plays in mediating many community disputes and finding solutions while incorporating Melanesian values.

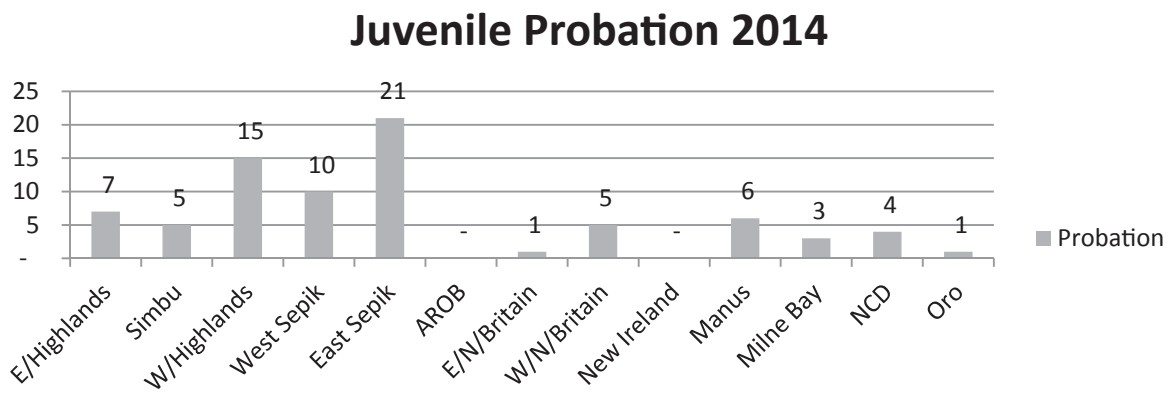
## VII. CONCUSION

Although the country has clearly detailed and differentiated the criminal justice system from the juvenile justice system, PNG still faces many difficulties in the implementation of justice administration outcomes and the NCD field office is no exception. The breakdown of the family structure and urbanisation and other factors have catapulted the increased rate of criminal activity in Port Moresby.

However, the NCD Provincial Field Office continues to strive to work together with other agencies regardless of the limited resources to ensure that restorative approaches are practiced and that rehabilitation and reintegration of offenders back into society is taking place and in the quickest time possible.

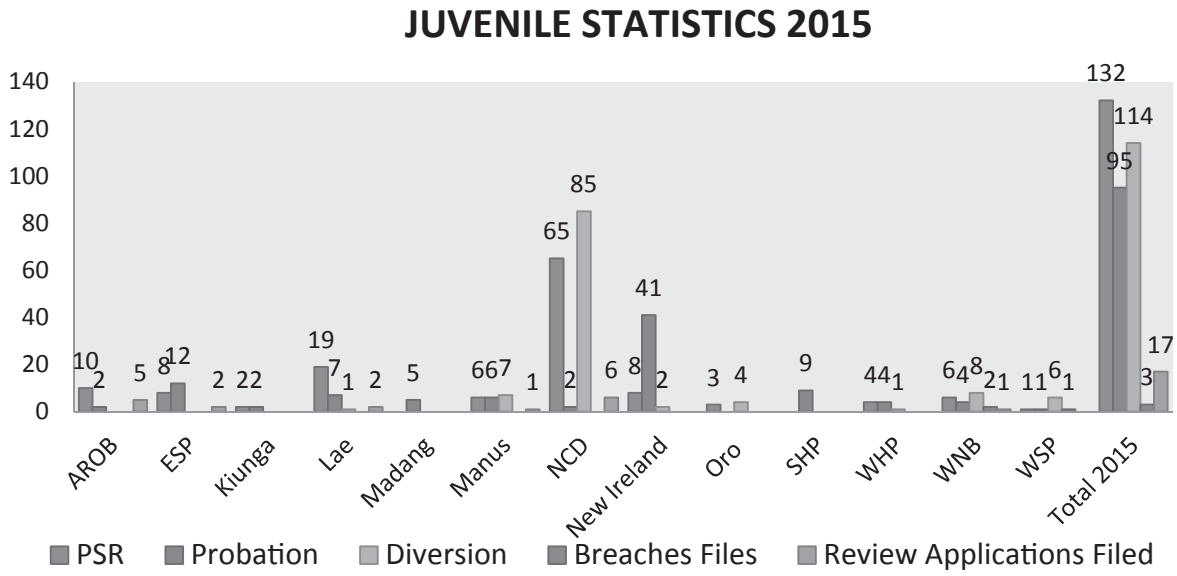
With the continued assistance from the government and non-governmental organisations, some challenges will be addressed in the near future as we continue to promote a safe, just and peaceful society for one and all.

### APPENDIX A




[11] Ibid.

**APPENDIX B**




Source Ref: Juvenile Justice Report 2014 and 2015 respectively

- Comparison of Juvenile's placed on probation supervision in 2014 and 2015 shows that probation supervision of juveniles has increased by 30.96%.
- Diversion has been performed, however, statistics do not clearly indicate at what point.
- Statistics indicated that Pre-Sentence Reports are regularly ordered by the courts.

# OVERVIEW OF PHILIPPINE JUVENILE JUSTICE AND WELFARE

*Jeza Mae Sarah C. Sanchez**

## I. THE JUVENILE JUSTICE AND WELFARE LAW

Republic Act No. 9344 or the "Juvenile Justice and Welfare Act" defines the Juvenile Justice and Welfare System as a system dealing with children at risk and children in conflict with the law, which provides child-appropriate proceedings, including programmes and services for prevention, diversion, rehabilitation, re-integration and aftercare to ensure their normal growth and development.

Instead of using the word "juvenile", Philippine laws made use of the word "child". As defined in R.A. No. 9344, "Child" is a person under the age of eighteen (18) years. While "Child at Risk" refers to a child who is vulnerable to and at the risk of committing criminal offences because of personal, family and social circumstances. Some of the examples mentioned in the law are: being abandoned or neglected, and living in a community with a high level of criminality or drug abuse.

"Child in Conflict with the Law" or CICL on the other hand refers to a child who is alleged as, accused of, or adjudged as, having committed an offence under Philippine laws.

A child can commit an act or omission whether punishable under special laws or the amended Revised Penal Code which is referred to as an "Offence". Under Republic Act 10630, offences which only apply to a child and not to adults are called "Status Offences". These shall not be considered as offences and shall not be punished if committed by a child. Examples of status offences include curfew violations, truancy, parental disobedience and the like.

Before R.A. No. 9344 was enacted, children at risk and CICL were treated much like adult offenders as when former President Ferdinand Marcos, Sr. signed into law the Judiciary Reorganization Act 1980 which abolished the juvenile and domestic relations courts. As such child offenders were subjected to the same adversarial proceedings as their adult counterparts.

As an offshoot of the United Nations Convention on the Rights of the Child (UNCRC), the R.A. No. 9344 intends to deal with these children without resorting to judicial proceedings. Instead of punishing juvenile offenders and treating them as criminals, these child offenders will be provided by the State and the community with assistance to prevent them from committing future offences.

## II. THE PHILIPPINES AS A JUVENILE JUSTICE ADVOCATE

As a signatory to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the most importantly the Convention on the Rights of the Child, the Philippines guarantees the protection of the best interests of the child in accordance with the standards provided for by these international laws.

In the Philippines, members of Congress had passed bills intended to make laws more consistent with the Philippines' advocacy on juvenile justice. As much as the Philippines should be concerned with a juvenile justice system in harmony with international policies, the dominant goal is to achieve a standard national policy on CICL rather than an accurate reproduction of an international model on CICL.

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R.A. No. 9344, one bill passed into law, institutionalized the promotion of the well-being of child and their families, involvement of parents and guardians, promotion of diversion, avoiding deprivation of liberty and protecting the privacy rights of children.

R.A. No. 10630 further emphasized child-sensitive justice policies focused on the best interest of the child. This principle has been first laid down in the Doha Declaration.

## III. THE PHILIPPINE JUVENILE JUSTICE SYSTEM

### A. Diversion and Intervention Programmes

The main features of R.A. No. 9344 are the diversion and intervention programmes. During the diversion process, the responsibility and treatment of CICL will be determined on the basis of his/her social, cultural, economic, psychological or educational background without resorting to formal court proceedings. If the CICL is found to be responsible for an offence, he/she will be required to undergo diversion programmes without resorting to formal court proceedings. During the intervention programmes on the other hand, they will undergo a series of activities to address issues that caused them to commit an offence. These may take the form of counselling, skills training, and education. The bigger the role these diversion and intervention programmes play in child behaviour development, the more acceptance and social legitimacy these programmes are likely to enjoy in resolving problems with CICL.

### B. Age of Criminal Responsibility and the Presumption of Minority

R.A. No. 9344 likewise raises the age of criminal responsibility from nine years of age under Presidential Decree 603 to a minimum of 15 years old. CICLs aged 15 and above are also exempted from criminal liability unless the prosecution proves that they acted with discernment — the capacity to distinguish right from wrong. These child offenders are also afforded all the rights of a CICL until he/she is proven to be eighteen (18) years old or older under the "presumption of minority" rule. In all proceedings, law enforcement officers, prosecutors, judges and other government officials concerned are mandated to exert all efforts at determining the age of the CICL.

### C. Restorative Justice

The concept of "restorative justice" as opposed to retributive justice has also been introduced by R.A. No. 9344. It espouses resolving conflicts with the maximum involvement of the victim, the offender and the community. It primarily aims to achieve reparation for the victim, reconciliation of the offender, the offended and the community, and enhancement of public safety. It also ensures that the child's rights will not be infringed when he/she admits to the offence.

## IV. THE PHILIPPINES' TREATMENT OF CICL

### A. Treatment of Children below the Age of Criminal Responsibility

If it has been determined that the child taken into custody is 15 years old or below, the authority which will have an initial contact with the child, in coordination with the Local Social Welfare Development Officer (LSWDO), has the duty to *immediately release* the child to the custody of his/her parents or guardian, or in the absence thereof, to the child's nearest relative. If they cannot be located or they refuse to take custody of the child, the CICL may be released to any of the following: a duly registered nongovernmental or religious organization, a barangay official or a member of the Barangay Council for the Protection of Children (BCPC), LSWDO, or the Department of Social Welfare and Development (DSWD).

Authorities which have initial contact with the child refer to law enforcement officers or private citizens apprehending or taking custody of the CICL.

If the LSWDO determines that the child is abandoned, neglected or abused by his parents, and the best interest of the child requires that he/she be placed in a youth care facility or "Bahay Pag-asa", the child's parents or guardians shall execute a written authorization for the *voluntary commitment* of the child. But if there are no parents or guardians, or they will not execute it, the LSWDO or the DSWD shall file the proper petition for *involuntary commitment*. Only those who are at least 12 years old can be committed to a youth care facility.

**B. Treatment of CICL Depending on Whether They Acted with or without Discernment**

The social worker using the discernment assessment tools developed by the DSWD will come up with an initial assessment which is without prejudice to the preparation of a more comprehensive case study report. The local social worker can either release or commit the child to a youth care facility if he/she is 15 years or below or above 15 but below 18 years old but who acted without discernment. However, if the child is above 15 years old but below 18 and who acted with discernment, diversion should be implemented.

**C. System of Diversion**

If the imposable penalty for the crime is not more than six years' imprisonment, mediation, family conferencing and conciliation, or other indigenous modes of conflict resolution in consonance with restorative justice shall be facilitated by the law enforcement officer or Punong Barangay with the assistance of the LSWDO or members of the BCPC. Both the child and his/her family shall be present in these activities.

In victimless crimes where the imposable penalty is not more than six years' imprisonment, the LSDO shall develop an appropriate diversion and rehabilitation programme, in coordination with the BCPC. Again, involvement of the child and his/her parents or guardians is a must.

Where the imposable penalty for the crime committed exceeds six years' imprisonment, diversion measures will only be decided by the courts.

The diversion programme shall cover socio-cultural and psychological services for the child which may include: reparation of the damage caused, counselling, participation in available community-based programmes, or in education, vocation and life skills programmes.

At the level of the appropriate court, in addition to the programmes cited, diversion programmes can also include reprimand, fine or institutional care and custody.

A diversion programme will depend on the individual characteristics and the peculiar circumstances of the CICL. Some of these factors are: the child's feelings of remorse; the ability of the parents or the guardians to supervise, the victim's view; and, the availability of community-based programmes for rehabilitation and reintegration of the child.

In case of failure to comply with the terms and conditions of the contract of diversion as certified by the LSWDO the offended party can institute the appropriate legal action. Also, if no diversion took place because the imposable penalty exceeds six years, or the child or his/her parents does not consent to diversion, the case shall be filed according to the regular processes.

**D. Release on Recognizance**

Where a child is detained, the court shall order the release of the minor on bail or release on recognizance to his/her parents and other suitable person. The court has also the option to transfer the minor to a youth care facility. In no case shall the court order the detention of a child in a jail pending trial or hearing of his/her case.

**E. Discharge of the Child in Conflict with the Law**

When at the time of the commission of the offence, the child is under 18 years old and subsequently he is found guilty of the offence charged, the court shall place the CICL under suspended sentence without need of application. Suspension of sentence shall still be applied even if he/she is more than 18 years old at the time of the pronouncement of his/her guilt.

The court shall impose the appropriate disposition measures in consideration of the various circumstances of the CICL. Upon recommendation of the social worker who has custody of the child, the court shall dismiss the case if it finds that the objectives of the disposition measures have been fulfilled.

**F. Confinement of Convicted Children in Agricultural Camps and Training Facilities**

After conviction and upon order of the court to serve his/her sentence, a CICL may in lieu of confinement in a regular penal institution, serve in an agricultural camp and other training facilities that may be

supervised by the Bureau of Correction, in coordination with the DSWD.

**G. Competent Authority**

Family Courts have exclusive jurisdiction over cases involving children in conflict with the law. Jurisdiction is vested with Regional Trial Courts in places where there are no family courts.

## V. THE PHILIPPINES' INSTITUTIONAL TREATMENT OF CICL

Republic Act No. 10630 or the Act Strengthening the Juvenile Justice System provided for the establishment of an Intensive Juvenile Intervention and Support Center for children (IJISC) under the minimum age of criminal responsibility in "Bahay Pag-asa".

The "Bahay Pag-asa" is a 24-hour child-care institution funded and managed by local government units (LGU) and licensed and/or accredited non-government organizations. Children in conflict with the law who are 15 to 18 years old shall be housed in these temporary shelters while awaiting trial and the judgement to be rendered by the courts.

The law also clarified procedures for children below the minimum age if criminal responsibility, including those who commit serious offences. It provides that any child aged 12 to 15 who commits a serious offence punishable by more than 12 years' imprisonment should be deemed a neglected child under the Child and Youth Welfare Code. As a neglected child, the minor should be placed in the IJISC. The same is true with a child who was previously subjected to a community-based intervention programme. He shall also be deemed a neglected child and as such shall undergo an intensive intervention programme supervised by the LSWDO. The child will undergo appropriate intervention programmes through the written authorization for voluntary commitment of the child as executed by the parents or guardians or through a petition in the court for the involuntary confinement filed by the LSWDO or DSWD.

The "Bahay Pag-asa" will be managed by a multi-disciplinary team composed of a social worker, a psychologist/mental health professional, a medical doctor, an educational guidance counsellor, and a member of the Barangay Council for the Protection of Children (BCPC). They will come up with individualized intervention plan for the child and his/her family.

Based on the recommendation of the multi-disciplinary team of the IJISC, the LSWDO or the DSWD, the court may require the parents of the CICL to undergo counselling or any other intervention that would advance the best interest of the child.

## VI. THE PHILIPPINES' COMMUNITY-BASED (NON-INSTITUTIONAL) TREATMENT OF CICL

**A. Who can avail?**

One of the disposition measures that can be availed of by a *CICL under suspended sentence* is Community-based Rehabilitation wherein he/she shall be released to parents, guardians, relatives or any other responsible person in the community. The LSWDO shall supervise the CICL in coordination with his/her parents/guardian. Examples of these programmes are: competency and life skills development; socio-cultural and recreational activities; community volunteer projects; leadership training; spiritual enrichment; and, family welfare services.

A child under the *minimum age of criminal responsibility* shall also be subjected to a community-based intervention programme supervised by the LSWDO.

**B. Cooperation between Community-based Treatment and Institutional Treatment**

If the best interest of the child requires, the CICL shall be referred to a youth care facility or 'Bahay Pag-asa' managed by LGUs or licensed and/or accredited NGOs monitored by the DSWD.

As mentioned previously, a CICL who was previously subjected to a community-based intervention programme can be deemed a neglected child. As such, he/she shall undergo an intensive intervention programme supervised by the LSWDO.

## VII. THE PHILIPPINES' SOCIAL INTEGRATION OF CICL

Aftercare support services shall be made to prevent re-offending. These will be given for a period of at least six months. These services could include life skills development, livelihood programmes and membership to existing youth organizations. The aftercare support services shall be provided by the LSWDO. However, licensed and accredited non-government organizations may also be tapped. As with the previous programmes, it will require active participation of both the child and his/her parents or guardians.

The ultimate objective of providing the children in conflict with the law with interventions that will improve their social functioning is for them to be eventually reintegrated to their families and to their communities as well.

## VIII. THE PHILIPPINE JUVENILE JUSTICE SYSTEM

In its effort to articulate the Juvenile Justice System in laws, rules and guidelines, the method of its proponents has always been experimented serving as a working hypothesis which is continually being retested in the laboratories of youth detention homes.

Throughout the history of its implementation, R.A. No. 9344 and its progeny have been hailed as a medium of hope for CICL. During such times, the Juvenile Justice System also faced criticism and difficulty. As such, the Juvenile Justice System of the Philippines is at odds with itself as to whether or not the present system warrants reconsideration. Today, the Philippines should see this exigency.

# REPORTS OF THE COURSE

## *GROUP 1*
## DEALING WITH CHILDREN: DIVERSION, COURT ACTION, COOPERATION

| | | |
|---|---|---|
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### I. EXECUTIVE SUMMARY

This paper discusses the various aspects of juvenile justice systems which are in place in different countries, looks into the shortcomings in these systems and finally comes up with certain recommendations for the improvements in the systems in all these countries which are in consonance with the standards provided by the Beijing Rules of 1985.

One of the main themes of juvenile justice systems is diversion from the normal justice procedures employed by the juvenile or family courts. The report will take an account of the diversion mechanisms at different stages that are in vogue in these countries. The procedures which are adopted by the courts while dealing with juveniles are discussed in the second part, followed by an account of the inter-organizational cooperation between different agencies involved in the juvenile justice system. The next part discusses the role of the community and the private sector in helping the government to improve the situation of juvenile offenders and providing the best possible environment for the rehabilitation and social reintegration of juveniles.

The final part of the report is on recommendations and suggestions on the above-discussed themes.

### II. INTRODUCTION

A story is told about an ex-offender returning home from a distant prison. Prior to his release, he wrote to his wife as he was not sure whether he was going to be accepted or not. In his letter, he said that if they are to accept him, tie a yellow ribbon on the old oak tree. Upon his release and arrival at the front of their yard, he saw the oak tree with not one but a hundred yellow ribbons tied on its every branch.

And such was the concept of the "Yellow Ribbon". From a story that introduces forgiveness and acceptance springs forth the method that engages the community in giving ex-offenders, parolees and probationers, a second chance at life.

The rehabilitation and social reintegration approach is far better than the retributive approach, and this is especially true with juvenile offenders.

### III. SIGNIFICANCE OF THE STUDY

Research suggests that children and adolescents are much more responsive to environmental pressure since they are typically less experienced and therefore have a different perception about what is right and what is wrong.

Further, guidelines from the United Nations on juvenile justice expressly provide for access to education, assistance, social support and normal social roles.

As such, this paper will examine the strategies and procedures that promote such reconnection, including rehabilitative diversion measures, fair access to court processes, expansion of access to basic needs and opportunities that will support not just the reintegration of juveniles back to the society, but more importantly the normal growth of children in the community.

## IV. DIVERSION

### A. Definition

Article 11 of the Beijing Rules describes how to conduct diversion. According to the commentary to Article 11, diversion—which involves removal from criminal justice processing and, frequently, redirection to community support services—is commonly practiced on a formal and informal basis in many legal systems.

Diversion may be used at any point of decision-making—by the police, the prosecution or other agencies such as the courts, tribunals, boards or councils. It may be exercised by one, several or all authorities, according to the rules and policies of the respective systems and in line with the Beijing Rules. The consensus reached is that there can be several types of diversion at each stage of juvenile justice procedure.

### B. Basis of Diversion

In most of the countries diversion is based on the law except Cote d'lvoire and Pakistan where its use is more of something informal. Most of the countries have specific rules to perform diversion. In each country diversion is performed for all offences but in cases of murder and drugs, diversion is not allowed, In Pakistan in case of a compromise between the two parties' diversion can be adopted in any offence, in some cases at the investigation level by police and in some cases by the court.

### C. Competent Authorities and Procedure of Diversion

Judges, courts and officers can perform diversion in different countries. In Japan, a judge can dismiss a case without ordering a Family Court Investigating Officer (FCIO) to investigate. Most cases are minor offences. A judge can also dismiss a case as a result of a social investigation by an FCIO. In the social investigation, an FCIO interviews juvenile and his/her custodian. First of all, the FCIO confirms whether or not the facts of delinquency are true from the juvenile and his/her custodian using case records. If the juvenile and his/her custodian admit the delinquency, an FCIO continues to interview the juvenile, investigates his/her life history, family and items in relation to school/occupation etc. After that, certain measures can be taken for the purpose of preventing recidivism depending on the possibility of reoffending. There are mainly four educative methods: (a) On-site learning: a judge orders the juvenile to participate in community service activities such as cleanup and nursing care for the purpose of forming a bond with the community and enhancing his/her self-esteem, (b) Group Work: for the purpose of changing the parent-child relationship for a better environment, (c) Enhancing knowledge: (i) drug education/sex education by a medical officer of the Family Court; (ii) Lesson on traffic rules: car accidents, driving without a license and bicycle accidents. (iii) Classes to consider the harm of shoplifting or bicycle theft, (d) Employment assistance: instructions on writing a resume or on improving interview skills.

In some countries, diversion is performed by the officers of juvenile police departments, with the mutual constant of the parties. In other countries, the prosecutor receives the police report, and then decides. Still in other countries, only the courts perform diversion. In fact, the courts may only proceed with reconciliation if the offences committed are not substantially of a personal or private nature and not aggravated in degree. The courts may in the process of promoting reconciliation in an amicable way consider the following terms: (i) payment of compensation, (ii) the giving of an apology in any appropriate manner, (iii) the giving of a promise or undertaking not to reoffend, or to respect the rights and interests of any victim, (iv) mandatory attendance at any counselling or other programme aimed at rehabilitation, or (v) a promise or undertaking to alter any habits or conduct, such as the consumption of alcohol or the use of drugs.

In Cote d'Ivoire, there are no effective procedures for diversion because the Penal Procedure Code (PPC) does not take this system into account.

**D. Link with Recidivism**

No countries in the group have official data to show the relation between diversion and recidivism. In Brazil, the diversion of juveniles can be linked to the hypothesis of recidivism when the offender does not understand it as a second chance, but as impunity. Thus, the adolescent thinks that if he/she commits another crime, it will not have consequences. There is a feeling that taking a very lenient view with the offender may enhance recidivism.

In some other countries, there is the same argument that the function of diversion serves as an avenue for recidivism. However, this notion is not satisfactorily supported because there is no exact data to prove this statement. In some other countries, diversion is considered as working well.

**E. Analysis**

Diversion in each country has different results and in some systems it works well because diversion is conducted on the basis of law and is very effective for rehabilitation of the juveniles. But, generally speaking, diversion in the case of juveniles is a better option for the effective rehabilitation of juveniles.

**F. Court Procedures in the Juvenile Justice System**

Court procedure is a necessary mechanism in the juvenile justice system. The Beijing Rules provide *Standard Minimum Rules* expected from any ratifying state when handling juveniles in such mechanism. The *Minimum Standard Rules* shall be applied without restrictions of any kind, form or color. The requirements are as follows:

1. Competent Authority to Adjudicate

*Competent authority to adjudicate* is seen in the Beijing Rules as the first issue that must be taken into consideration when a juvenile offender has not been diverted from the investigating agencies.

Most countries have a court specifically authorized to handle juvenile matters. For example, in Japan and the Philippines, it is the *Family Court* whereas other countries such as Brazil, Cote d'Ivoire and Jordan have courts such as *Child and Youth Court*, *Court of Children* and *Juvenile Court,* respectively.

On the other hand, Pakistan does not have a juvenile court even though it is enshrined in its laws.

The second issue considered by the Beijing Rules is that the juvenile must be dealt with by the competent authority according to the principle of a *fair and just trial.*

The principle of fair and just trial is exercised in all countries as the right of the child. Such right includes the right to be innocent until proven guilty, the right to be present when being tried, the right of appeal to, or review by, a higher court and so forth.

The third issue considered by the Beijing Rules is that *proceedings shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express her- or himself freely.*

Japan and PNG take a leading role on this requirement as their courts employ a juvenile friendly concept. For example, the judge or the magistrate sits at eye-level, as opposed to the adult court, where the judge is seated above the defendant. The setup of the court is designed in a way that the juvenile feels at ease without pressure. Nevertheless, most countries recognize the importance of having a closed court.

2. Legal Counsel, Parents and Guardians

On the matter *of legal counsel, parents and guardians*, the Beijing Rules state that *throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.*

All member countries have embraced this issue as a right of the child. The child is given such right in writing on the opportunity for legal counsel and so forth. Most countries make it mandatory that the

parents and/or guardians are present in every enquiry stage during the police interview. This right is also exercised in the various courts.

3. Social Inquiry Reports

On the theme of *social inquiry reports* the Beijing Rules state that *before the competent authority (courts) renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case.*

All the country members boldly had the probation officer (PO) or social worker (SW) taking the leading role in this matter except Japan who has the Family Court Investigating Officer (FCIO).

4. Various Disposition Measures

On the question of *various disposition measures* the Beijing Rules emphasize that *a large variety of disposition measures shall be made available to the courts, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures include care, guidance and supervision orders; probation; community service orders etc.*

This emphasis has been abided by different country members. For example, the Fiji courts have alternatives to institutionalization such as the opportunity to have the matter discharged; order of fine/compensation or cost (Parents or guardian are ordered by the court to pay on behalf of the juvenile); probation orders; order the parent/guardian of the offender to give security for the good behaviour of the offender in a period of time; a care order in respect of the offender or imprisonment term.

The Philippines interestingly has a detailed alternative such as having the court exercise its discretion in imposing other diversion methods such as restitution of property; reparation of the damage caused; indemnification for consequential damages; written or oral apology; care, guidance and supervision orders; counselling for the child in conflict with the law and the child's family; attendance in trainings, seminars and lectures; participation in available community-based programmes, including community service and so forth up to institutional care and custody.

Nevertheless, it is noted that all countries have the institutional care and custody as the last option available when other methods are exhausted.

5. Institutionalization as a Last Resort

On the issue of *last possible use of institutionalization*, the Beijing Rules clearly highlight that *the placement of the juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.*

This is reflected by the fact that most countries mandate the use of institutionalization as the last option. For example, in Papua New Guinea the courts can impose various sentences depending on the nature of the case and the law. Punishment such as non-custodial sentences where probation, community work, fines or good behaviour bonds are available in return for custodial sentences.

6. Avoidance of Unnecessary Delay

On the matter of *avoidance of unnecessary delay*, the Beijing Rules state that *each case from the outset shall be handled expeditiously, without an unnecessary delay*. In all member countries, this issue is regarded as a right of the child. There is no compromising on this issue. The child has the right to have a trial before a court of law begin and conclude without unreasonable delay.

7. Records

On the subject of *records*, the Beijing Rules state that *records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.* It further states that *the records of juveniles shall not be used in adult proceedings in subsequent cases.*

In Fiji, the juvenile offenders' fingerprints cannot be taken without an order of the courts. The court

will only issue such order if and when necessary. Other countries have their strict confidentiality rule adhered to without hesitation.

8. Need for Professionalism and Training

Firstly, regarding the *need for professionalism and training*, the Beijing Rules state *that professional education, in-service training, refresher courses and other appropriate modes of institution shall be utilized to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases.*

To begin with it is important to note that seventeen countries are represented in the *164th UNAFEI International Training Course* on *Effective Measures for Treatment, Rehabilitation and Social Reintegration for Juvenile Offenders*. This is testimony to the participating and observing countries' intention to learn not only from one another but from the leading countries on this issue.

Secondly regarding the *need for professionalism and training*, the Beijing Rules state that *the juvenile justice personnel shall reflect the diversity of juveniles who come into contact with the juvenile justice system. Efforts shall be made to ensure the fair representation of women and minorities in juvenile justice agencies*. In most countries women and minorities are actively represented in the juvenile justice agencies.

**G. Inter-Organizational Cooperation among Related Agencies**

Inter-organizational cooperation between or among related agencies continues to play an integral part in the efficient and effective administration of juvenile justice procedures. While some of the things are not common, there are also many things in common. The police play a vital role in apprehension of juvenile offenders and are usually the first point of contact between the juvenile offender and the justice system. The various organizations involved in this process are police, the courts, the prosecution, the probation officers, the correction facilities and the rehabilitation centres.

First and foremost, Japan: Police, prosecutors, family courts, probation offices, juvenile classification homes, probation offices, child consultation centres and children's self-support facilities are the organizations involved in the process. Cooperation between all of them is necessary for the smooth functioning of the system.

The type of cooperation in Côte d'Ivoire is vertical. At the top the system of procedure, there are public prosecutors and children's judges for matters of juveniles. A police officer submits his investigation report to the public prosecutor who is the director of penal procedure. The officer cannot do anything without the prosecutor's advice. When a police report is sent to a prosecutor, he refers it to the children's judge if he decides to initiate court proceedings, otherwise, he dismisses the case.

Then, the children's judge investigates, and he can direct the police officer or social worker to collect any information with regard to the offence. In cases of murder, the children's judge refers the case to the General Attorney, and in other cases he can refer the case to a public prosecutor also. If he doesn't refer to the magistrate, he tries the case in his Chamber of council. In the second case, it's the Children's Court which deals with it. However, there is cooperation which is instituted by law and current practices.

In Papua New Guinea the key players in the Juvenile Justice System include the police, courts, probation/juvenile justice services, remand centres and corrective institutions. In the juvenile justice system, one system cannot work without the other. They are interdependent. There are specific policies and guidelines that key players of the juvenile justice system are to work together in improving justice for juveniles in the country. This also goes in line with the international rules. Nothing is considered legal until there are written documents. These is also a need for the proper court procedures. From the point of arrest to the point of sentencing from the courts, certain actors are engaged such as probation officers, or juvenile justice officers.

The court information is widely shared. Reports such as the social enquiry reports provided by the Probation Office to the courts are only for the Courts and the Probation Services, and they are inaccessible to other stakeholders to protect the identity of the offender.

There are monthly or quarterly meetings that are held to discuss any grievances faced by each player

in the delivery of the juvenile justice services. This meeting is usually referred to as the Court User Forum. Also, there is the formation of the Provincial Juvenile Justice Working Group (PJJWG) where all stakeholders also come to meet and discuss. This meeting is held quarterly, and there are PJJWGs in almost all provinces.

In Brazil, police, prosecution, child and youth courts, social work centres, clinics where treatment against drugs takes place and juvenile prisons are the organizations that require inter-organizational cooperation in regard to the juvenile justice system. There is no law that specifies the need for inter-organizational cooperation among the related agencies. The communication with other agencies is performed using email, letters of notification or reports by a specific sector in the prosecution office.

In Jordan, there are neither laws nor policies that specify a need for inter-organizational approaches between agencies. Regular meetings are held among agencies.

For the Republic of Fiji, the different stakeholders that are vital in juvenile justice procedures are the police, the Director Public Prosecutions, the Legal Aid Commission, the judiciary, social welfare, and Fiji Correction Service, and these agencies are all stipulated by the Constitution of the Republic of Fiji; the Criminal Procedure Decree; the Juvenile Act; and the Probation Act. Engaging stakeholders during the juvenile justice system is not fixed. It is based on when the need arises. Any engagement will include written and/or oral communication.

Agencies that are involved in the juvenile justice system in Pakistan have a certain level of cooperation between them, and it is a must for the smooth functioning of the system. Although these departments are independent in working with their own chain of command, at the same time they are somewhat dependent on each other for the smooth running of affairs. Formal communication is done through official written correspondence on a regular basis as well as periodic meetings in which everything between them is reviewed. Informal communication is between the officers at their own ends on a regular basis.

The police, after completing the investigation, submit the case to the court through the prosecution, and the court starts the trial and summons the witnesses. Pretrial detention is also permitted by the court. During this time the offenders are kept either at the police station or later at the prison so in this loop all the organizations have to work with each other and cooperation is a must. At the trial stage, the summoning of witnesses desired by the court is the responsibility of the police; thus, cooperation between the two is required. In Pakistan, there are no rehabilitation centers or halfway houses that are run by the government for the released offenders before sending them to the community.

While in most countries, juvenile laws provide for cooperation between agencies in the justice system, the Philippine Juvenile Justice Act also provides for cooperation among agencies engaged in the protection of children and those involved in providing basic and technical education to them. Primarily, this kind of collaboration aims to come up with programmes that prevent children from committing crime and delinquency.

Nonetheless, the cooperation continues even in institutional treatment of juveniles. When children in conflict with the law are taken into custody or detained in rehabilitation centres, they are provided the opportunity to continue learning under an alternative learning system with basic literacy programme or non-formal education accreditation equivalency system.

Although there is existing inter-organizational corporation between agencies as presentenced in most countries, most still believe that a lot more can be done to improve the inter-organizational systems in their respective countries. Under the Riyadh Guidelines in Part III of General Prevention 9(b), (c), (f), (g), there has to be inter-organizational cooperation among all relevant agencies for the juvenile justice system to function.

**H. Forging Public and Private Partnerships in Dealing with Children**

1. Point of Agreement

The point at issue here is not whether cooperation between and among government agencies and the private organizations is a must—the members all agree that it is. The question rather is, what are the

existing ties of the government agencies of Japan, Brazil, Fiji, Papua New Guinea, Pakistan, Cote d'Ivoire, Jordan, and the Philippines with the private sector or the community in general, that each of the participants can learn from.

2. Spirit of Volunteerism in Japan

The following community-based correction system provides a picture of the public and private partnership backed primarily by a fervent spirit of volunteerism in Japan:

*(a) Volunteer Probation Officers (VPOs)*

VPOs are citizens commissioned by the Minister of Justice, who cooperate with probation officers in providing various rehabilitation services to offenders. Their main activities are (i) to assist and supervise probationers and parolees; (ii) to coordinate the social circumstances of inmates; and (iii) to promote crime prevention activities in the community. They do not receive salaries: only a certain amount of their necessary expenses is reimbursed.

*(b) Offenders Rehabilitation Facilities (Halfway houses)*

Halfway houses in Japan are officially termed Offenders Rehabilitation Facilities. They accommodate probationers, parolees, or other eligible offenders and provide them with necessary assistance for their rehabilitation such as: (i) help in obtaining education, training, medical care, or employment; (ii) vocational guidance; (iii) training in social skills; and (iv) improving, or helping them adjust to their environment. Most halfway houses are run by juridical persons for Offenders Rehabilitation Services. The government supervises and provides financial support to such juridical persons and other entities that operate halfway houses. The government exempts them from taxes and offers tax deductions to individuals who donate to these organizations.

*(c) Rehabilitation Aid Associations*

Rehabilitation Aid Associations exist throughout Japan. They provide offenders with temporary aid, such as meals or clothing, and/or engage in "co-ordination and promotion services" for Offenders Rehabilitation Facilities, Volunteer Probation Officers Associations, and other volunteer organizations. "Co-ordination and promotion services" include providing subsidies, textbooks for training, and tools and materials for crime prevention activities.

*(d) Volunteer organizations or forms of volunteering*

There are other notable volunteer organizations or forms of volunteering in Japan, such as (i) the Women's Association for Rehabilitation Aid; (ii) Big Brothers and Sisters (BBS) Associations; and (iii) cooperative employers. The BBS (Big Brothers and Sisters Movement) is a volunteer activity in which mentors spend time, tutor, and engage in social activities with juveniles. It was named in honor of the Big Brothers Movement and Big Sisters Movement which began in the United States about 100 years ago.

*(e) Commissions of Correctional Guidance*

Family courts in Japan have community-based institutions which are called Commissions of Correctional Guidance. These institutions are mostly used in test supervision (Juvenile Act, Article 25).

By test supervision, a family court selects an appropriate volunteer, using the investigation report of the Family Court Investigating Officer (FCIO) which is based on the problem the juvenile has or the challenge the juvenile should overcome. The family court puts the juvenile under the care of a private volunteer for some time and commissions the volunteer to provide correctional guidance, and observes the juvenile's living conditions. An FCIO also provides his or her expertise in the commissioning of correctional guidance by giving advice to the juvenile and the volunteer.

The private volunteers who participate in correctional guidance commissions are various individuals, including managers of construction businesses, farming, and restaurants. The family court scrutinizes the background of the volunteer, and if found to be fit, they are permitted to register as an institution or a person to which correctional guidance is commissioned. The government provides only the cost of juveniles' meals and the office expenses which are allotted by law.

Rather than making static observations of the juvenile, these systems institutionalized in Japan provide

a dynamic process of placing the juvenile in environments conducive to educational and rehabilitative approaches.

## V. RELIGIOUS INSTITUTIONS AND REMAND CENTRES OF PAPUA NEW GUINEA (PNG)

The Juvenile Justice Act 2014 of PNG stipulates the following mode of detaining juveniles: (a) a juvenile section of a corrective institution, (b) a juvenile institution; and, (c) a remand centre. Due to a lack of human resources in the government, the operations of juvenile intuitions and remand centres are relegated to religious entities. Through a Memorandum of Understanding (MOU) between the Department of Justice and the Catholic and Anglican Churches, the government gives a quarterly grant to the institutions for daily expenses. The churches provide the facilities and human resources for the management of the institutions. They are also tasked to send at the end of each month, reports such as statistics and financial reports.

## VI. BRAZIL'S *CORONA*

Providing occupations to offenders is crucial to enhancing their self-reliance and, in that process, also reduces the probability of recidivism. Bearing this in mind, Brazil has encouraged multi-agency cooperation with the private sector by encouraging them to invest in prison facilities.

In the State of Sergipe, Corona, a manufacturer of washroom showers has established one of their manufacturing yards inside a prison and has been hiring male inmates to assemble the showers. Females, on the other hand, learn handmade crafts. A bank also built a facility near the prison so that the salaries of inmates can be deposited therein and withdrawn by their families.

Juvenile offenders are also taught livelihood skills such as brick laying, baking, hairdressing, automotive, playing of instruments and operating the computer, not just by the prison staff but by private entities as well.

## VII. FIJI'S TRYING AND TYING THE YELLOW RIBBON

Fiji institutionalized the yellow ribbon initiative. The yellow ribbon initiative provides opportunities for the inmates to be employed in the private sector with certain conditions. Currently there are inmates with mechanical skills working in renowned companies such as ASCO Motors, a subsidiary of Toyota Tsusho Corporation of Japan. The country also integrates the concept of religion in their rehabilitation efforts. Through encouraging religious organizations to conduct activities inside the jails, inmates practice their faith among members of the community.

## VIII. DE-RADICALIZATION IN PAKISTAN

Although the role of non-government organizations (NGOs) in Pakistan is too small compared to the magnitude of intervention needed, several points bear mentioning. A number of these are working in the education and health sectors in some poor communities. The law which regulates the working of these organizations is the Registration Act which binds companies to get registered with the government authorities.

Some rehabilitation centres in the Northern Region of Pakistan are run by the military in collaboration with the community, and these cater to radicalized segments of the area who were arrested in military operations. Some individuals and organizations are providing legal assistance to the inmates by bailing them out of these places.

Religious leaders visit the correctional facilities on a regular basis to impart teaching to the inmates for education and counselling purposes. But there is much room for intervention from the community and the private sector to help the government in this regard.

## IX. JORDAN AND COTE D'IVOIRE

The same is true with Jordan and Cote d'Ivoire wherein a few NGOs are involved in the rehabilitation efforts for offenders to include juveniles. Most of these NGOs though are involved in educational efforts.

## X. IDEALS AND LAWS: THE PHILIPPINE SETTING

Non-stock and nonprofit NGOs operated or organized exclusively for charitable purposes are generally exempt from taxes in the Philippines. Donors of these organizations also enjoy certain tax privileges like deductibility of donations and exemption from donor's taxes regardless whether they are individuals or corporations. This kind of environment fosters the growth of NGOs, which provide regular religious and skill-enhancement services to inmates to include children in conflict with the law incarcerated in youth detention homes and regional rehabilitation centres. The social security system of the country also provides services to detained inmates.

The Philippines recently strengthened the implementation of recognizance, or the process of releasing persons in custody or detention that are unable to post bail due to abject poverty. The court shall allow the release of the accused on recognizance to the custody of a qualified member of the barangay, city or municipality where the accused resides.

Perhaps what is uniquely from the Philippines is the prime importance its constitution puts on the family as the basic social institution. Statutes such as labour and personal laws are replete with provisions supporting the protection of families like ruling out divorce, mandatory family planning services by employers to their employees, solo-parent leave, etc.

The constitution likewise provides for the responsibility of the State in providing basic education to all. Schools, whether public or privately-owned, are mandated to provide individualized educational schemes for children manifesting difficult behaviour to include CICL. The mass media is also enjoined to promote child rights and delinquency prevention by relaying consistent messages through a balanced approach. The Sangguniang Kabataan (Youth Council) is given the right and responsibility to propose measures to the local councils for the protection of children, juvenile intervention and diversion programmes in the community.

## XI. CONCLUSIONS AND RECOMMENDATIONS

The treatment, rehabilitation and social reintegration of juveniles into the society needs a holistic approach on the part of all the stakeholders of the criminal justice system as well as active participation on the part of the community and the private sector.

Thus, the group proposes the following:

1. Diversion should be enlightening and educational where juveniles will learn responsibility accountability and empathy;

2. An objective parameter should be established to determine the effectiveness of diversion, to include a gathering of data regarding recidivism;

3. The spirit of patriotism through volunteerism among the citizenry should be fostered;

4. There should be sharing of information among government agencies through formal meetings, informal channels and an integrated information system;

5. A seamless flow of information between private entities and government agencies and stricter measures need to be in place to ensure full implementation of government subsidies;

6. Laws should be enacted to provide tax incentives for corporations or individuals employing ex-offenders, considered as persons with special needs;

7. The private sector should be encouraged to consider cutting its labour costs by expanding their manufacturing workshops inside prisons, as they realize their corporate social responsibility and cause-related marketing;

8. Legislators should pass laws which protect the family as the social fabric binding the ties of the community;

9. The educational system should be strengthened through the efforts of the state hand-in-hand with private institutions and the media;

10. The youth must participate in the formulation of policies and in governance of the community; and

11. International organizations such as UNICEF and others should play a more active role and support the resource-constrained countries to strengthen their social sectors to deal with the issues of juveniles in a more appropriate manner.

Lastly, this paper could go on and on in enumerating how a certain country handles diversion, court action and inter-organizational cooperation. After all, this programme is certainly intended to gather participants and learn from each country's best practices.

And yet, just like the astonishment that the released prisoner felt in learning that his wife filled the oak tree with yellow ribbons, so is the amount of surprise that each participant had upon knowing their respective communality with the others.

All countries experience problems, set-backs and detours. Yet, each also shares the same aspiration—a future secured by a justice system which fosters inclusive prosperity and protects the most vulnerable in society, the children.

## *GROUP 2*
## THE IDEAL JUVENILE JUSTICE MODEL: KEY INNOVATIONS AND PRACTICES

| | | |
|---|---|---|
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### II. INTRODUCTION

Group 2 agreed to base its discussion on the following agenda: (1) Procedure for Appropriate Treatment; (2) Risk/Needs Assessment and Treatment Programmes; (3) Reintegration; and (4) Inter-Agency Cooperation and Governmental Support.

### III. SUMMARY OF THE DISCUSSIONS

#### A. Procedure for Appropriate Treatment

The participants noted that there were various challenges faced within their jurisdictions, which included lack of formalized juvenile justice systems, evidence-based assessment and rehabilitation treatment. However, all the countries agreed that appropriate treatment should include specialized juvenile police and prosecutors, family/juvenile courts, juvenile rehabilitation centres and community supervision (i.e., probation officers and volunteer probation officers). All members agreed that the aforementioned components were important components of an ideal model and would be immensely beneficial for the care and treatment of juveniles in the various countries.

Some challenges were asserted by participants as acting as barriers to implementing the ideal model of juvenile justice due to lack of budget, lack of skilled human resources and lack of appropriate legislation.

Victims' rights were underscored by the group members as an important element in juvenile justice and should be considered during the whole process. The incorporation of victims was asserted to start at the police level and ending with the reintegration process.

#### B. Risk/Needs Assessment and Treatment Programmes

It was asserted that assessment is the collection and analysis of information which can be used for treatment planning, action/intervention and review. The five "W's" questions were also asserted as being an important component to assessment, as well as the performance of S.W.O.T analysis for the assessment of juveniles in institutions and by probation officers in the community, which enable us to identify the

critical factors and internal environment (strengths and weakness) and compared with the critical factors in the external environment (opportunities and threats). The latter was noted by the group as being beneficial in settings where there are no standardized actuarial tools as it is a simple method which does not require comprehensive technical knowledge (e.g., psychometric skills). There were participants who noted that in their countries there were no standardized tools and this approach would be beneficial.

Risk/needs assessment was noted as guiding the appropriate treatment intervention for juvenile offenders. A participant underscored the fact that risk assessment helps people, their personalities and social structures. Assessment is also aimed at tapping into the reason for offending. Furthermore, it was explained that interviews and tools are administered to ascertain the various focus areas for treatment as well as the level of intervention. For example, low risk juveniles could be treated in the community; on the other hand, high risk juveniles could be treated in an institution to ensure the best outcomes for various categories of juveniles.

The group agreed that risk assessment was an important element of the ideal model and some participants shared that there were various levels of risk assessment implemented in their jurisdictions. For instance, in the Japanese setting, life skills training for drug offenders, violent offenders and sex offenders were asserted as being guided through assessments of individuals who should receive the respective training both within institutional settings and community settings.

Members discussed the various treatment approaches available in their countries. They included: life skills training with a focus on criminogenic risk/needs, emotional development training and vocational training. The argument was made that interventions offered to juveniles were to be based on best practice.

Various novel approaches to treatment were discussed including initiatives to promote juveniles' self-reliance and the ability to make their own decisions. Examples of novel approaches included the Japanese Training Schools practice of *seijinshiki* (i.e., a rite of passage ceremony), which promotes exercise of agency as it fosters self-awareness as an adult, which is in line with the Good Lives Model. Another novel approach was the Fijian approach to including various members from the juveniles' community including village elders, police officers and social welfare officials in the process of diversion and treatment.

**C. Reintegration**

Reintegration was agreed as the process through which a person is integrated into the social context again after a period of deprivation of liberty, rehabilitation or treatment, in particular, for having committed a crime. The purpose of sanctions and sentencing and treatment programmes is the successful reintegration after release. Ideally reintegration should include the person being reintegrated with the greatest possible naturalness to live in society as someone who has reinvented him- or herself.

The participants discussed various challenges to reintegration faced in their countries, and they include: the absence of material and psychological and social support at the time of their release. Some offenders on the other hand may find it very difficult to break the cycle of release and re-arrest (i.e., may recidivate).

Another noted challenge was the fact that the transition period from detention to the community can be particularly difficult for juvenile offenders, and it may be worsened by the stress of being supervised in the community and the stigma towards ex-offenders within communities. Other challenges include finding suitable accommodation with very limited means, managing of finances with little or no savings until they start to make money, access to a range of services and support for specific needs. Research on the variables that influence successful reintegration reveals the correlation existing between employment, housing, addiction treatment and social network support. The aforementioned barriers to successful reintegration must be taken into account when designing and implementing support programmes.

In some countries, the percentage of convicted criminals who have at least a previous conviction or have multiple prior convictions is high. These high rates of recidivism involve significant costs to society, both in terms of financial and public safety. Community safety necessitates that governments and communities develop effective interventions to assist ex-juvenile offenders as they reintegrate into the community

and desist from crime. Well-managed resettlement programmes are achieving wider acceptance and can offer an effective way in terms of costs to prevent crime.

Juveniles face challenges gaining stable employment. These may include personal factors (e.g., low self-esteem, low motivation, lack of skill, lack of training, mental disease and substance abuse), lack of stable housing and social factors. The influence of negative peers, lack of family support and a history of poor work are other factors. Most offenders return to disadvantaged communities with limited opportunities to work. Peer groups in these communities tend to offer few contacts with the world of legitimate work, and weak contacts make it difficult to identify and exploit the few employment opportunities available in the community. The state of the economy also affects the reintegration of prisoners. Poor economic conditions make it particularly difficult for them to find the right job.

The pre-release programme was asserted as an initiative that has been developed within the Namibian context and prepares offenders who are about to be released by developing and reinforcing skills they have acquired. The programme also addresses concerns such as the strengthening of family support and referral to outside agencies for services. The Fijian model of re-entry programmes was also deemed as an important innovative approach to preparing offenders to successfully reintegrate into the community. The model encourages families and communities to support the released person and ensure that they maintain their reformation.

There are family support houses, family days and family meeting houses (family houses allow offenders to have visits from family members who stay at the house for a period of two or three days). This was asserted as a privilege based on good behaviour, implemented in the Republic of Korea. This was noted by the group as aiding in the rehabilitation and maintenance of close family bonds. The group agreed that this model was particularly beneficial for juveniles.

**D. Inter-Agency Cooperation and Governmental Support**

All participants agreed that the factors mentioned below are current good practices from the various countries, but each practice needs improvement in order to maintain successful living as law abiding citizens.

The group agreed that though some organizations in their countries are doing a great deal of good work within various areas of juvenile justice, there is a lack of information sharing between agencies. A shared database was proposed as being an important area which requires strengthening. Collaboration between correctional facilities/institutions and child welfare organizations was noted as being important. There was an identified gap between the aforementioned agencies and the argument was made for strengthened collaboration between these agencies. The human resources exchanges practiced between agencies was asserted as being an integral component of internal collaboration. Risk management was reported as a challenge, particularly for those who have completed their sentences. The MAPPA model was noted as an initiative which may be beneficial within various countries for risk management.

Some best practices discussed included the Fijian Prisoners Alleviation Project Fund initiative which is aimed at developing ex-offenders who have been released from prison. There are criteria that offenders have to meet, and they have to apply in writing (project plan proposal) in order to be recipients of this fund. Monitoring of the project is carried out by police, social welfare and corrections to evaluate what is being done with funds. Non-profit assistance is received. Businesses also assist, based on recommended areas of support identified by corrections. Faith-based organizations such as Prison Fellowship aid in supporting offenders. There is an inter-agency database which is shared between the police, social welfare and corrections.

Another best-practice was the Republic of Korea's sharing-of-information component to rehabilitation and reintegration of offenders. Agencies such as the police, corrections, prosecution and other agencies share information through a Criminal Justice Information System (i.e., Information Center), which is an integrated system for the sharing of information. Some participants noted challenges in the implementation of similar information systems such as the external criminal justice partners being hesitant to share information within the system. It was stated that accessing correct information would be aided by a more integrated system.

A final best practice discussed by participants was the initiative of non-governmental agencies offering reintegration support in the areas of accommodation and teaching of various life-skills.

## IV. CONCLUSIONS AND RECOMMENDATIONS

All participants agreed on the following conclusions and recommendations:

1. Establish specialized juvenile police with appropriate skills and promoting better rapport/trust through various methods such as the wearing of civilian clothing at work;

2. Formalized diversion for police in order to decrease detention for juveniles;

3. Amendment of legislation was proposed to improve the implementation of an ideal model for juvenile justice (e.g., the establishment of family/specialized juvenile courts);

4. Juvenile prosecutors and juvenile judges were deemed important elements for juvenile justice in various countries where these entities do not currently exist or function;

5. Public Awareness initiatives should be established to sensitize communities to juvenile justice and support crime prevention efforts;

6. Probation officers and volunteer probation officers might be advocated for in countries where these systems do not exist. Additionally, mentorship initiatives such as the Big Brothers and Big Sisters movement are also deemed as invaluable initiatives for juveniles;

7. Raise the level of cooperation with international agencies such as various United Nations offices as well as non-governmental agencies;

8. Pre-release and after-care programmes might be taken under consideration for the benefit of juveniles in participating countries where they do not have them;

9. Specialized skills and training for stakeholders within the juvenile justice system;

10. Twinning programmes (exchange programmes or cooperation on special juvenile justice projects) by JICA was suggested. This would include training, technical and other forms of support;

11. Information sharing for effective intervention and research, including the establishment of a uniform database;

12. Promotion of family ties through various initiatives such as family days and family consultation sessions;

13. Risk/needs assessment for juveniles within various cultural contexts specifically designed to guide treatment for addressing individual risk/needs as well as the evaluation of the effectiveness of this treatment;

14. The perspective of juveniles should be considered (through interviews) when making decisions on the appropriate measures to be taken following the commission of an offence;

15. The establishment of low security facilities for juveniles close to schools to enable them to attend school within settings where there is a lack of resources to provide educational services.

*GROUP 3*

# SOCIAL REINTEGRATION

| | | |
|---|---|---|
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## I. INTRODUCTION

The question of reintegration is certainly one of the most difficult problems linked to juvenile offenders, as it implies the effort of a lot of different stakeholders to impulse a real change and a real chance for those juveniles. The participants of Group 3 agreed in stating that detention is not always the appropriate way to deal with most juvenile offenders. Therefore, the discussion of different ways to deal with children in conflict with the law will be the main goal of this paper, as we firmly believe the final aim of all treatment should be the successful social reintegration of juvenile offenders.

Following this guideline, Group 3 agreed to base its discussion on the following agenda:

- Diversion and alternatives
- Crime prevention
- Inter-agency cooperation with the community and the private sector

The paper highlights a brief summary of the current situation and the challenges related to social reintegration of children in conflict with the law (CICL) in the countries represented. A focus is placed on best practices and solutions relevant to the topic of social reintegration.

According to Group 3, social reintegration is intended to re-establish a place in society for children that have been in conflict with the law so they can still feel included and contribute to the society.

## II. SUMMARY OF DISCUSSION

### A. Diversion and Alternative Measures to Detention

1. Current Situation and Challenges

For social reintegration to be effective, it is significant to put the emphasis on both diversion and alternatives measures (to detention). As each country has different mechanisms and structures in place concerning juvenile offenders; therefore, for the purpose of this report, a common understanding for the definition of the following terms was made. They are:

- **Diversion** According to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') (1985) Article 11.1, consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, and under Article 11.2 the police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal systems and also in accordance with the principles contained in these Rules.

- **Alternatives** (to deprivation of liberty or to detention): Measures that may be imposed on children who are being formally processed through the criminal justice system that do not involve deprivation of liberty. Alternatives can be applied from the time of apprehension until final disposition for children who have not been diverted away from the formal justice system.

All countries recognize the importance of effective diversion and alternative measures to judicial proceedings that are child friendly and gender sensitive and are generally based on community-based programmes. However, looking at the current practices, few countries have implemented specific dispositions to divert cases by the police, prosecutor or other agencies. Also, the forms of diversion measures practiced differ widely from one country to another. However, there are few countries that use diversion as a pilot project without any laws backing such practice. In this regard, Japan has a very unique system of dismissal of cases by the family court as the family court judges have the discretionary power to dispose of cases prior to the beginning of the trial, as prescribed by law. Similarly, Japan has a special way of dealing with children under the age of 14 who violate criminal laws, considering them as children in need of care and protection (as prescribed in the Child Welfare Act).

Members of the group also agreed that some countries rely on the adjudication and institutionalization of juvenile offenders. On the other hand, while some countries do have some diversion programmes in place, the effectiveness of these programmes is in question as little information exists on the quality of the programmes and the skills possessed by those delivering them.

Some of the diversion measures before the entering the formal juvenile justice system include cautioning, reparations and restorative justice measures. However, some participants from countries find their diversion options too limiting.

Diversion away from custody applied at both pre-trial and sentencing stages is an important method of reducing reoffending. Almost all countries have this form of diversion. Meanwhile the alternative measures taken to divert children away from custody include probation, community service, conditional or unconditional discharge, training and rehabilitation treatment.

All countries were able to identify challenges hindering the effective social reintegration of children in conflict with the law after exposure to the criminal justice system. The primary difference noted in the feedback provided by the countries is that the challenges reported originated from carrying structures. While some countries identified such challenges to exist within the juvenile justice system itself, the challenges experienced by some countries were external to the system. The following issues were raised:

i. Juveniles often feel excluded after exposure to the juvenile justice system. Negative identities are developed and a challenge exists to reverse the negative narratives developed for children who come into conflict with the law. Stigmatization was generally highlighted as a concern. One country brought to attention how the juveniles' own parents or extended families tend to reject them, which forces them to their criminal associates as the only individuals ready to accept them. Few participants shared their concerns due to the negative impact of harmful images and distribution of inappropriate information by media regarding juveniles and youth involvement in crimes.

ii. Juvenile offenders often lack protective measures such as opportunities for employment after receiving interventions, which makes it difficult for them to desist. Therefore, even when rehabilitation programmes are provided, lack of community support and acceptance renders such programmes futile.

iii. It was brought to light by some participants that even in cases where juveniles are offered some opportunity to reintegrate, such opportunities are often limited in scope mainly due to lack of specialized skills and knowledge. On the other hand, sometimes juveniles themselves contribute to challenges in diverting as some are not interested in the opportunities afforded to them.

iv. Lack of professionals with capacity to specifically cater to the needs of juvenile offenders was also identified as an obstacle to providing diversion and alternative measures for case-by-case situations for children in conflict with the law (CICL). However, for some countries where those professionals

are well trained, the juvenile justice system structure is not effective in ensuring quality, monitoring, and evaluation. Furthermore, for some countries the limited number of officers is cited as a reason for not frequently making use of probation services. Others attributed the poor utilization of such programmes to lack of awareness by those responsible for enforcing such options. Thus, issues of resource constraints and training also came to the fore.

v. Most agreed that there were challenges with regard to the availability of community resources and support from non-governmental organizations (NGO's) to aid the reintegration of CICL.

vi. While some countries seem to have effective juvenile justice systems in place that are well able to cater for the reintegration needs of such offenders, it was observed that some of the behavioural changes (e.g., the development of discipline) fostered by governmental agencies during the rehabilitation process are not sustained within the community after reintegration. Societal and family behavioural norms and practices were, thus, also identified as factors reducing opportunity for effective reintegration.

**B. Best Practices and Solutions**

The group identified the following as possible solutions to the challenges identified in implementing diversion and alternative measures:

i. To create a culture of respect for children's rights and to implement supportive diversion and alternative practices across professions with specialized training for professionals.

ii. Support the engagement of volunteers to compensate the lack of professionals.

iii. To promote better management practices, also by sanctioning malpractice, to ensure that the professionals respect the law.

iv. To bring out legislative reforms and/or develop enabling legislation to support diversion and alternative measures.

v. To ensure that contextual issues such as the lack of sufficient community agents (e.g. volunteer probation officers) are addressed alongside the laws, because laws alone are insufficient to address the challenges being experienced.

vi. To transform media into partners by sharing information on the positive actions led by all stakeholders of the criminal justice system. Sensitize the media to their role and responsibility in the social vision of juvenile offenders and its potential harmful effect for their reintegration.

**C. Crime Prevention**

1. Current Practices and Challenges

Some countries reported that they lack specific laws and strategies relating to crime prevention at the national level. It was also recognized that where such laws exist, it is often the case that crime prevention programmes are not coordinated and sustained by the various agencies involved in such initiatives.

Many of the countries represented identified the lack of resources as a big hindrance to crime prevention efforts. It was noted that often no specific budgetary allocations are made for social reintegration, and those primarily charged with the responsibility of doing so have no means to address the reintegration needs of juvenile offenders on their own.

It was agreed that public education and awareness are critical to crime prevention as low understanding by the public was found to affect opportunities for the successful reintegration of juvenile offenders in some of the countries. Yet, it was observed that when effort is made to educate and create public awareness, the mediums used for crime prevention initiatives were found to be limited with a number of countries primarily relying on the use of the media.

While it was generally the case that most of the countries were able to narrate a number of positive

initiatives aimed at crime prevention and, ultimately, the successful reintegration of juvenile offenders, it was also noted that a few countries lagged behind in this regard. It was for instance reported that too much emphasis is placed in these countries on punitive measures with little effort being placed on sensitization as a preventative and protective measure. Correspondingly, no programmes are in place to assist with reintegration after incarceration to prevent recidivism especially if the child has reached the age of 18 or more.

2. Best Practices and Solutions

Various countries were able to draw out good practices relating to crime prevention. The following are some of the practices outlined:

i. In Hong Kong, it was noted that extensive prevention programmes are in place particularly in terms of awareness creation and intensive education for juveniles to deter them from offending.

ii. Other good practices noted included the effective crime prevention measures in place in Japan. The country's reoffending prevention measures include assisting juvenile offenders to have training and obtain employment after detention. Japan also conducts an annual crime prevention programme, which is stipulated by law and conducted within the country as it is a multi-sectoral effort in which various governmental and non-governmental organs collaborate.

iii. Kenya reported that the probation service customizes its interventions based on the crimes most prevalent in certain localities and that all children that leave penal institutions are also supervised in the community to provide them support. This serves as a preventative measure.

iv. Namibia identified how the correctional service widely makes use of various forms of media, both electronic and print, to create awareness on issues relating to offending in general including the need for community support in reintegrating offenders as a means to prevent offending. The development of a new community supervision framework specifically focusing on supporting offenders after release in Namibia was also identified as a good preventative measure.

**D. Inter-Agency Cooperation**

1. Current Practices and Challenges

The participants agreed that multi-agency cooperation exists in their countries, though in varying degrees. In some countries, the cooperation among agencies was found to be strong while in other countries it was weak and almost non-existent. Generally, it was observed that among those countries with strong multi-agency cooperation there is strong inter-agency collaboration among juvenile justice agencies such as the police, prosecution, courts, prisons and community corrections. The converse was true for those countries that did not have strong multi-agency cooperation. However, this notwithstanding, it was found that challenges existed in all countries regardless of the level of interaction with stakeholders as we shall see below:

i. *Lack of legislation.* In some jurisdictions, it was reported that at the very basic level, they lacked policy guidelines or legislation to guide cooperation among different actors in juvenile justice. As a result, engagement of stakeholders was an activity whose sustainability was not assured because there were no structures in place for longevity.

ii. *The problem of prioritising.* It was found that in most countries, priority was given to children in need of care and protection, while children in conflict with the law were neglected. The participants agreed that this had resulted in inequitable resource allocation, bearing in mind that the rights of the child were to be maintained indiscriminately.

iii. *Lack of awareness.* This was a common problem in many of the countries. It emerged that many people, including public officials, were unaware or disinterested in issues relating to CICL. In some countries, the situation was worsened by the media where negative media attention was focused on actions of juvenile offenders. Altogether, these issues contributed to a negative attitude by the society towards child offenders, thus, making it difficult for children to socially reintegrate when they return home.

iv. *The problem of insufficient resources*. Most participants agreed that this was the most difficult problem because of the existing negative mind-set towards children offenders. In some countries, it was reported that there were no organizations dealing with child offenders. On the contrary, organizations dealing with children in need of care and protection were found to be numerous. These problems were equally replicated among government agencies, where the least priority was given to children in conflict with the law.

2. Best Practices and Solutions

Through discussions it was agreed by all participants that best practices of multi-agency cooperation existed in all countries. However, some of these practices were context specific and difficult to be replicated. Nonetheless, the following observations and suggestions were made:

i. *Legislation*. In countries where multi-agency cooperation was found to be strong, the existence of government policies and laws was a major contributing factor. In Japan, the existence of the Volunteer Probation Officers Act provides the basis upon which individuals in the community can be involved in the social reintegration of juvenile offenders.

ii. *Structure*. Another common feature found in countries with strong multi-agency cooperation is the existence of properly laid down procedures and processes. In some countries, these procedures were either anchored in law, contained in standard operating procedures or were part of government policy.

iii. *Strategy*. The existence of plans and strategies purposely created to engage participation of various public and private sector organizations was found effective. In Malaysia, the National Blue Ocean Strategy (NBOS) is one such programme developed by the government to ensure multi-agency cooperation in social reintegration of child offenders.

iv. *Community involvement*. The involvement of the community in discussion of cases relating to juvenile offenders encouraged multi-agency cooperation. In Maldives, such discussions took place in case conferences where organizations dealing with juvenile matters were present.

v. *Government incentives*. In order to retain existing partnerships with organizations and individuals assisting juvenile offenders, some governments gave reimbursements to meet costs incurred. This not only helped in meeting expenses incurred, but also attracted potential partners willing to assist juvenile offenders but found it too expensive to do such an undertaking without additional support.

vi. *Increasing resources*. This being one of the main drawbacks in all countries, it was generally recognized that training of staff members to increase their capacity of dealing with juvenile offenders, increasing the number of staff to match the number of juvenile offenders as prescribed in international standards, and increasing the financial resource base is necessary in sustaining partnerships.

## III. CONCLUSIONS AND RECOMMENDATIONS

All participants agreed on the following conclusions and recommendations.

1. In order to create a protective and enabling environment for children, it is important to have a holistic support system in place to provide **early response and support** for those children whose needs are violated. Programmes and activities can include strengthening family ties; creating community awareness programmes, strengthening parenting-skills programmes such as multi-systematic therapy and other welfare support directed to families and not just to the child.

2. Improving case management and existing programmes for juvenile offenders by applying the Good Lives Model practices, desistance, risk and needs based assessment, SWOT analysis, system binding and so on. Moreover, the participants felt that it was always vital to look at the strengths of juvenile offenders more than the weaknesses, questioning also the push and pull factors as much as assessing practitioners' mindsets.

3. Creating more awareness-raising and behaviour-change campaigns will eventually help in curbing negative attitudes of society and media.

4. Following the example set by countries such as Japan, bring reformative changes to laws and regulations to allow more involvement of the private sector and passionate individuals or NGO's to work proactively toward crime prevention and to assist children who are in conflict with the law. A vivid example is the volunteer probation officer system in Japan and its adaptation in Kenya.

5. Some members from countries felt more resources need to be pooled to strengthen the existing juvenile justice system. This includes financial support, increased numbers of probation officers etc.

6. Establishment of multi-sectoral (national, district level etc.) work by creating specialized institutional bodies to ensure and control effective and efficient (juvenile justice system) programmes and processes. For example, Kenya has a National Council on the Administration of Justice among other committees.

7. Members also felt that it is important to ensure that all practitioners working with juvenile offenders undergo a basic juvenile justice training.

8. Members also felt that it is important to create a platform on both the national and international level to share the lessons learned and the best practices among countries or multi-disciplinary agencies (including public and private).

9. In order to create awareness and to strengthen the system, data management, clear language and guidelines are important. Furthermore, a common recognition of the importance of a balance between data sharing and confidentiality seems to be an aim to fulfill.

# PART TWO

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**UNAFEI**

# VISITING EXPERTS' PAPERS

## THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: AN OVERVIEW OF ITS CONTENTS AND FUTURE ACTION

*Dimitri Vlassis**

### I. INTRODUCTION

Barely two decades ago, corruption was only whispered about and largely accepted as inevitable, pretty much as an incurable disease and as "part of doing business." For international organizations, it was the "C" word, which could not be uttered or included in programmes and debates, as it was deemed politically too sensitive. At the time, there were quite a few "pundits" who were publishing articles about the positive economic effects of corruption, expounding the theory that money has no color or smell and all that matters is that it be reinvested in the economy.

The situation now is fundamentally different. Corruption is generally recognized as an impediment to development and as an ill that can be cured. It is also recognized as a scourge affecting all societies globally, regardless of state of development. Therefore, it is now commonly accepted that corruption is one of those phenomena which require all countries and all societies to work together to find solutions and help each other meet the enormous challenges it creates. The ultimate goal is, and must remain, to eradicate corruption. But we must be realistic. This goal is achievable, but will require a generational shift in attitude, mentality and institutional development, and will demand sustained and ever growing determination. Corruption has been with us since the dawn of history and our generation will not be able to wipe it from the face of the earth. We need to have aspirations, plan our work carefully and stay the course. We must ensure that future generations are better equipped than ours, so for them saying "no" to corruption would be the default response. Our efforts and sacrifices (and there are plenty of those around the world) are building blocks. Each one of us is laying a brick on our global edifice. The palace of integrity will require efforts as herculean as those that produced the monuments that our civilizations cherish.

We have come a long way. In a very short time, by any standard, we have laid solid foundations. We have made the transition from acceptability to constantly decreasing levels of tolerance. We have gone from timid exhortations and tentative diatribes to strong international legally binding instruments, which are shaping policy and spurring the establishment of new normative and institutional frameworks for domestic action. We have moved from resignation or cynicism to placing action against corruption at the top of the political agenda around the world.

Getting this far was not easy. It took incredible work by many dedicated and visionary people in public service (both national governments and international organizations) and the private sector (including civil society).

The United Nations focused increased attention on the prevention and control of corruption in 1989, after the failed attempt of the late 1970s under the rubric of transnational corporations. Under the umbrella of its Crime Prevention and Criminal Justice Programme, the UN began building common understanding and bringing countries together around the topic through the gradual development of political documents and practical tools. Meanwhile, regional or sectoral organizations started putting the issue on their agenda and developing international conventions. The result of these efforts were the Interamerican Convention against Corruption (1996)[1], the OECD Convention on Bribery in International Commercial Transactions (1997)[2], the Council of Europe Conventions against Corruption (1998 and 1999) [3] and the

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African Union Convention against Corruption[4].

The culmination of efforts against corruption was the successful negotiation in 2003 of the first global international legally binding instrument, the United Nations Convention against Corruption (UNCAC). Its negotiation and entry into force in record time were unprecedented and marked a turning point in both the appreciation of the importance of the issue and the determination of countries around the world to join forces and take meaningful action.

The new United Nations Convention against Corruption has enormous significance. It offers all countries a comprehensive set of standards, measures and rules that they can apply to strengthen their legal and regulatory regimes to prevent and control corruption.

Negotiating the Convention was not an easy undertaking. There were many complex issues and concerns from different quarters that the negotiators had to tackle. It was a formidable challenge to maintain the quality of the new Convention while making sure that all of these concerns were properly reflected in the final text. Very often compromise was not easy and all countries made concessions. But the result is a source of pride and was made possible by the flexibility, sensitivity, understanding, and above all strong political will that all countries displayed.

## II. OVERVIEW OF THE CONVENTION

### A. General Provisions (Chapter I, Arts. 1-4)

The first article of the Convention states that its purposes are the promotion and strengthening of measures to prevent and combat corruption more efficiently and effectively; the promotion, facilitation and support of international cooperation and technical assistance, including in asset recovery; and the promotion of integrity, accountability and public management of public affairs and public property.

The Convention then includes an article on the use of terms. In addition to such definitions as "property", "proceeds of crime" and "confiscation", the most significant innovation of the new Convention are the definitions of "public official", "foreign public official" and "official of a public international organization."

The Convention contains a broad and comprehensive definition of "public official" that includes any person holding a legislative, executive, administrative or judicial office and any person performing a public function, including for a public agency or public enterprise, or providing a public service. The definition retains the necessary link with national law, as it would be in the context of national law that the determination of who belongs in the categories contained in the definition would be made.

During the negotiation process, significant debate revolved around whether there was a need for a definition of "corruption" and, should the answer to that question be affirmative, what the content of such a definition would be. In the end, negotiators decided that attempting to define in legal terms, i.e., in terms that would stand scrutiny in a wide array if legal systems around the world and would add value to the rest of the text of the Convention was neither feasible nor desirable. Corruption could easily be allowed to stand as a word describing conduct that that was broadly understood in a progressively more consistent manner throughout the world. While the term might still be understood in a broader or narrower fashion depending on national exigencies or traditions, attempting to crystallize in a short legal text requiring high precision the core of the collective perception of the concept entailed a number of unnecessary risks. There was the risk of limiting the Convention to the current understanding, thus depriving

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[1] Inter-American Convention Against Corruption, OAS General Assembly resolution AG/res.1398 (XXVI-0/96) of 29 March 1996, annex.

[2] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* OECD document DAFFE/IME/BR(97)20.

[3] European Criminal Law Convention on Corruption, 1998, European Treaty Series #173, European Civil Law Convention on Corruption, 1999, European Treat Series #174.

[4] African Union Convention on Preventing and Combatting Corruption, Maputo Mozambique, 11 July 2000, available from the AU on-line at: http://www.africa-union.org/Official_documents/Treaties_%20Conventions_ %20Protocols/Treaties_ Conventions_&_Protocols.htm.

the instrument from the dynamism necessary for it to remain relevant to national efforts and international cooperation in the future. There was also the risk of capturing in the definition only some aspects of the phenomenon, thus inhibiting broader action against corruption that countries might have already taken or might be contemplating. In deciding not to include a definition of "corruption" in the final text. the negotiators were inspired to a large extent by the similar approach taken by the United Nations Convention against Transnational Organized Crime[5], which does not define "transnational organized crime" but, instead, contains a definition of "organized criminal group".

The Chapter contains an article on the scope of application, which states that for the purposes of implementing the Convention, it will not be necessary, except as otherwise provided in the Convention, for the offences set forth in it to result in damage or harm to state property. This provision has particular importance for international cooperation and asset recovery.

Finally, the chapter contains an article on protection of sovereignty, an issue which figures prominently in the concerns of Member States, especially in view of the jurisdictional provisions that are later found in the Convention. The article was inspired and follows the formulation of a similar article in the United Nations Convention against Transnational Organized Crime.

**B. Preventive Measures (Chapter II, Arts. 5-14)**

The Convention contains a compendium of preventive measures which goes far beyond those of previous instruments in both scope and detail, reflecting the importance of prevention and the wide range of specific measures which have been identified by experts in recent years. More specifically, the Convention contains provisions on policies and practices, preventive anti-corruption bodies; specific measures for the public sector, including measures to enhance transparency in the funding of candidatures for elected public office and the funding of political parties; comprehensive measures to ensure the existence of appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making; measures related to the judiciary and prosecution services; measures to prevent corruption involving the private sector; participation of society; and measures to prevent money laundering. The chapter on prevention has been structured in a way that would establish the principle of what needs to be put in place, but allow for the flexibility necessary for implementation, in recognition of the different approaches that countries can take or their individual capacities.

The provisions on preventive measures are regarded as forming an integral part of the mechanisms that the Convention is asking States to put in place. It is the one side of the coin, the other being the criminalization of a variety of manifestations of corruption. It is important to note that the prevention chapter covers all those measures that the international community collectively considers necessary for the establishment of a comprehensive and efficient response to corruption at all levels.

**C. Criminalization and Law Enforcement (Chapter III, Arts. 15-44)**

While the development of the Convention reflects the recognition that efforts to control corruption must go beyond the criminal law, criminal justice measures are still clearly a major element of the package. The Convention would oblige States Parties to establish as criminal offences bribery of national public officials; active bribery of foreign public officials; embezzlement, misappropriation or other diversion of property by a public official; money laundering; and obstruction of justice. Further, States Parties would establish the civil, administrative or criminal liability of legal persons.

In recognition of the fact that there may be other criminal offences which some countries may have already established in their domestic law, or may find their establishment useful in fighting corruption, the Convention includes a number of provisions asking States Parties to consider establishing as criminal offences such forms of conduct as trading in influence, concealment, abuse of functions, illicit enrichment, or bribery in the private sector.

The final formulation of the criminalization chapter, with the inclusion of both "mandatory" and "discretional" offences, created a quandary for negotiators as to how to deal with international cooperation, more significantly certain principles such as dual criminality, which normally govern such forms of international

[5] GA/RES/55/25, annex.

cooperation as mutual legal assistance. The solution found, which is explained below under "international cooperation", is another innovative feature of the Convention, adding significantly to its value for the international community.

Other measures found in Chapter III are similar to those of the *Convention against Transnational Organized Crime*. These include the establishment of jurisdiction to prosecute (Art.42), the seizing, freezing and confiscation of proceeds or other property (Art.31), protection of witnesses, experts and victims and cooperating persons (Art.32-33) and other matters relating to investigations and prosecutions (Art.36-41).

Elements of the provisions dealing with money-laundering and the subject of the sharing or return of corruption proceeds are significantly expanded from earlier treaties (see Chapter V), reflecting the greater importance attached to the return of corruption proceeds, particularly in so-called "grand corruption" cases, in which very large amounts of money have been systematically looted by government insiders from State treasuries or assets and are pursued by subsequent governments.

**D. International Cooperation (Chapter IV, Arts. 43-49)**

Chapter IV contains a series of measures which deal with international cooperation in general, but it should be noted that a number of additional and more specific cooperation provisions can also be found in Chapters dealing with other subject-matters, such as asset recovery (particularly Art. 54-56) and technical assistance (Art.60-62). The core material in Chapter IV deals with the same basic areas of cooperation as previous instruments, including the extradition of offenders, mutual legal assistance and less-formal forms of cooperation in the course of investigations and other law-enforcement activities.

A key issue in developing the international cooperation requirements arose with respect to the scope or range of offences to which they would apply. The broad range of corruption problems faced by many countries resulted in proposals to criminalise a wide range of conduct. This in turn confronted many countries with conduct they could not criminalise (as with the illicit enrichment offence discussed in the previous segment) and which were made optional as a result. Many delegations were willing to accept that others could not criminalise specific acts of corruption for constitutional or other fundamental reasons, but still wanted to ensure that countries which did not criminalise such conduct would be obliged to cooperate with other States which had done so. The result of this process was a compromise, in which dual criminality requirements were narrowed as much as possible within the fundamental legal requirements of the States which cannot criminalise some of the offences established by the Convention.

This is reflected in several different principles. Offenders may be extradited without dual criminality where this is permitted by the law of the requested State Party.[6] Mutual legal assistance may be refused in the absence of dual criminality, but only if the assistance requested involves some form of coercive action, such as arrest, search or seizure, and States Parties are encouraged to allow a wider scope of assistance without dual criminality where possible.[7] The underlying rule, applicable to all forms of cooperation, is that where dual-criminality is required, it must be based on the fact that the relevant States Parties have criminalised the conduct underlying an offence, and not whether the actual offence provisions coincide.[8] Various provisions dealing with civil recovery[9] are formulated so as to allow one State Party to seek civil recovery in another irrespective of criminalization, and States Parties are encouraged to assist one another in civil matters in the same way as is the case for criminal matters.[10]

**E. Asset Recovery (Chapter V, Arts. 51-59)**

As noted above, the development of a legal basis for cooperation in the return of assets derived from or associated in some way with corruption was a major concern and a key component of the mandate of the Ad Hoc Committee. To assist delegations, a technical workshop featuring expert presentations on

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[6] Art. 44, para.2.
[7] Art. 46, para.9.
[8] Art. 43, para.2.
[9] See, for example, Arts. 34, 35 and 53.
[10] Article 43, paragraph 1 makes cooperation in criminal matters mandatory and calls upon States Parties to consider cooperation in civil and administrative matters.

asset recovery was held in conjunction with the second session of the Ad Hoc Committee,[11] and the subject-matter was discussed extensively during the proceedings of the Committee.

Generally, countries seeking assets sought to establish presumptions which would make clear their ownership of the assets and give priority for return over other means of disposal. Countries from which return was likely to be sought, on the other hand, had concerns about the incorporation of language which might have compromised basic human rights and procedural protections associated with criminal liability and the freezing, seizure, forfeiture and return of such assets. From a practical standpoint, there were also efforts to make the process of asset recovery as straightforward as possible, provided that basic safeguards were not compromised, as well as some concerns about the potential for overlap or inconsistencies with anti-money-laundering and related provisions elsewhere in the Convention and in other instruments

The provisions of the Convention dealing with asset recovery begin with the statement that the return of assets is a "fundamental principle" of the Convention, with annotation in the *travaux preparatoires* to the effect that this does not have legal consequences for the more specific provisions dealing with recovery.[12] The substantive provisions then set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned. A further issue was the question of whether assets should be returned to requesting State Parties or directly to individual victims if these could be identified or were pursuing claims. The result was a series of provisions which favour return to the requesting State Party, depending on how closely the assets were linked to it in the first place. Thus, funds embezzled from the State are returned to it, even if subsequently laundered,[13] and proceeds of other offences covered by the Convention are to be returned to the requesting State Party if it establishes ownership or damages recognised by the requested State Party as a basis for return.[14] In other cases assets may be returned to the requesting State Party or a prior legitimate owner, or used in some way for compensating victims.[15] The chapter also provides mechanisms for direct recovery in civil or other proceedings (Art.53) and a comprehensive framework for international cooperation (Art.54-55) which incorporates the more general mutual legal assistance requirements, *mutatis mutandis*. Recognizing that recovering assets once transferred and concealed is an exceedingly costly, complex, and all-too-often unsuccessful process, the chapter also incorporates elements intended to prevent illicit transfers and generate records which can be used should illicit transfers eventually have to be traced, frozen, seized and confiscated (Art.52). The identification of experts who can assist developing countries in this process is also included as a form of technical assistance (Art.60, para.5).

**F. Technical Assistance and Information Exchange (Chapter VI, Arts. 60-62)**

The provisions for research, analysis, training, technical assistance and economic development and technical assistance are similar to those contained in the United Nations Convention against Transnational Organized Crime, modified to take account of the broader and more extensive nature of corruption and to exclude some areas of research or analysis seen as specific to organized crime. Generally, the forms of technical assistance under the Convention against Corruption will include established criminal justice elements such as investigations, punishments and the use of mutual legal assistance, but also institution-building and the development of strategic anti-corruption policies.[16] Also called for is work through international and regional organizations (many of who already have established anti-corruption programmes), research efforts, and the contribution of financial resources both directly to developing countries and countries with economies in transition and to the United Nations Office on Drugs and Crime,[17] which is expected to support pre-ratification assistance and to provide secretariat services to the Ad Hoc Committee and Conference of States Parties as the Convention proceeds through the ratification process and enters into force.[18]

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[11] See A/AC.261/6/Add.1 and A/AC.261/7, Annex I.
[12] Art. 51 and A/58/422/Add.1, para.48
[13] Art. 57, subpara. 3(a).
[14] Art. 57, subpara. 3(b).
[15] Art. 57, subpara. 3(c).
[16] Art. 60, para.1.
[17] Art. 60, paras.3-8.

**G. Mechanisms for Implementation (Chapter VII, Arts. 63-64)**

The Convention contains a robust mechanism for its implementation, in the form of a Conference of the States Parties, with comprehensive terms of reference already specified in the Convention and with a secretariat that would be charged to assist it in the performance of its functions. These provisions are inspired by the United Nations Convention against Transnational Organized Crime, but go considerably beyond that instrument, both in terms of scope and detail. The Secretary General is called upon to convene the first meeting of the Conference within one year of the entry of the Convention into force,[19] and the Ad Hoc Committee which produced the Convention is preserved and called upon to meet one final time to prepare draft rules of procedure for adoption by the Conference, "well before" its first meeting.[20] The bribery of officials of public international organizations is dealt with in the Convention only on a limited basis (Art.16), and the General Assembly has also called upon the Conference of States Parties to further address criminalization and related issues once it is convened.[21]

**H. Final Provisions (Chapter VIII, Arts. 65-71)**

The final provisions are based on templates provided by the United Nations Office of Legal Affairs and are similar to those found in other United Nations. treaties. Key provisions include those which ensure that the Convention requirements are to be interpreted as minimum standards, which States Parties are free to exceed with measures which are "more strict or severe" than those set out in the specific provisions,[22] and the two articles governing signature and ratification and coming into force. The Convention is open for signature from 9 December 2003 to 9 December 2005, and to accession by States which have not signed any time after that. It will come into force on the 90th day following the deposit of the 30th instrument of ratification or accession with the Office of Legal Affairs Treaty Section at U.N. Headquarters in New York.[23]

## III. THE ROAD AHEAD: THE IMPLEMENTATION REVIEW MECHANISM

The importance of ensuring that the United Nations Convention against Corruption would be an effective tool for combating corruption was at the centre of discussions throughout the negotiations on the terms of reference of a mechanism for reviewing the implementation of the Convention. It was considered essential that the Convention be an instrument that would add value to the efforts of Member States in preventing and fighting corruption, including by supporting countries through technical assistance, enhanced international cooperation and data collection.

Such discussions had already taken place at the early stages of negotiating the Convention. During the meetings of the Intergovernmental Open-ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption, many delegations emphasized the importance of effective mechanisms for monitoring the implementation of a new convention. As can be discerned from the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, the discussions on reviewing implementation eventually resulted in article 63 of the Convention, in particular paragraph 7: "Pursuant to paragraphs 4 to 6 of this article, the Conference of the States Parties shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention".

From the outset, there was a special focus on establishing a mechanism that would assist States parties in fully implementing the Convention and would support their efforts in measuring progress towards that end. In preparation for the discussions on a mechanism and in a bid to support such a process, several comparisons to other corruption-related implementation review mechanisms were

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[18] GA/RES/58/4, paras. 8 and 9 and Convention Art.64. UNODC is already designated as the secretariat for the Ad Hoc Committee pursuant to GA/RES/55/61, paras, 2 and 8 and GA/RES/56/261, paras. 6 and 13. By convention, the General Assembly calls on the Secretary General to provide the necessary resources and services, leaving to his discretion the designation of particular U.N. entities and staff to do so.

[19] Art. 63, para.2.

[20] GA/RES/58/4, para.5.

[21] GA/RES/58/4, para.6.

[22] Art.65, para.2.

[23] Art. 67 (*signature, ratification, acceptance, approval and accession*) and 68 (*Entry into force*) For further information see the segment on procedural history and footnotes 10 and 11 (sources of assistance), above.

prepared, both by the Secretariat and by other organizations.

Following extensive deliberations during the first and second sessions of the Conference of the States Parties to the Convention, resolution 3/1 was adopted at its third session, in November 2009, annexed to which were the terms of reference of the Mechanism for the Review of Implementation of the Convention. In the same resolution the Conference decided that the Implementation Review Group would be established to be in charge of the operation of the Mechanism and report to the Conference of the States Parties, which remains the supreme body with respect to the implementation of the Convention.

The Review Mechanism commenced its work in July 2010. Owing to the comprehensive nature of the Convention, which covers in four substantive chapters measures to prevent and criminalize corruption, as well as provisions on international cooperation and asset recovery, it was decided to establish two review cycles: the first review cycle covers chapters III (Criminalization and law enforcement) and IV (International cooperation), while the second will cover chapters II (Preventive measures) and V (Asset recovery).

The Review Mechanism created renewed momentum for the ratification of and accession to the Convention. While the ratification pace was high from 2003 to 2008, with 140 ratifications, a lull followed in 2009; but then the pace was reinvigorated by the Review Mechanism, when it became operational in 2010. Since then, another 38 States have ratified or acceded to the Convention, making a total of 178 States parties out of 193 Member States of the United Nations. This nearly universal participation in the Convention creates an enabling environment allowing for a comprehensive global picture of the state of efforts against corruption.

The peer review process is aimed at further enhancing the potential of the Convention by providing the means for countries to assess progress in implementation, identify challenges and develop action plans to strengthen its implementation domestically. The ability to fund the participation of least developed countries and developing countries in the review process has proved critical to its success, as it ensures that each State party has an equal opportunity to participate both as reviewer and country to be reviewed and to engage in discussions on an equal footing at the sessions of the Implementation Review Group, thus creating a sense of ownership and involvement.

The inclusive nature of the Review Mechanism has allowed countries that, because of resource constraints, do not always sit at the same table with other countries to participate actively in the peer reviews and intergovernmental processes, thus enriching the discussions with their experience and providing an opportunity to learn from others.

In its resolution 3/1, the Conference decided on the use of a self-assessment checklist (now also referred to as the omnibus software) as the tool for gathering information for the reviews. National focal points and governmental experts are trained in the use of the self-assessment checklist, as well as on the substantive provisions of the Convention and the procedural aspects of the reviews. Since the launch of the Mechanism, UNODC has trained over 1,400 anti-corruption practitioners.

Of the growing number of States parties involved in the review process, many, in sharing their experiences as States under review and as reviewing States, have highlighted how useful it was to serve first as reviewers before undergoing their own review. It was an opportunity to gain understanding of and expertise on the provisions of the Convention, as well as to analyse another country's system in that light. The exercise enabled them to share lessons learned with the other reviewers and with their own colleagues at the national level.

As the same individuals often participate as reviewers in more than one country review, as well as in their own country review, their enhanced understanding of the Convention is often shared with other anti-corruption practitioners nationally, creating a powerful multiplier effect. The comprehensive self-assessment checklist and the training provide the basis for a better and deeper understanding of the provisions of the Convention.

By the end of its first cycle the Review Mechanism will have reached nearly all States Members of the United Nations. The outcomes of the reviews will constitute a knowledge base on anti-corruption

measures in place in all regions. The analysis of the country reports will present a global assessment of the state of anti-corruption efforts and will provide a global benchmark for trends and progress.

At the time of writing this article, more than 166 States Parties had completed and submitted their self-assessment checklists for the first cycle of reviews (chapters III and IV of the Convention). The exceptionally high response rate to the self-assessment checklist is proof of the value that States parties attribute to the Mechanism and to the implementation of the Convention. It is also proof of the fact that the professional, respectful and objective operation of the Mechanism has allayed initial hesitation or concerns that some countries may have harboured regarding the Mechanism. Instead, the abundance of ideas exchanged and information, advice and good practices shared among governmental experts has contributed to opening up the issue of corruption to a frank and constructive global dialogue across regions and legal systems.

The Review Mechanism has also proved to be an important forum for all States parties to engage on practical anti-corruption issues in a positive and constructive spirit, both as States parties under review and reviewing States parties. The transparent, efficient, non-intrusive, inclusive and impartial nature of the Mechanism, as well as its multilingualism, have emerged as assets of great value in this regard.

The substantive exchange of experiences and the establishment of informal channels of communication among States have been highlighted as key factors for international cooperation, including direct contacts between central authorities, law enforcement agencies and financial intelligence units. Most countries under review have reported that the dialogue between reviewing experts and focal points in the framework of the Review Mechanism facilitates such informal contacts.

The review exercise has enabled States parties to enhance internal inter-agency dialogue, cooperation and coordination through the establishment of dedicated steering committees and the holding of workshops for the validation of the information shared through the self-assessment checklists, country reports and executive summaries. Institutions involved in reviews have so far included, apart from the dedicated anti-corruption agencies, supreme audit institutions, public administration authorities, government departments, law enforcement, the judiciary, and parliaments and their committees. This inclusiveness of the process has facilitated and frequently set in motion an informed national policy dialogue about reform requirements.

In many instances, the country reports have been beneficial for efforts to institute domestic reforms and address implementation challenges at the national level in response to the outcomes of the reviews. In several cases, a broad national dialogue has taken place to fill the gaps identified during the review process and to establish action plans. In other cases, specific legislative, institutional and capacity-building activities have been undertaken to address the recommendations in the review report, with the support of UNODC and other technical assistance providers on an ad hoc basis.

Through the Review Mechanism and its process States parties have dedicated time and effort to reflecting on the interaction among national stakeholders. This has enabled a comprehensive analysis of deficiencies, gaps and bottlenecks, as well as the identification of good practices, and has in a number of countries led to the establishment of new channels of communication among the stakeholders, as well as the creation of specialized, dedicated anti-corruption bodies and services.

The self-assessment process has offered new opportunities for refining and enhancing national data collection in areas directly relevant to national policy development. Indeed, the self-assessment process makes use of existing national research, assessments and statistics, while at the same time seeking to identify how these can be improved and complemented. In cases where data were scattered, there was a clear opportunity to develop a more sustainable data-collection system, in particular with regard to the time and resources national authorities generally spend on the self-assessment. Some States parties have consequently built their continuous data collection on the initial data-collection team that was formed for the review process, while others (approximately a quarter of States parties to date) have indicated databases and tracking systems as a priority technical assistance need. Many States parties have also indicated that they will use the outcome of the review process as a yardstick against which they will continue to measure progress domestically.

UNODC has noted that States parties have found it very useful to receive ad hoc targeted technical assistance in the form of training or advisory services throughout the Review Mechanism cycle, i.e. not only in response to the findings of the review but also during the initial preparatory stages, to help gain momentum. This has shown that there is an increase in trust and confidence in the Mechanism and has also encouraged State's parties under review to focus on what they consider to be the most pressing needs emerging from the review and to address at an early stage lacunae that might otherwise hamper the success of the review.

Priority actions may include the development of an action plan to meet the needs identified during the review; training courses on financial investigations; training courses on international cooperation to facilitate extradition and mutual legal assistance in cases of corruption; legal advice to ensure that offences criminalized in the Convention are incorporated into national legislation (some countries have requested comments on a draft bill that would address some of the shortcomings identified in current legislation); expert advice for the development of a case management system for the anti-corruption agency; and legal advice and training on the adoption and use of special investigative techniques. Requests have also been received regularly on ways to improve the detection of corruption cases, be it through the development of witness and whistle-blower protection programmes or through advisory services on how to structure systems of asset and income declaration.

Both the formal training sessions and the hands-on, in situ assistance have contributed to building the capacities of national authorities to assess their own legislative and institutional framework. As UNODC has sought to ensure that these processes are country-led, it is expected that the expertise will remain available beyond the formal review process and will allow States to develop their own capacity to monitor existing gaps, review progress and reassess compliance with the Convention on a regular basis.

In the margins of the *in situ* gap-analysis missions, UNODC has been able to advise on pressing matters such as asset recovery cases and on the structuring and operation of asset declaration and verification systems, most of which are newly established. As a result, not only does the gap analysis serve as the basis for self-assessment reports and allow countries to make timely submissions, but countries have also been able to address some needs and gaps prior to the review, thanks to the advice they received during the gap analysis.

While many countries have already adopted anti-corruption legislation in line with the Convention, UNODC has continued to receive requests from States seeking to improve their domestic legislation to prevent and fight corruption, in particular on the basis of the challenges identified through the country reviews. To this end, UNODC has provided legislative assistance mostly to address corruption in a comprehensive manner, but support has also been provided on several pieces of legislation covering specific aspects such as asset declarations, money-laundering, bribery of foreign public officials, mutual legal assistance, access to information, witness protection and corporate liability. In several cases, examples and good practices from other States were shared with the authorities.

Along the same lines, UNODC has provided wide-ranging support to Member States to improve their capacity to prevent, detect, investigate and prosecute corruption. Assistance has been provided for the development of national anti-corruption strategies, for the establishment and strengthening of relevant institutional frameworks, structures, policies, processes and procedures and for the strengthening of the preventive, investigative and prosecutorial capacities of relevant institutions, through both national and regional activities.

The Review Mechanism allows States parties under review to identify and state their technical assistance needs and requests as part of a broader programme of reform. Donors, many of whom will have participated in the Mechanism, are thus able to view their possible entry points for support as part and parcel of a comprehensive programming and delivery effort that may take several years, thus often promoting a multi-year and multi-stakeholder engagement.

The chances for identifying strategic priorities and developing an effective prioritized national anti-corruption strategy increase substantially on the basis of findings from a comprehensive review and a contextually relevant understanding of the corruption problem. The strategy benefits from having information

from different stakeholder perspectives and from addressing anti-corruption efforts from the perspective of a whole government and beyond. A comprehensive and inclusive review process helps to ensure ownership of the review outcomes and of future reforms, and provides an important benchmark against which progress can be measured.

Another important dimension is the use of the body of knowledge and information generated through the Review Mechanism. It has been noted on several occasions that States parties, as well as their national and international counterparts, use the information gathered during the reviews as a basis to enhance their anti-corruption work. The wealth of information on laws, regulations, cases and statistics gathered through the Mechanism has been collated and made available online through the UNODC-managed Track portal.[24] The portal hosts several sub-pages, including that of the legal library.

The data is organized by Convention provision and is searchable by country, legal system, government structure and level of human development. On the basis of the information gathered through the reviews, the legal library is continuously being updated and validated. This has been useful for States parties in preparing for the reviews and has been extremely valuable for countries wishing to draw on examples from other countries.

From September 2011, when the TRACK portal was launched, until August 2016, it had more than 74,500 users, and statistics show that the average time spent per visit has remained steady over the years. Some 34 per cent of visitors have specifically visited the legal library. While the aforementioned training activities on the Review Mechanism and the Convention have important advocacy aspects, awareness and understanding of the importance of the Convention in anti-corruption efforts is also enhanced through the TRACK portal.

The Review Mechanism has helped to desensitize and depoliticize the issue of corruption at the national level, as it has allowed States parties to engage previously unlikely partners, such as civil society and non-governmental organizations, in one joint effort.

The Review Mechanism has led to the creation of several inter-agency initiatives to support the implementation of the Convention, including work with UNDP on the implementation of the UNODC/UNDP "going beyond the minimum" methodology; the "Partnership for anti-corruption knowledge" initiative; judicial integrity; programming through United Nations country teams); and work with the World Bank on the UNODC/World Bank StAR Initiative.

At its sixth session, held in November 2015 in St. Petersburg, the Conference of the States Parties to the Convention launched the second cycle of the Implementation Review Mechanism, which will cover chapters II on prevention and V on asset recovery. The second cycle became operational in June 2016 with the determination, through drawing of lots, of which States Parties will be under review in each of the next five years and the drawing of lots of the reviewers for the first 36 States parties, which will be reviewed from June 2016 until June 2017.

## IV. CONCLUDING REMARKS

While the Review Mechanism cannot resolve all issues related to the implementation of the Convention, it has proved to be an important entry point for many dimensions of the fight against corruption and above all has raised awareness and understanding of the Convention. The peer review aspect of the Mechanism has embodied the spirit of the United Nations Charter and the Convention against Corruption not only by opening a dialogue among States parties but also by desensitizing the issue of corruption in general, by demonstrating that no country is exempt from it.

With the entry into force of the UNCAC, with the number of parties to the Convention growing rapidly (178 as of August 2016) and with the smooth operation of the Conference of the States Parties and the Implementation Review Mechanism, the anti-corruption landscape has definitely and unalterably changed for the better.

[24] www.track.unodc.org/Pages/home.aspx.

The adoption in September 2015 of the 2030 Sustainable Development Agenda[25] is another momentous milestone. Especially important is the inclusion of Goal 16, which states "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". The targets under this goal include promoting the rule of law at the national and international levels and ensure equal access to justice for all (target 16.3); by 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime (target 16.4); substantially reduce corruption and bribery in all their forms (target 16.5); and develop effective, accountable and transparent institutions at all levels (target 16.6). The achievement of these targets and Goal 16 will be made possible through the full and effective implementation of the Convention and operation of the Implementation Review Mechanism.

[25] General Assembly resolution 70/1.

# ARTICLE 9 OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC): IMPLEMENTATION AND PRACTICE

*Dimitri Vlassis**

## I. INTRODUCTION: STATUS AND SIGNIFICANCE OF THE UNCAC

Adopted by the United Nations General Assembly in its resolution 58/4 of 31 October 2003 and having entered into force on 14 December 2005, the United Nations Convention against Corruption (UNCAC) is the sole global legally-binding anti-corruption instrument. With 180 States parties[1], is close to becoming universal in reach.

Recognizing the dangers posed by corruption, the Convention requires States parties to criminalize acts of corruption, to put in place policies and to undertake specific measures to prevent corruption, to strengthen their international cooperation in the fight against corruption and to ensure that stolen assets are returned to their country of origin.

## II. PUBLIC PROCUREMENT AND CORRUPTION: IMPLICATIONS ON DEVELOPMENT

### A. Public Procurement and Development

A strong procurement system is indispensable for achieving country's development objectives. Procurement of goods, construction and services is required to build and equip schools and universities, hospitals, to put in place infrastructure and security sector facilities. In carrying out the procurement function, governments are generally expected to minimize costs and maximize the value of the contracts, ensuring that the services provided to the public are accessible and or the required quality. Effective procurement system helps to address the real needs of the society and ensures that the procurement contracts are implemented to the benefit of the public, balancing both the public interest and the interest of the private sector entities.

### B. Corruption as an Obstacle to Governance, Economy and Social Development

A consensus has emerged in the recent years that corruption is a key governance challenge. Most social scientists and economists agree that corruption introduces uncertainty into economic life, undermining fair competition and investment activities. When the quality and price of goods and services matter less than bribes and political connections, the competitiveness of the economy suffers; honest companies with otherwise competitive products fail to realize their full potential and lose out to their corrupt competitors. In the worst-case scenario, in environment of systemic corruption only the companies that play by the "rules" of corruption survive. Moreover, corruption flourishes where inequality is high and where institutions are ineffective, further exacerbating social exclusion and destroying trust.

The dangers that corruption poses have been recognized by national authorities, international organizations and development assistance providers. The importance of integrity is recognized in the 2030 Agenda for Sustainable Development, and in particular in the Sustainable Development Goal 16 and its targets.

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[1] Status as of 28 September 2016.

**SDG 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels**

- **16.3** Promote the rule of law at the national and international levels and ensure equal access to justice for all
- **16.4** By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime
- **16.5** Substantially reduce corruption and bribery in all their forms
- **16.6** Develop effective, accountable and transparent institutions at all levels
- **16.7** Ensure responsive, inclusive, participatory and representative decision-making at all levels
- **16.10** Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements

### C. Corruption as an Obstacle to Effective Procurement

The United Nations Office on Drugs and Crime estimates that the cost of public procurement can account for up to 30 per cent of gross domestic product,[2] making it the largest single area of government spending. Various studies suggest that an average of 10-25 per cent of a public contract's value may be lost due to corruption.[3]

The size of the procurement market, its proportion as a percentage of gross domestic product and the fact that procurement involves interaction between public and private sector actors, makes it vulnerable to corruption[4] and a primary area of concern for the integrity of public administration.[5]

Recognizing the importance of integrity in procurement, the UN Convention against Corruption requires in its article 9 the States parties to base their public procurement systems on principles of transparency, competition and objective criteria in decision-making.

## III. PREVENTING AND FIGHTING CORRUPTION IN PROCUREMENT

### A. Preventing Corruption: Transparency, Objectivity and Competition as Prerequisites for Integrity and Effectiveness

The current paper summarizes some of the approaches taken by UNCAC States parties in implementing article 9 of the Convention. Article 9, paragraph 1 of the United Nations Convention against Corruption focuses on the need to prevent corruption in procurement and require that procurement systems are based on the principles of **transparency, competition and objective criteria in decision-making**. Further, it provides a list of possible measures that promote these principles in practice and may help States parties in their efforts to strengthen the integrity of the procurement process.

**Article 9. Public procurement and management of public finances**

Each State party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

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[2] *Guidebook on anti-corruption in public procurement and the management of public finances: Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption, p. 1.*

[3] Ibid.

[4] United Nations, *Integrity in public procurement processes and transparency and accountability in the management of public finances* (CAC/COSP/WG.4/2015/3).

[5] Ibid.

(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;
(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

Establishing the national procurement systems on the principles of transparency, competition and objectivity is suggested also by other international instruments, such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on the Procurement of Goods, Construction and Services and by the World Trade Organization Government Procurement Agreement. Adherence to these principles would ensure that the countries are establishing a system which is predictable, reliable and enjoys a high degree of compatibility. It is important to underline, that these principles, when applied in the procurement, have a very specific meaning, one that may differ from the everyday use of the words "transparency, competition and objectivity"

1. Transparency

In procurement, "transparency" promotes integrity by supporting trust in the procurement system and institutions and by making it easier to detect irregularities and malpractices. Transparency in itself may not be regarded as a goal: it is rather an important principle that enables and facilitates the achievement of the objectives of the procurement system.[6] Transparency guarantees equal access to information to all participants in the procedure. Ensuring that all procedures are recorded and minutes are kept is a prerequisite for effective control of the procedure and may be required in case of a judicial or administrative review.

In procurement, transparency is understood as having three important elements:

a. The open and transparent publishing of all procurement notices as well as the rules, criteria and the standards to be followed in the procurement process; the specific rules for the procurement procedure and its implementation should be laid down in a publicly available document that is accessible to all potential participants.

b. Ensuring that the procurement procedure is open to public scrutiny and uses clear, standardized documents; as well as published rules and criteria; and

c. Putting in place a system that facilitates effective internal and external control over the procurement.[7]

Most States parties have put in place requirements for transparency for different elements of the procurement process, including, as a minimum, the publication of the invitation to tender. While the established practice in many countries has been that this isdone primarily through publication in newspapers or official journals, but increasingly electronic tools and portals are being used. Publication of the tender notice may take place in the media, official bulletins of the public procurement agency, and the national newspapers with possibility for online publication.

2. Objectivity

In procurement, the principle of "**objective criteria in decision-making**" requires that all procurement decisions are justified and taken in accordance with predetermined criteria to ensure disinterested, neutral decision-making and to avoid subjective bias. Integrity of the procurement process is a direct outcome of the correct application of the principle of objectivity.

Typical approaches to ensuring objectivity in procurement include the early, transparent definition and

[6] United Nations, *United Nations Convention against Corruption: implementing procurement-related aspects* (CAC/COSP/2008/CRP.2). Submitted by the United Nations Commission on International Trade Law.
[7] Ibid.

publication of the criteria for participation and selection of candidates as well as drafting of technical specifications and terms of reference in a non- discriminatory manner.

This principle also emphasizes the need to use whenever possible, open procedures. They should be preferred to procedures that limit competition, such as direct negotiations with a single supplier. It should be noted that the use of restricted methods for selecting suppliers or contractors may still be possible in case of procurements below a certain threshold value or in cases of *force majeure*.

3. Competition

Free competition improves the efficiency of the market mechanisms and is a prerequisite for sustainable development. In procurement, competition between candidates is thought to reduce the risks of bid-rigging and collusion. It facilitates detection of corruption and other procurement fraud schemes.

Competition may reduce the cost of procurement and may improve the quality of the services and goods procured. To ensure fair competition, principles of transparency and objectivity should be respected: clear, openly publicized rules should be followed and eligibility and selection criteria must be pre-determined; changes in the criteria should not be possible.

An important precondition for the fair competition is that technical specifications should be formulated broadly, in a generic, objective way, with no reference to trademarks or specific technologies, in order not to favour particular bidders (unless this is a key requirement of the process). Whenever possible, the characteristics of the product must be used that describe it in terms of outcome rather than as a specific model or brand. Ensuring that all participants in the tender procedure have sufficient (and similar) time to prepare and submit the tender documents is a key requirement to ensure fair competition in the procurement process. Unreasonably short deadlines make proper preparation for the tender difficult and increase the risk that some of the participants in the procedure might attempt to acquire inside information and thus obtain an illegal advantage.

Similarly, using the open tender procedure by default reduces the risks to integrity associated with artificially restricted competition and ensures that the goods or services are procured at a fair market price. The free competition of many participants in the tender process makes bid rigging and collusion less likely and easier to detect.

UNODC experience shows that most of the States parties' procurement systems allow for a specific period of time to prepare and submit tenders, which in some countries depended on the complexity of the project. The time allocated for this phase of the procurement process however differed across countries, based on the legal and administrative traditions of the States parties.

**B. Elements of the Effective Preventive Framework: Legislation, Institutions and Practices**

Corruption is both a cause and a consequence of ineffective institutions. Integrity is a core feature of effective organizations and a prerequisite for achieving the organizational goals. Corrupt organizations are often unpredictable; and to secure predictability, citizens and businesses may resort to corruption – the bribe becomes the price of certainty. The procurement system is part of the public administration; it is interconnected with all other systems, structures and laws. Therefore, to effectively prevent corruption in procurement, measures should be taken to strengthen the integrity of the public administration as a whole- in addition to the integrity of the public procurement system.

1. Legislative Framework

Most but not all of the UNCAC States parties have adopted specialized legislation to regulate procurement. Some countries regulate procurement through legislation that covers other areas[8]. Some countries rely on secondary legislation to manage procurement, or even on internal organizational documents (instructions, bylaws).

To strengthen integrity in procurement, a solid legal framework for both procurement and public ad-

[8] For example, Lebanon' s procurement system is regulated by the Public Accountancy Act and not by a special law on procurement.

ministration as a whole should be put in place. Because the procurement system does not operate in isolation, it is important that the public administration as a whole would be based on strong legislation, regulating the status of public officials. To ensure that the procurement system is legally able to use the modern information and communication technologies, laws on electronic transactions should be put in place, including regulations on electronic signatures. Effective control systems including both internal and external control should be provided for. The legislation should lay the ground for access to information, participation of society and the effective detection and reporting of irregularities and malpractices.

To ensure that the new legislation meets the real needs of the society, many countries carry out extensive public consultations, thus ensuring that legislative reform is undertaken in a participative manner and involves the stakeholders from civil society and the private sector. The public discussion helps build momentum to support the reform process, and consensual decisions help the implementation of the new legal framework.

2. E-government and E-procurement

The use of information and communications technologies (ICT) in the fight against corruption is becoming increasingly popular. The dramatic increase in the use of computers and mobile telephones has led to the introduction of new solutions to reinforce transparency, build trust in government and increase the participation of society.

Internet portals which facilitate access to information, public participation and e-procurement are being used in many countries to engage the public in consultations and to simplify the procurement process. Electronic procurement is introduced, aiming to increase the number of bidders and to stimulate competition, allowing broader access of small and medium sized enterprises to procurement contracts.

In addition, the use of e-procurement as a part of a broader effort to introduce ICT-based procurement systems contributes to better overall governance by encouraging the participation of society, enabling transparency and ensuring public accountability.

Economies achieved by the use of e-procurement could be substantial. The benefits of increased transparency in terms of avoiding inflated prices are also widely recognized.

It must be taken into account that the introduction of ICT in procurement brings a new set of challenges for public administrations –related to the information security, public confidence and the capacity of public administrations to manage complex electronic systems.

To ensure transparency, countries are increasingly using specialized electronic tools and means such as specialized internet portals and websites, thus minimizing printing costs and ensuring quick and easy access to information. Some countries operate an integrated paperless e-procurement platform which allows for publishing procurement notices, downloading and submitting tender documentation and registering awarded contracts. Some States parties opt for introducing a system that has additional functions which could be useful for preventing and detecting irregularities and corruption. For example, Slovenia requires all contracting authorities to publish the information on all new contracts within 48 days following the award of the contract or the selection of a partner for a public private partnership (framework agreement). This information is made available to the public on a dedicated online procurement portal. Metadata on contracts is also published in a machine-readable format and is updated on a quarterly basis. In January 2016, the Ministry of Public Administration launched another electronic platform, STATIST, which provided the public with comprehensive, direct and up-to-date information on all procurement contracts awarded since 2013[9].

In addition, most States parties require procurement decisions to be public. It is possible however, when the value of the contract is below a certain threshold, to advertise contract notice. Sometimes contracts awarded by negotiated procedure are exempt from advertising when their estimated amount is lower than certain thresholds.

[9] UNODC, CAC/COSP/WG.4/2016/2

Further on, certain States parties actively engage in public consultations on the public procurement plans as part of the efforts to increase efficiency of procurement and strengthen its transparency.

3. Strong Ethics Infrastructure, Including Systems for Managing Conflicts of Interest

Article 9 of the Convention requires States parties to put in place *"measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements"*.

The public procurement system as a part of the public administration is staffed with civil servants. As such, it is subject to overall government efforts to promote integrity in the public administration. Taking into account the risk of corruption in procurement, it is crucial for governments to take measures in order to ensure that the officials engaged in procurement behave ethically at all times.

Establishing a strong ethics infrastructure requires the adoption of rules (e.g. a code of conduct); the provision of training to ensure that staff has the knowledge and skills to apply the rules; clear leadership (including leading by example); and a functioning enforcement mechanism.

Article 8 of the Convention requires that codes of conduct for public officials should be adopted. Violation of the codes should entail dissuasive and proportionate sanctions. These codes should clearly and unambiguously state what behaviours are acceptable and which will not be tolerated, and should provide clear guidance on how to act in a situation of a conflict of interest, such as when offered a gift or hospitality.

As a part of the ethics infrastructure and as required by UNCAC many countries have introduced disclosure systems that focus on the external interests of public officials and facilitate the management of conflicts of interest. A key instrument for managing conflict of interest situations is the mandatory (ideally in written form) disclosure of the conflict to a direct supervisor or to a designated official or body. Disclosure (or signing a mandatory declaration that members are not in a situation of conflict of interest) is often a requirement and part of the procedures of tender evaluation committees. To be effective, such an approach should be complemented by the verification of declarations on a regular basis, ensuring that all declarations are at some point subject to verification. Proportionate and dissuasive sanctions should be put in place to ensure that the submission of declaration information with incorrect data is punished. These measures are even more important for the sensitive positions, such as the ones regularly involved in public procurement procedures.

The establishment of a sound and merit-based system of selection of personnel is an important prerequisite to ensuring the integrity of the procurement system. Such a system should take into account the provisions of article 8 of the Convention, with due regard to the specificity of the positions involved in procurement.

Depending on the national legal traditions, the personnel exercising procurement functions may be centralized in a single agency in charge of procurement procedures in the whole public administration, or may be placed in a decentralized procurement system. In both a centralized and a decentralized procurement system, the Convention requires States parties to undertake special measures to promote ethical conduct and to effectively avoid and manage conflicts of interest in order to ensure the integrity of the procurement processes[10].

Some States parties establish conflict of interest management systems requiring officials to declare their outside interests. Staff in a situation of conflict of interest should take steps to ensure that they recuse themselves from the decision-making process. Restrictions are placed on secondary appointments and often post-employment prohibitions are put in place, preventing the procuring entity from awarding contracts to a former employee for a certain period of time.[11] The legislation may prohibit staff from participating in tender evaluation committees in case of a conflict of interest; and mandatory personnel rotation is introduced.

[10] UNODC, CAC/COSP/WG.4/2015/3
[11] Ibid.

4. Specialized Procurement Oversight and Anti-Corruption Bodies

The *Technical Guide to the United Nations Convention against Corruption*[12] recommends establishing through legislation a specialized procurement body with executive or monitoring responsibilities for:

- Bidding and implementation procedures;
- Identifying fraud indicators, which might point to corrupt activity at an early stage;
- Collating intelligence on procurement fraud and corruption;
- Developing and overseeing integrity pacts;
- Coordinating prevention strategies through education and training initiatives, provision of direction and guidance to internal audit, provision of advice on anti-corruption issues, performing due diligence reviews, or developing and maintaining debarment lists;
- Promoting freedom of information legislation and access to information; and
- Promoting specialist training, codes of conduct and asset declaration requirements for procurement staff and auditors.

Countries are increasingly moving towards establishing specialized bodies in line with the recommendations of the Technical guide. These bodies may be responsible for the oversight of procurement in the central administration, decentralized agencies, national universities, armed and security forces.

Another type of institution is the centralized procurement agency, which actually carries out all procurement procedures on behalf of the other government structures.

In addition, countries are establishing special review bodies or tribunals to deal with the administrative review of procurement decisions to ensure that they are carried out in line with the principles of transparency, competition and objectivity in decision-making. Other States rely on existing systems of administrative and judicial review.

In an effort to ensure accountability and oversight with regard to the implementation of the provisions of articles 6 and 36 of the United Nations Convention against Corruption, many States parties have established specialized anti-corruption bodies that have preventive and investigative mandates or specialized procurement agencies.

While not strictly a part of the procurement system, specialized anti-corruption bodies (with preventive and/or enforcement functions) are a vital part of a country's overall anti-corruption infrastructure; their existence is also required by articles 6 and 36 of the Convention. They allow for effective oversight of procurement processes and the better planning of preventive anti-corruption activities.

Debarment of companies that use unethical or unlawful practices (mostly associated with corruption) to win or to implement procurement contracts is increasingly being used to shield the procurement system from corrupt businesses.

5. Protecting Reporting Persons

The protection of people who in good faith report corruption to authorities is critical for the detection of corruption and procurement irregularities. The United Nations Convention against Corruption acknowledges the importance of mechanisms to provide protection for reporting persons and, through its article 33, calls on States parties to consider appropriate measures to provide protection against unjustified treatment to those reporting offences of corruption to competent authorities when done in good faith and on reasonable grounds.

The United Nations Office on Drugs and Crime has developed the *Resource Guide on Good Practices in the Protection of Reporting Persons* (2015) that looks in detail at the legal obligations of States parties under the Convention against Corruption and the practical measures that can be taken to protect whistleblowers.

Ensuring that the anti-corruption bodies are known to the public and enjoy public trust is important

[12] UNODC, *Technical Guide to the United Nations Convention against Corruption*, page 32.

for their successful operation. States are taking measures to ensure the visibility of the anti-corruption bodies and to promote reporting of corruption. Importance is attached to the development of reporting mechanisms which would contribute to the detection of corruption and to subsequent effective investigations and prosecutions. An important trend that could be identified[13] is the increasing use of Internet and mobile telephone applications to both provide information to the public on the activities of anti-corruption bodies and to seek input and feedback and provide for channels for reporting corruption.

In relation to the reporting of incidents of corruption, a widely known tool, the hotline — both in its classic form of a telephone hotline and in the form of feedback web pages or mobile telephone applications — is used to provide communication channels to citizens. One issue which is not addressed in a uniform manner is the issue of anonymous reporting. While some countries allow and encourage anonymous reporting, others either do not allow for it or would use the anonymous reports only as a basis for a preliminary inquiry. A primary method for protecting the whistleblowers remain the strict confidentiality of the persons who report corruption.

6. Access to Information and Participation of Society

Access to information is an important prerequisite for integrity, and in one form or another it is reiterated throughout Chapter II – and in particular in articles 10 and 13. Its reach goes well beyond the provisions of article 9 and the procurement context. The multiple benefits of ensuring access to information in relation to the integrity of public administration are widely recognized.[14] It facilitates participation of society and enables better control over the activities and the discretionary decision-making of governments; it facilitates the introduction of an effective managerial framework in public administration; and it makes the detection of corruption easier. In this context, measures that aim to strengthen the transparency of public administration might have a positive impact on corruption in procurement.

In relation to access to information, two complementary approaches could be identified as trends among the States parties: allowing members of the public to make specific requests for government information and pro-actively making government information available to the public. Countries are increasingly adopting specialized legislation on the access to information, recognizing it as important tool to promote the transparency and accountability of the public administration. In addition, transparency portals are being developed to provide access to information to citizens.

7. External Control and External Audits

While internal control operates from within an institution and is carried out under the auspices of the head of the respective public body, external control is independent from the controlled (audited) institution. The *Technical Guide to the United Nations Convention against Corruption* states that the overall purpose of an external or state audit "is to carry out an appraisal of management's discharge of its stewardship responsibilities, particularly where they relate to the use of public money, and to ensure that these have been discharged responsibly". [15] It also emphasizes the need for an external appraisal of the work of internal auditors. The Guide underlines the importance of the scope of the audit mandate, in that it should include "extra budgetary funds, autonomous agencies and anybody in receipt of public funding, including private sector contractors involved in public procurement".[16]

An external audit may provide useful information on the efficiency of government spending and whether procurement is achieving its goals. Both the capacity of a supreme audit institution and the transparency of its audit reports are important preconditions for effective external control.

8. Links between Prevention of Corruption and Enforcement: Corruption Risk Assessment in Procurement

Identifying and addressing irregularities and malpractice is an important element of corruption prevention and enforcement practices. It allows for measures to be taken to address detected problems and to

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[13] UNODC, CAC/COSP/WG.4/2016/2
[14] More information is available at UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* and UNODC, *Technical Guide to the United Nations Convention against Corruption.*
[15] UNODC, *Technical Guide to the United Nations Convention against Corruption.*
[16] Ibid.

protect against them happening again. These measures may include reviewing staff manuals and guidelines, introducing new standard operating procedures, changing checklists and providing additional training. Systems of internal control and internal audit, including the management of risks, should be an integral part of public sector bodies, and are particularly important in bodies that engage often in procurement.

It is important to underline that as in the case of every other anti-corruption measure, risk management and internal control have their costs, both financial and in terms of human resources. This needs to be taken into consideration when designing or undertaking reform of internal control systems.

Proper accounting and rigorous auditing lie at the foundation of the effective management of public finances. They ensure the financial accountability of the government agencies and allow for collection of information on the budget implementation and for identification of potential problems or irregularities.

Most of the countries reported that control and oversight measures are carried out by both the parliament of the country and specialized structures such as a national audit office or an office of internal financial control.

Article 9, subparagraph 2(b) of the Convention calls for establishment of an "effective system of risk management and control", as key to detecting irregularities. It refers to introducing preventive measures such as separation of functions, hierarchies of approvals and reviews or ex-post facto measures to identify problems such as financial reporting, performance monitoring, protection of whistle-blowers and internal audits. Article 9, subparagraph 2(b) of the Convention requires States parties to establish an "effective system of risk management and control". Such a system requires the establishment of internal procedures to identify and manage corruption risks: future, possible events which could adversely influence the performance of the organization. As a part of the risk assessment process, organizations involved in procurement should identify all potential corruption schemes (risks), prioritize risks and think of what could be done to prevent them from happening – in a most practical manner. Introducing effective systems of risk management is a relatively new approach which requires States to introduce measures to identify and prioritize individual budgetary risks and to consider measures for addressing those risks.

The risks in the procurement could be identified in all three phases of the procurement process: pre-tender, tender and contract administration phase.

**In the pre-tender phase** corruption in procurement demonstrates itself mainly in the identification of the procurement needs and in tailoring contract specifications to fit the products or experience of specific bidders. Projects may be initiated for the sole purpose of syphoning budget funds; or given priority for the same reason. Thus, money is diverted from the public budget into initiatives with little or no usefulness for the society. Large scale and complex projects, or ones which require development of new products (equipment, software) are at particularly high risk.

**In the tender phase** corruption demonstrates itself in the process of tendering as collusion between buyer or contractor or collusion between contractors which may be facilitated by buyer's often intended negligence. Typical corruption schemes include leaking inside information to preferred bidders, changing the content of bids to make them ineligible; extension (formal or informal) of the deadline so that the preferred bidder could submit the best offer; bid rigging, use of phantom bids and bid rotation.

**In the contract administration phase** corruption demonstrates in mainly product substitution schemes, in which the contracting authority accepts sub-standard quality goods or services; inflation of the project costs through addenda to contracts and in payment of bribes to the contracting authority to secure a payment or a preferable treatment.

Prevention of these specific schemes is possible – as a result of careful identification, based on review of documents, discussions with stakeholders and staff members. Such an identification would allow to focus on the real, actual corruption scenarios – and to design effective response.

## IV. EPILOGUE

Considerable work has been done over the last years to enhance international action against corruption. A milestone in this endeavour is the United Nations Convention against Corruption. In the context of preventing corruption in procurement, the Convention provides for a range of measures which, if implemented by the States parties, would lead to substantial strengthening of the integrity of procurement system. It is important to recognize addressing corruption in procurement may require politicians and anti-corruption practitioners to go against deeply entrenched corruption schemes and against groups with powerful economic interests – groups which may have their own political influence or even political representation. Preventing corruption in procurement requires a focused work with the procurement system; but it also requires a broader reform effort, which would strengthen the integrity in all public sector bodies that have a stake in the procurement process. Engaging with the private sector in order to ensure that the companies will not use corruption in their dealings with the government is also necessary in order to reduce the corruption pressure on the administration. A question which each country has to answer for itself is whether to address this challenge incrementally, allowing the potentially corrupt system to adapt to the anti-corruption measures; or as a comprehensive reform package – which may generate strong anti-reform sentiments on the part of the groups which will lose as a result of the reform. In any case, article 9 of the Convention provides for a road map to strengthening integrity in procurement; and establishing the reform efforts of the individual country on the non-political, non-controversial foundation of the United Nations Convention against Corruption and presenting it as an issue of compliance with the international obligations of the specific country may provide for a non-controversial and universally acceptable entry point for reforms.

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# EFFECTIVE MEASURES TO COMBAT CORRUPTION IN HONG KONG

*Tony KWOK Man-wai**

## I. INTRODUCTION

I am honoured to have been invited by Mr Keisuke Senta, Director of UNAFEI and Professor Masahiro Yamada, the Programming Officer of the subject course to come to UNAFEI for the 12th time as Visiting Expert to share with you my 27 years of experience in fighting Corruption in Hong Kong, as well as my last 14 years of experience as an anti-corruption consultant in 25 different countries. I have maintained a strong passion for anti-corruption mission and thus I am most grateful for the opportunity to participate in this most meaningful course and share my experience with the participants from different countries.

## II. SHORT HISTORY AND THE ACHIEVEMENT OF THE ICAC

From my international experience, I generally group countries into three levels of corruption. At the first and lowest level, corruption is only restricted to a "few rotten apples". Even the most corruption free countries belong to this group, as no country can be totally immune from corruption. At the second level, corruption is relatively common but restricted to individuals. At the most serious level, i.e. the third level, corruption is not only widespread, it is openly operated and organized by powerful corrupt syndicates, often colluded with organized crime gangs. In the early 70s, Hong Kong belonged to the third level and was definitely one of the most corrupt places on earth. Corruption was widespread and regarded as a "way of life". It existed "from womb to tomb". Corruption in the public sector, particularly the law enforcement agencies, was well organized and syndicated, hence making a mockery of the criminal justice system. As a taxi-driver, you could even buy a monthly label from the corrupt syndicate to stick on the windscreen of your taxi and it would guarantee you from any traffic prosecution during that month! Such

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Hong Kong University SPACE and Former Deputy Commissioner and Head of Operations Independent Commission Against Corruption (ICAC), Hong Kong. About the author: Mr Kwok joined the Hong Kong Independent Commission Against Corruption (ICAC) shortly after its inception in 1975, and hence had witnessed and participated in the successful battle in transforming Hong Kong from a most corrupt place to one of the cleanest city. He retired as Deputy Commissioner and Head of Operations in 2002, after having led the Commission through the smooth transition of sovereignty from a British Colony to China in 1997, despite international pessimism.

Since his retirement in 2002 he has been invited to 25 countries in a total of 220+ missions to share his anti-corruption experience. In particular, he has assisted a number of countries to set up their new anti-corruption agencies, including Mongolia, Cambodia, Serbia, Mauritius and Timor Leste.

He is a member of the UNODC Anti-corruption Expert Group (2006), Visiting Lecturer of the International Anti Corruption Summer Academy (2011 & 2012), Regional Coordinator (Asia) of the International Association of Anti Corruption Authorities; Honorary Anti Corruption Advisor to the Office of the Ombudsman of the Philippines and the Mongolian Independent Authority Against Corruption; Visiting Professor of the National Prosecutors College & four other universities in China. He is also the Past Chairman of the Chartered Management Institute, Hong Kong Branch.

In Hong Kong, he assisted the Hong Kong University in designing the world's first International Postgraduate Certificate Course in Corruption Studies and he is the Adjunct Professor and Honorary Course Director. Since the first launch in 2003, 13 annual courses have been organized and it has attracted over 350 delegates, mostly senior officials of anti-corruption agencies, coming from 38 countries. He received the "Outstanding Teacher Award" from the University in 2006.

In the Hong Kong National Day Honour List, Mr. KWOK was awarded the ICAC Distinguished Service Medal (IDS) by the Chief Executive in 1998 and the Silver Bauhinia Star (SBS) in 2002, in recognition of his contribution to the success of ICAC in the fight against corruption in Hong Kong. He was appointed as the Justice of the Peace (JP) in 2016.

was the scale of open corruption in Hong Kong. After the establishment of the Independent Commission Against Corruption, and within five years, all the overt and syndicated corruption were eradicated and now Hong Kong was regarded as one of the most corruption free societies in the world. The Hong Kong case was regarded as one of the very few successful model of turning from a very corrupt place to a clean one. It demonstrates that corruption can be effectively controlled, no matter how serious and widespread the problem is.

In its 42 years of history, ICAC has achieved the following success:

- Eradicated all the overt and syndicated type of corruption in the Government. Corruption now exists as a highly secretive crime, and often involves only satisfied parties. Citizens rarely suffer from extortion from government officials.
- Amongst the first in the world to effectively enforce private sector corruption, providing an excellent business environment for Hong Kong and a level playing field for all investors.
- Ensured that Hong Kong has a clean election in its transition from a British Colony to democracy
- Pioneered solutions through corruption prevention studies in most corruption prone areas and promulgateed best practice guidelines in areas such as public procurement, construction, financial sectors, staff management etc.
- Changed the public's attitude to no longer tolerating corruption as a way of life; and supports the fight against corruption in not only willing to report corruption, but be prepared to identify themselves in the reports. Before ICAC was set up, most corruption reports were anonymous. Now more than 75% of the reports come from non-anonymous sources.
- As an active partner in the international arena in promoting international co-operation. ICAC is the co-founder of the International Anti Corruption Conference (IACC)

## III. WHAT ARE THE HONG KONG ICAC'S SUCCESS FACTORS

As a result of the success of the Hong Kong model in fighting corruption, many countries followed Hong Kong's example in setting up a dedicated anti-corruption agency. However, many of them are not effective and hence there are queries as to whether the Hong Kong model can be successfully applied to other countries. The point is whether there is a thorough understanding of the working of the Hong Kong model. From my experience, it consists of the following eleven indispensable components

### 1. Three-Pronged Strategy

There is no single solution in fighting corruption. Hong Kong ICAC adopts a three-pronged approach: deterrence, prevention and education. As a result, the Commission consists of three separate departments: the Operations Department to investigate corruption and to prosecute the offenders: the Corruption Prevention Department to improve the corruption prevention systems and procedures in the public sector; and the Community Relations Department to educate the public against the evil of corruption and to enlist their support and partnership in fighting corruption.

### 2. Enforcement Led

The three prongs are equally important, but unlike many Anti-corruption Agencies (ACA), ICAC places priority in resources on enforcement. It devotes over 70% of its resources in the Operations Department. The reason is that any initiatives in corruption prevention and education are doomed to fail in a corrupt country where the corrupt officials are still around and powerful. Any successful fight against corruption must start with effective enforcement on major targets, so as to get rid of the obstacles, and demonstrate to the public the political will and determination to fight corruption at all costs, as well as to demonstrate the effectiveness of the anti-corruption agencies. Without that, the ACA is unlikely to get the public support, which is a key to success. Successful enforcement also assists in identifying problem areas for corruption prevention review and can clear any human obstacle in the change management. The successful enforcement stories also provide a basis for public education and act as deterrence for the other corrupt officials.

### 3. Professional Staff

Fighting corruption is a very difficult task, because you are confronting people who are probably very intelligent, knowledgeable and powerful. Thus, the corruption fighters must be very professional in their

jobs. The ICAC ensures that their staff are professionals in their diverse responsibilities — the Operations Department has professional investigators, intelligence experts, technical experts, accountants and lawyers as their staff. The Corruption Prevention Department has management experts and the Community Relations Department pools together education, ethics and public relations experts. Apart from professionalism, all ICAC staff are expected to uphold a high level of integrity and to possess a passion and sense of mission in carrying out their duties. ICAC strives to be highly professional in their investigation. ICAC is one of the first law enforcement agencies in the world to introduce the interview of all suspects under video; they have a dedicated surveillance team with over 120 specially trained agents who took surveillance as their life-long career. They also have a number of specialized units such as witness protection, an undercover unit, computer forensics and financial investigation.

**4. Effective Deterrence Strategy**

The ICAC's strategy to ensure effective enforcement consists of the following components:

- An effective public complaint system to encourage reporting of corruption by members of the public and referrals from other institutions. ICAC has a report centre manned on a 24-hour basis and there is a highly publicized telephone hotline to facilitate public reporting.
- Effective confidentiality system and protection of whistle-blowers and witnesses
- A quick response system to deal with complaints that require prompt action. At any time, there is an investigation team standing by, ready to be called into action.
- The ICAC adopts a zero-tolerance policy. So long as there is reasonable suspicion, all reports of corruption, irrespective of whether it is serious or relatively minor in nature, will be properly investigated.
- There is an effective internal and external review system to ensure all investigations are professionally and promptly investigated.
- All successful enforcement is publicized in the media to demonstrate effectiveness and to cause maximum effect in deterrence.

**5. Effective Prevention Strategy**

The corruption prevention strategy aims at reducing the corruption opportunities in government departments and public institutions. The general principle is to ensure a high level of efficiency, transparency and accountability in all government services. The priority areas are public procurement, public works, licensing, public services delivery, law enforcement and revenue collection. Comprehensive corruption prevention strategy should include enhancement in the following management systems:

- Performance Management
- Procurement Management
- Financial Management
- Human Resources Management
- Complaint Management

Examples of some of the corruption prevention practices are:

- Identifying risk in vulnerable areas and risk management
- Streamlining work procedure manual
- Enhancing staff supervision through surprise check system
- Enhancing internal auditing
- Maintaining proper documentation for accountability
- Information security policy
- Job rotation policy
- Performance indicators/performance pledges (service guarantee)
- E-government and e-procurement
- Exercising transparency & fairness in staff recruitment, appraisal & promotion

**6. Effective Education Strategy**

The ICAC has a very wide range of public education strategies, in order to enlist the support of the entire community as a partnership to fight corruption. It includes:

- Media publicity to ensure successful enforcement cases are well publicized, through press releases, press conferences and media interviews, as well as the making of TV drama series based on these cases
- Media education — use of mass media commercials to encourage the public to report corruption; promote public awareness to the evil of corruption and the need for a fair and just society, and as deterrence to the corrupt.
- School ethics education programme, starting from kindergarten up to the universities
- Establish ICAC Club to encourage the public to join as members to perform voluntary work for the ICAC in community programmes
- Promote a code of ethics in government and business
- Corruption prevention talks and ethics development seminars for public servants and business sectors
- Publish corruption prevention best practices and guidelines
- In partnership with the business sector, set up an Ethics Development Centre as a resource centre for the promotion of business code of ethics
- Organize exhibitions, fun fairs, television variety shows to spread the message of clean society.
- Wide use of websites and social media for publicity and reference, youth education and ethics development

**7. Effective Legal Framework and Anti-Corruption Law**

Hong Kong has comprehensive legislation to deal with corruption. In terms of offences, apart from the normal bribery offences, it created three unique offences:

a. offence for any civil servant to accept gifts, loans, discounts and passage over a certain limit, even if there is no directly related corrupt dealing, unless specific permission from a senior official is given

b. offence for any civil servant to be in possession of assets disproportionate to his official income; or living above means

c. Offence for conflict of interest. Any public officials abusing their authority to show favouritism to other persons, such as nepotism, can be criminally liable. It includes a statutory requirement to report potential conflicts of interest.

On investigative power, apart from the normal police power of search, arrest and detention, ICAC has the power to check bank accounts, require witnesses to answer questions on oath, restrain properties suspected to be derived from corruption, and hold the suspects' travel documents to prevent them from fleeing the jurisdiction. If justified and in serious cases, they can apply proactive investigation techniques such as telecommunication intercept, surveillance, undercover operations etc. Not only are they empowered to investigate corruption offences, both in the Government and private sectors, they can investigate all crimes which are connected with corruption.

The ICAC cases are prosecuted by a selected group of public prosecutors to ensure both the quality and integrity. The Judiciary of Hong Kong is a strong supporter of fighting corruption, ensuring that the ICAC cases are handled in courts by highly professional judges with fairness. The conviction rate for ICAC cases is very high, around 80%

**8. Review Mechanism**

As the Commission is independent and only answerable to the Chief Executive and with the provision of wide investigative power, there is an elaborate check and balance system to prevent abuse of such wide power. One unique feature is the Operations Review Committee. It is a high-powered committee, with a majority of its members coming from the prominent citizens in the private sector, as representing the society to act as a watchdog over the ICAC. The committee reviews each and every report of corruption and investigation, to ensure all complaints are properly dealt with and there is no "whitewashing". It publishes an annual report, to be tabled before the Legislature for debate, thus ensuring public transparency and accountability. In addition, there is an independent Complaint Committee where members of the public can lodge any complaint against the ICAC and/or its officers and there will be an independent investigation. It also publishes an annual report to be tabled before the Legislature for debate

**9. Equal Emphasis on Public & Private Sector Corruption**

Hong Kong is amongst one of the earliest jurisdiction to criminalize private sector corruption, in 1970. ICAC places equal emphasis on public and public sector corruption. The rationale is that there should not be a double standard in the society. Private sector employees vastly outnumber the public-sector employees and unless they maintain the similar ethical standard, the society can never achieve corruption free status. Indeed, private-sector corruption can cause as much damage to the society, if not more so, than public-sector corruption. Serious corruption in financial institutions can cause market instability; corruption in the construction sector can result in dangerous buildings. Effective enforcement of private-sector corruption can be seen as a safeguard for foreign investment and ensures that Hong Kong maintains a level playing field in its business environment, thus a competitive advantage in attracting foreign investment.

**10. Partnership Approach**

You cannot rely on one single agency to fight corruption. Everyone in the community and every institution have a role to play. ICAC adopts a partnership approach to mobilize all sectors to fight corruption together. The key strategic partner of ICAC is the government agencies. The head of a government agency should appreciate that it is his solemn responsibility to clean his own house. Every government agency should have a tailor made anti-corruption strategy, translated into an anti-corruption action plan and should have a high power management committee to monitor the progress of the action plan, which should be subject to annual review and revision.

Other important partners of ICAC include:

i. Civil Service Commission
ii. Business community
iii. Professional bodies
iv. Civil society & community organizations
v. Educational institutions
vi. Mass media
vii. International networking

**11. Top Political Will, Independence and Adequate Resources**

The most important factor in fighting corruption is "political will". In Hong Kong, there is clearly a top political will to eradicate corruption, which enables the ICAC to be a truly independent agency. ICAC is directly responsible to the very top, the Chief Executive of Hong Kong. This ensures that the ICAC is free from any interference in conducting their investigation. The strong political support was translated into financial support. The ICAC is probably one of the most well-resourced anti-corruption agencies in the world! ICAC's annual budget amounted to US$90M, about US$15 per capita.

**12. Comparison with other ACAs**

Some critics argue that the Hong Kong model can only work in Hong Kong because of the unique Hong Kong situation and cannot be applied to other countries. They usually give the following reasons:

1. Hong Kong is a small city whilst most corrupt countries have a large geographical area. This argument cannot stand. Hong Kong is a large city of over 7 million population. If any corrupt country can apply the Hong Kong model as a pilot scheme just on its capital city, and achieve equal success, it would have a tremendous impact on the whole country, and there is no reason why the successful model cannot then be applied throughout the country.

2. The country is unable to afford the resources like the Hong Kong ICAC. It is true that the HK ICAC has a large budget. But it merely accounts for 0.2% of the national budget. In most corrupt countries where the ACA are not seen to be effective, their budgets invariably are below 0.01% of the national budget, that speaks for the political will of these countries! If a corrupt country can raise their anti-corruption budget to the same level as the Hong Kong ICAC, i.e. 0.2% of the national budget, which clearly is justified, the budget should be more than adequate for any national anti-corruption agency.

3. The country has a unique cultural tradition of gift giving and nepotism. Hong Kong had the same corruption-friendly culture in the past, if not more prevalent. The Chinese tradition of giving "Laisee" or "red packet" containing money to all children and business associates in the Chinese New Year was an open way of giving/receiving bribes in the past. The Hong Kong experience is that through an effective public education campaign and law enforcement, this cultural problem can be solved.

Hence the problem is not that the Hong Kong model is not applicable. It is more the case of the lack of political will to fully adopt the Hong Kong model

## IV. CONCLUSION

There is no single solution in fighting corruption. Every country has to examine its unique circumstances and come up with a comprehensive strategy, but any strategy must embrace the three-pronged approach — deterrence, prevention and education. Ideally there should be one dedicated and independent anti-corruption agency tasked to coordinate and implement such strategy, and to mobilize support from the community.

The Hong Kong experience offers hope to countries which have serious corruption problems that appear to be insurmountable. Hong Kong's experience proved that given strong political will, a dedicated anti-corruption agency and a correct strategy, even the most corrupt place like Hong Kong can be transformed to a clean society within a rather short period of time.

# EFFECTIVE MEASURES TO INVESTIGATE PROCUREMENT RELATED CORRUPTION & FRAUD

*Tony KWOK Man-wai**

## I. INTRODUCTION

Procurement of goods and services is an area most vulnerable to corruption and fraud, often involving huge loss of government revenue. In order to effectively investigate the related crime, one needs to understand the "modus operadi" of the corrupt offenders in the process so as to focus on areas where evidence can be discovered.

Procurement related corruption usually takes the form of the suppliers offering money, entertainment and other advantages to public officials in return for assistance or favour in the various stages of the procurement process. Advantages offered include provision of lavish entertainment, sexual services; invitation to gambling, offering gifts and extending loans and other favours.

As the corrupt offenders are invariably smart criminals. It is not possible to list out all the clandestine methods they could have employed. Some common corruption opportunities that can be identified in the procurement process are:

Requisition Stage:

- public officials drawing up a requisition specification in favour of a particular supplier, e.g. quoting brand name & model number which only the specific supplier can have ready stock.
- public officials splitting the amounts in the purchase orders so that they can exercise their authority to approve, whereas the full amount would require approval of high authority
- public officials allowing unqualified supplier to be included in the "approved suppliers list"
- public officials inflating the budget price to make room for illegal commission

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*SBS, IDS, JP, Honorary Fellow, Adjunct Professor & Hon Course Director of Anti Corruption Program, Hong Kong University SPACE and Former Deputy Commissioner and Head of Operations Independent Commission Against Corruption (ICAC), Hong Kong. About the author: Mr Kwok joined the Hong Kong Independent Commission Against Corruption (ICAC) shortly after its inception in 1975, and hence had witnessed and participated in the successful battle in transforming Hong Kong from a most corrupt place to one of the cleanest city. He retired as Deputy Commissioner and Head of Operations in 2002, after having led the Commission through the smooth transition of sovereignty from a British Colony to China in 1997, despite international pessimism.

Since his retirement in 2002 he has been invited to 25 countries in a total of 220+ missions to share his anti-corruption experience. In particular, he has assisted a number of countries to set up their new anti-corruption agencies, including Mongolia, Cambodia, Serbia, Mauritius and Timor Leste.

He is a member of the UNODC Anti-corruption Expert Group (2006), Visiting Lecturer of the International Anti Corruption Summer Academy (2011 & 2012), Regional Coordinator (Asia) of the International Association of Anti Corruption Authorities; Honorary Anti Corruption Advisor to the Office of the Ombudsman of the Philippines and the Mongolian Independent Authority Against Corruption; Visiting Professor of the National Prosecutors College & four other universities in China. He is also the Past Chairman of the Chartered Management Institute, Hong Kong Branch.

In Hong Kong, he assisted the Hong Kong University in designing the world's first International Postgraduate Certificate Course in Corruption Studies and he is the Adjunct Professor and Honorary Course Director. Since the first launch in 2003, 13 annual courses have been organized and it has attracted over 350 delegates, mostly senior officials of anti-corruption agencies, coming from 38 countries. He received the "Outstanding Teacher Award" from the University in 2006.

In the Hong Kong National Day Honour List, Mr. KWOK was awarded the ICAC Distinguished Service Medal (IDS) by the Chief Executive in 1998 and the Silver Bauhinia Star (SBS) in 2002, in recognition of his contribution to the success of ICAC in the fight against corruption in Hong Kong. He was appointed as the Justice of the Peace (JP) in 2016.

Inviting quotation/tender stage:

- public officials leaking prices quoted by other competitors to a certain bidder, so that a lower quote can be made before the stipulated deadline
- public officials tampering with the quotations/tenders after the deadline in favour of a certain bidder.
- public officials conspiring with a bidder to submit false tenders/quotations so as to meet the minimum requirement of quotations/tender bids
- public officials assisting a certain bidder in the preparation of quotation/tender to fit in with the confidential set of criteria

Evaluating & Awarding Stage

- public officials showing favour to a certain bidder or making a biased decision not based on set criteria and merit
- public officials modifying the criteria and weightings in favour of a certain bidder after the quotations/tenders have been received
- Failing to declare conflicts of interest

Receipt of Goods & Services

- Supplier providing short delivery or sub-standard goods
- Supplier providing false certificate on quality of goods
- Public officials failing to report the substandard or short delivery of goods or to take appropriate action and sanction against the supplier
- Public officials over-rating the supplier's performance to enable the supplier to be favourably considered in future procurement exercises

In some cases, corruption takes the form of nepotism where the public officials show special favour in awarding procurement tenders to suppliers owned by his close relatives or personal friends.

In cases of fraud, where public officials may not be involved, it often takes the form of submitting quotation/tenders with false particulars and certificates, so as to score higher marks in the assessment. There are also cases where the approved suppliers conspire together to submit pre-determined prices so as to avoid competitions amongst themselves.

## II. DIFFICULTIES OF INVESTIGATING CORRUPTION

Procurement related corruption and fraud is regarded as one of the most difficult crimes to investigate. It is by nature a secretive crime and often involves just two satisfied parties, so there is no incentive to divulge the truth. There is no scene of the crime nor fingerprints to follow up. Even if there are witnesses, they are often parties to the corruption themselves, hence tainted with doubtful credibility when they become prosecution witnesses in court. The offenders are intelligent and professional and know how to cover up their trails of crime. In this modern age, the sophisticated corrupt offenders will make full advantage of the loopholes across jurisdictions in the bribe payments and acquire the assistance of other professionals, such as lawyers, accountants and computer experts in their clandestine operations and to help them launder their corrupt proceeds.

### A. Prerequisites for an Effective Investigation

Hence, there is an essential need for professionalism in corruption investigation. There are several prerequisites to an effective corruption investigation:

a. Independent — procurement related corruption can involve very senior public officials and hence the investigation can be politically sensitive and embarrassing to the Government. The investigation can only be effective if it is truly independent and free from undue interference. This depends very much on whether there is a top political will to fight corruption in the country, and whether the head of the anti-corruption agency has the moral courage to stand against any interference.

b. Adequate investigative power — Because such corruption is so difficult to investigate, you need adequate investigative power. The HK ICAC enjoys wide investigative power. Apart from the

normal police power of search, arrest and detention, it has power to check bank accounts, intercept telephone communications, conduct surveillance and undercover operations, require suspects to declare their assets, require witnesses to answer questions on oath, restrain properties suspected to be derived from corruption, and hold the suspects' travel documents to prevent them from fleeing the jurisdiction. I must hasten to add that there is an elaborate check and balance system to prevent abuse of such wide power.

c. Confidentiality — it is crucial that all corruption investigation should be conducted covertly and confidentially, at least before arrest action is ready, so as to reduce the opportunities for compromise or interference. On the other hand, many targets under investigation may prove to be innocent and it is only fair to preserve their reputation before there is clear evidence of their corrupt deeds. Hence in Hong Kong, we have a law prohibiting any one, including the media, from disclosing any details of ICAC investigations until overt action such as arrests and searches have been taken. The media once described this as a "press gag law" but they now have come to accept it as the right balance between press freedom and effective law enforcement.

d. International mutual assistance — many corruption cases are now cross jurisdictional and it is important that you can obtain international assistance in the areas such as locating witnesses and suspects; money trails, surveillance, exchange of intelligence, arrest, search and extradition, and even joint investigation and operation.

e. Professionalism — all the investigators must be properly trained and professional in their investigation. The HK ICAC strives to be one of the most professional law enforcement agencies in the world. ICAC is one of the first law enforcement agencies in the world to introduce the interview of all suspects under video, because professional interview techniques and the need to protect the integrity of the interview evidence are crucial in any successful corruption prosecution. The investigators must be persons of high integrity. They must adhere strictly to the rule of confidentiality, act fairly and just in the discharge of their duties, respect the rights of others, including the suspects and should never abuse their power. As corruption is so difficult to investigate, they need to be vigilant, innovative and be prepared to spend long hours to complete their investigation. The ICAC officers are often proud of their sense of mission and this is the single most important ingredient of success of the ICAC.

f. An effective complaint system — No anti-corruption agency is in a position to discover all corrupt dealings in the society by itself. They rely heavily on an effective complaint system. The system must be able to encourage quality complaints from members of the public or institutions, and at the same time, deter frivolous or malicious complaints. It should provide assurance to the complainants on the confidentiality of their reports and if necessary, offer them protection. Since the strategy is to welcome complaints, customer service should be offered, making it convenient to report corruption. A 24-hour reporting hotline should be established and there should be a quick response system to deal with any complaints that require prompt action. All complaints, as long as there is substance in them, should be investigated, irrespective of how minor the corruption allegation. What appears to be minor in the eyes of the authority may be very serious in the eyes of the general public!

**B. Understanding the Process of Corruption**

It should be helpful to the investigators to understand the normal process of bribery, through which the investigators would be able to know where to obtain evidence to prove the corrupt act. Generally, a bribery transaction may include the following steps:

1. Softening up process — it is quite unlikely that a public official would be corrupt from his first day in office. It is also unlikely that any potential bribe-offerer would approach any public official to offer a bribe without building up a good relationship with him first. Thus, there is always a "softening up process" when the briber-offerer would build up a social relationship with the public official, for example, inviting him to dinner and karaoke etc. Thus, the investigator should also attempt to discover evidence to prove that the public official had accepted entertainment prior to the actual corrupt transaction.

2. Soliciting/offering of bribe — when the time is ripe, the bribe-offerer would propose to seek favour from the public official and in return offer a bribe to him. The investigator should attempt to prove when and where this had taken place.

3. Source of bribe — when there is agreement for the bribe, the bribe-offerer would have to withdraw money for the payment. The investigator should attempt to locate the source of funds and whether there was any third person who assisted in handling the bribe payment.

4. Payment of bribe — The bribe would then be paid. The investigator should attempt to find out where, when and how the payment was effected.

5. Disposal of bribe — On receipt of the bribe, the receiver would have to dispose the cash. The investigator should try to locate how the bribe was disposed, either by spending or depositing into a bank.

6. Act of abuse of power — To prove a corruption offence, you need to prove the corrupt act or the abuse of position, in return for the bribe. The investigator needs to examine all the documents and witnesses relating to the full process of the procurement, in order to ascertain whether any of the abuse of process described in the earlier paragraphs can be found.

The task of the investigator is to collect sufficient evidence to prove the above process. He needs to prove "when", "where", "who", "what", "how" and "why" on every incidence, if possible. However, this should not be the end of the investigation. It is rare that corruption is a single event. A corrupt government servant would likely take bribes on more than one occasion. A bribe-offerer would likely offer bribes on more than one occasion and to more than one corrupt official. Hence it is important that the investigator should seek to look into the bottom of the case, to unearth all the corrupt offenders connected with the case.

**C. Methods to Investigate Corruption**

Investigating corruption can broadly be divided into two categories:
a. Investigating past corruption offences
b. Investigating current corruption offences

**D. Investigating Past Offences**

The investigation normally commences with a report of corruption and the normal criminal investigation technique should apply. Much will depend on the information provided by the informant and from there, the case should be developed to obtain direct, corroborative and circumstantial evidence. The success of such investigation relies on the meticulous approach taken by the investigators to ensure that "no stone is left unturned". Areas of investigation can include detailed checking of the related bank accounts and company ledgers, obtaining information from various witnesses and sources to corroborate any meetings or corrupt transaction etc. At the initial stage, the investigation should be covert and kept confidential. If there is no evidence discovered in this stage, the investigation should normally be curtailed and the suspects should not be interviewed. This would protect the suspects, who are often public servants, from undue harassment. When there is a reasonable suspicion or evidence discovered in the covert stage, the investigation can enter its overt stage. Action can then be taken to interview the suspects to seek their explanation and if appropriate, the suspects' home and office can be searched for further evidence. Normally further follow-up investigation is necessary to check the suspect's explanation or to go through the money trails as a result of evidence found during searches. The investigation is usually time-consuming.

**E. Investigating Current Corruption Offences**

Such investigation will enable greater scope for ingenuity. Apart from the conventional methods mentioned above, a proactive strategy should always be preferred, with a view to catch the corrupt red-handed. In appropriate cases, with proper authorities obtained, surveillance and telephone intercepts can be mounted on the suspects and suspicious meetings can be monitored. A co-operative party can be deployed to set up a meeting with a view to entrap the suspects.

Undercover operation can also be considered to infiltrate a corruption syndicate. The pre-requisites to all these proactive investigation methods are professional training, adequate operational support and a comprehensive supervisory system to ensure that they are effective and in compliance with the rules of evidence. As mentioned above, corruption is always linked and can be syndicated. Every effort should be explored to ascertain if the individual offender is prepared to implicate other accomplices or the mastermind. In Hong Kong, there is a judicial directive to allow a reduction of 2/3 of the sentence of those corrupt offenders who are prepared to provide full information to ICAC and to give evidence against their accomplices in court. The ICAC provides special facilities to enable such "resident informants" to be detained in ICAC premises for the purpose of de-briefing and protection. This "resident informant" system has proved to be very effective in dealing with syndicated or high-level corruption.

**F. Investigation Techniques**

To be competent in corruption investigation, an investigator should be professional in many investigation techniques and skills. The followings are the essential ones:

- Ability to identify and trace persons, companies and properties
- Interview techniques
- Document examination
- Financial Investigation
- Conducting a search & arrest operation
- Surveillance and observation
- Acting as an undercover agent
- Handling informers
- Conducting an entrapment operation

**G. Professional Investigative Support**

In order to ensure a high degree of professionalism, many of the investigation techniques can be undertaken by a dedicated unit, such as the following:

- **Intelligence Section:** a central point to collect, collate, analyse and disseminate all intelligence and investigation data, otherwise there may be major breakdowns in communication and operations

- **Surveillance Section:** a very important source of evidence and intelligence. The Hong Kong ICAC has a dedicated surveillance unit of over 120 surveillance agents and they have made significant contributions to the success of a number of major cases

- **Technical Services Section:** provides essential technical support to surveillance and operations

- **Information Technology Section:** it is important that all investigation data should be managed by computer for easy retrieval and proper analysis. In this regard, a computer can be an extremely useful aid to investigation. On the other hand, a computer is also a threat. In this modern age, most personal and company data are stored in computers. The anti-corruption agency must possess the ability to break into these computers seized during searches to examine their stored data. Computer forensics is regarded as vital for all law enforcement agencies worldwide these days

- **Financial Investigation Section:** The corruption investigations these days often involve a sophisticated money trail of proceeds of corruption, which can go through a web of off-shore companies and bank accounts, funds etc. It is necessary to employ professionally qualified investigative accountants to assist in such investigation and in presenting such evidence in an acceptable format in court.

- **Witness Protection Section:** ICAC has experienced cases where crucial witnesses were compromised, with one even murdered, before giving evidence. There should be a comprehensive system to protect crucial witnesses, including 24-hour armed protection, safe housing, new identity and overseas relocation. Some of these measures require legislative backing.

## III. CONCLUSION AND OBSERVATION

In conclusion, the success factors for an effective investigation of procurement related corruption and fraud include:

- An effective complaint system to attract quality corruption reports
- An intelligence system to supplement the complaint system and to provide intelligence support to investigations
- Professional & dedicated investigators who need to be particularly conversant with the procurement process and its corruption and fraud opportunities. They should also be effective in interviewing techniques and financial investigation
- More use of proactive investigation methods, such as telephone intercepts, surveillance and undercover operations
- Ensure strict confidentiality of corruption investigations, with a good system of protection of whistle-blowers and key witnesses
- International co-operation in mutual legal assistance and tracing of corrupt proceeds

# PARTICIPANTS' PAPERS

## ANTI-CORRUPTION ENFORCEMENT MEASURES IN PUBLIC PROCUREMENT IN EGYPT

*Wael Khorshid**

## I. INTRODUCTION

Public procurement is considered essential to the activities of the private sector, with the total cost of tenders for products, services, equipment, appliances and materials required for government authorities and other affiliated agencies. Clear and comprehensive regulations are essential for curbing corruption in public procurement. The passing of public funds into private hands through public procurement procedures presents enormous potential for corruption. However, public procurement agencies play a significant role in detecting and sanctioning corruption.

Egypt has taken some positive steps towards establishing a sound anti-corruption framework. Egypt has signed and ratified the United Nation Convention against Corruption (UNCAC) on 25 of February 2005. Following the revolution and the resignation of former president Mubarak, the country has undertaken a number of institutional reforms and has deepened its partnerships with the EU and the UN around anti-corruption and anti-money laundering programmes. On 2014, Egypt launched the National Anti-Corruption Strategy, which is a critical milestone for the development and implementation anti-corruption policies, aiming to create a culture that embraces justice, integrity and loyalty and rejects corruption.

## II. LEGISLATION IN RELATION TO CORRUPTION IN PUBLIC PROCUREMENT IN EGYPT

### A. Public Procurement System in Egypt

1. The Public Tender Law 89/ 1998

The Public Tender Law is the law which governs the process of public procurement in administrative bodies and government entities in Egypt. The law stipulates as a primary rule that all public tenders should fall under the principles of openness, equal opportunity, fairness and free competition. However, it vests the concerned Minister, the governor or an equally authorized person the right to contract by direct award within limitations, in some cases (Article 7) and with no limitations in others (Article 8).

In addition, the law offers an additional advantage to the national contractor by giving him priority if his bid does not exceed the lowest foreign bid by more than 15%. The law allows for local bidding contracts if they do not exceed EGP 400,000 (by virtue of the amendment No.191 for the year 2008), compared to 200,000 EGP before.

The concerned Minister or an equally authorized person is confined by 1,000,000 EGP for procuring transferable goods or provision of services, consultative studies, technical work or transport contracting and 3,000,000 EGP for construction work. However, the law allows the Prime Minister in extreme emergency to permit direct contracting within the limits stipulated in Article 7.

As for contracting by limited tenders, the fifth article of the law sets the following conditions: Items that are not manufactured or imported except through certain persons or companies. Items, which by nature require obtaining or buying from their certain production locations. Technical work, which requires by nature to be carried out by certain technicians, professionals or specialists. Contracts where national security dictates confidentiality.

To limit the misinterpretation of these terms, article 39 prohibits public officials who fall under this

*Chief Judge, Technical Bureau of the Court, Criminal Department, Court of Cassation, Egypt.

category of the law from participating themselves or through middlemen with offers or proposals for these authorities.

The problem with these laws lies in the following:

(i) Lack of regulations or terms that govern the participation of the private sector, in addition to absence of evaluation criteria to match the nature of these projects.

(ii) Lack of legal procedures to govern the means of following up on implementation of contracts and settling disputes that may arise. Lack of technical, financial and legal expertise required by the government financial entities to offer these projects to investors and to organize their participation.[1]

2. Penal Code 58 /1937

Under Articles 103-112 of the Penal Code, corruption is a serious offence and falls into the category of offences against the civil service and the public interest.

3. Illicit Gain Law (Law no.62/1975)

The Illicit gains law gives the Illicit Gains Bureau (IGB), a department affiliated to the Ministry of Justice, the power to investigate any public official for unjustified increase in his wealth. If the person cannot prove the legitimate source of this increase, his assets are frozen, and they are prohibited from travel and can be prosecuted on corruption charges. The proposed amendments expand the coverage of the law as well as the scope of the crime and allow defendants to avoid prosecution if they pay back the funds of unknown origin along with interest.[2] The Egyptian regulatory framework obliges public officials to submit a financial disclosure form upon taking their position, at the end of their term or contract and every 2-5 years during their mandate, to the Illicit Profit Apparatus. All public officials are required to declare: (i) loans; (ii) bank deposits; (iii) real estate assets; (iv) valuable movables; and (v) securities. These declarations are, however, not available to the public for scrutiny.[3]

4. Conflict of Interest Law (Law no.106 /2013)

The law also includes provisions obligating public representatives (The President, The Prime Minister, governors and others stated in article 1) to remove all kinds of conflict of interest between his personal job and his public duties. Under Article 6, he /she should resign from the companies' administration council or the commercial projects if it conflicts with his original public position (absolute contradiction). Moreover, it prohibits him/ her from purchasing stocks or shares of commercial companies for the whole period of his position (with some exceptions stated in Article 9).

5. Law 16/2016

The law amended article 18 bis 2 of the law 150/1950 which stated that a felon can reconcile in crimes in chapter four of Book Two of the Penal Code (Defalcation, Encroachment on, and Peculation of Public Funds) and the conciliation should be within an expert committee formed by the Prime Minister. In addition, the conciliation can be in any level of the trial or even after the last judgement, the felon can demand conciliation to the General Prosecutor to stop implementation of the punishment. (Previously, the reconciliation was not applicable.)

6. Presidential Decree No. 307 of 2004

The decree concerns the accession by the Government of the Arab Republic of Egypt to the United Nations Convention against Corruption, which was approved by Parliament on December 20, 2004 and was ratified in 2005.

**B. The Status of Criminalization of Corrupt Acts in Relation to Public Procurement.**

1. Corruption of Foreign Public Officials

The Egyptian Penal Code does not explicitly recognize nor regulate the corruption of foreign public

[1] Transparency in Government Procurement–Series of White Papers to Promote Transparency & Combat Corruption in Egypt,http://cipearabia.org/files/pdf/Corruption/Policy_Paper_Procurement-EN.
[2] http://english.ahram.org.eg/NewsContentPrint/4/0/177401/Opinion/0/Egypt-Why-amend-the-illicit-gains-law-now.aspx
[3] Transparency International, anti-corruption in Egypt helpdesk, 2015

officials. However, it recognizes the concept of extraterritoriality. According to Article 2(1) of the Law, the Egyptian Penal Code applies to "any person who commits, outside the country, an act that makes him a principal or an accessory in a crime committed wholly or partially in Egypt." Therefore, where the elements of the crime were perpetrated, as defined in the Egyptian Penal Code, will not have any impact on its qualification as bribery.

2. Illicit Enrichment

The Egyptian regulatory framework contains an obligation for public officials to declare their assets, upon taking their position and at the end of their term or contract and every 2-5 years during their mandate, to the Illicit Profit Apparatus. All public officials are required to declare: (i) loans; (ii) bank deposits; (iii) real estate assets; (iv) valuable movables; and (v) securities. However, these declarations are not available to the public for scrutiny.[4] Egypt also established a specialized agency for illicit enrichment called the Illegal Gains Department (IGD), which I will talk about later in this paper.

## III. EFFECTIVE INVESTIGATION AND PROSECUTION OF CORRUPTION IN PUBLIC PROCUREMENT

### A. Public Procurement Agencies

Public procurement agencies play a significant role in detecting, and sanctioning corruption. They can take measures to improve integrity and transparency, and prevent corruption by putting specific tools to monitor decisions and enable the identification of potential corruption and enhance transparency. However, the designated institutions need to be independent in resources and in working conditions, and have sufficient number of responsible officials well educated and trained. Egypt has two kinds of authorities in that field:

1. Administrative Auditing and Monitoring Authorities

*(a) The Central Audit Organization (CAO)*

The CAO was created in 1964 and is today a legally, technically and physically independent entity under the auspices of the president. The CAO is the external auditor of the national and local administration, local governments and public bodies.

According to article 2 and 5 of law 144/1988, the CAO role is to conduct financial audits legal and accounting perspectives and to monitor the implementation of governmental plans. The CAO holds an independent budget, as required by law. The CAO produces reports for the scrutiny of the president's office, the prime minister's office and the parliament.

*(b) Administrative Control Authority (ACA)*[5]

The ACA is a government agency which has been operating under the auspices of the Prime Minister by the law 54 /1964, It has very wide investigative powers for detecting and fighting against corruption by exercising a financial, administrative and technical control of the government, state-owned enterprises and private sector firms that accomplish public work. The ACA also follows up on the implementation of related legislation, plays an advisory role for the prevention of corruption and other abuses, and detects negligence and violations. The ACA has investigative powers, and it can hand over suspects to the Illicit Gains Authority.

It has been active for over fifty years in detecting and preventing administrative and financial corruption in the public sector, but its independence is limited by the fact that it must obtain the consent of the Prime Minister in order to arrest public officials suspected of corruption[6].

In September 1999, the ACA was conducting an investigation into a suspicious relationship between a businessman and someone believed to be within the Customs Authority who had agreed to assist him in finalizing the customs procedures on the importation of 200 vehicles from Saudi Arabia. Surveillance units followed the businessman to a meeting at a desert road outside Alexandria where they also found the Head of the Customs Authority and his son. The same day the General Prosecutor issued a warrant to

[4] Transparency International forthcoming 2015.
[5] www.rekaba.com/english/english.html
[6] Transparency International forthcoming 2015.

wiretap and record the phone calls of the Head of the Customs Authority. As a result of the phone wiretapping the ACA found out the corrupt relationship between the Head of the Customs Authority and the Minister of Finance who had been benefiting from the evasion of import duties. Investigations revealed three other businessmen, one a Saudi, the Head of the Technical Office of the Customs Authority and other minor customs officials were involved.

In October 2001, the ACA completed the prosecution of a former Minister of Finance following a trial at the Supreme State Security Court, which lasted over a year. The former Minister and the former Head of the Customs Authority received 8 years and 11 years' imprisonment respectively and were heavily fined and ordered to pay compensation to the Treasury[7].

*(c) The General Department of Public Funds Investigation Police (GDPF)*[8]

The GDPF is affiliated to the Ministry of Interior and was established by Presidential Decree no. 10/1984. Its structure and organization are determined by Ministerial Decree No. 167/1985 (Ministry of Interior). While its missions are those of a police force, it does have a special bribery and corruption unit.

*(d) Money Laundering Combating Unit (MLCU)*

The MLCU is the Egyptian financial intelligence unit. It was established by the Anti-Money Laundering Law No. 80/2002. The MLCU is an independent unit functioning within the Central Bank of Egypt (CBE). The MLCU receives all reports concerning money laundering activities and offences. It is in charge of the investigation and reports any investigation results to the public prosecution body. The MLCU maintains a database gathering all received reports and information concerning money laundering and receive suspicious transaction reports from financial institutions. According to the Anti-Money Laundering Law of 2002, the MLCU personnel are nominated by minister of justice decree, upon the request of the governor of the Central Bank of Egypt.

2. Prosecuting and Judicial Authorities

In the Egyptian court system, investigation and prosecution are both carried out by public prosecutors. Public prosecutors and magistrates with responsibilities in the fight against corruption are part of the judiciary.

The Attorney-General is responsible for investigating for public prosecutions cases related to public funds and bribery under the terms of Law No. 46/1972 (on judicial authority). The powers of prosecutors are set out in Law No. 150/1950 in accordance with criminal procedural law. In seeking to uncover bribery, prosecutors enjoy wide-ranging investigative powers[9].

*(a) Illegal Gains Department (IGD)*

The IGD is governed by laws No. 11/1968, No. 2/1975 and No. 95/1980. Its mandate is to examine suspected illegal revenues and analyse asset disclosure forms. Public officials are required to disclose their assets and those of their spouses and children upon gaining office. The IGA does not enjoy investigative power, but it receives reports concerning corruption from the public as well as from private and public employees. In situations where asset disclosures are proven to be fraudulent, the IGD transfers the case to criminal courts.

*(b) Administrative Prosecution Authority (APA)*

The Administrative Prosecution Authority was founded in 1958 as an agency to monitor and investigate civil servants in all ministries and agencies at all levels. The Administrative Prosecution Authority is supported by professional staff to investigate administrative and financial corruption. The APA has a full-time staff and, despite being placed under the authority of the Ministry of Justice and being staffed with state investigators, the Supreme Constitutional Court decided in June 2000 that the APA was a judicial authority. Some administrations and entities have refused to be under the APA's prosecution power, making the mandate of the organization difficult to fulfil[10].

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[7] Administrative Control Authority websitehttp://www.icac.org.hk/newsl/issue12eng/button4.htm
[8] www.moiegypt.gov.eg/english/departments%20sites/publicfunds/generaldepartment/
[9] Business climate development strategy, December 2009, MENA-OECD Initiative.
[10] Daily News Egypt 2014.

*(c) The Public Funds Prosecution (PFP)*

The Public Funds Prosecution (PFP) was placed under the authority of the Attorney-General; the PFP is a prosecuting agency that investigates public fund offences, including corruption. This institution, in order to play its role in a sufficient way, needs to be independent, and officials should be more familiar with sophisticated anti-corruption techniques and updated detection methods.

**B. Effective Steps towards Anti-corruption**

Egypt launched a National Anti-Corruption Strategy on the occasion of Anti-Corruption Day. The Egyptian Prime Minister launched the National Anti-Corruption Strategy for the period starting in December 2014 and ending in December 2018. The strategy is a critical milestone for the development and implementation of effective and coordinated anti-corruption policies in Egypt, aimed at creating a culture that rejects corruption and embraces justice, integrity and loyalty.

The Strategy was developed by members of the National Coordinating Committee for Combating Corruption which is headed by the Prime Minister and includes representatives of most of the concerned national official bodies. Its work is coordinated by a technical committee that is headed by the ACA.

The National Anti-Corruption Strategy in Egypt adopts ten main objectives, which range from short to medium term, namely:

(1) Raising the level of performance in government,
(2) Establishing transparency and integrity principles among public officials,
(3) Developing and updating anti-corruption legislation,
(4) Strengthening judicial procedures to achieve prompt justice.
(5) Strengthening capacities of anti-corruption bodies.
(6) Raising living standards and achieving social justice.
(7) Raising awareness and building trust between citizens and State institutions.
(8) Strengthening national cooperation against corruption.
(9) Strengthening regional and international cooperation against corruption.
(10) Strengthening civil society participation in combating corruption.

The Strategy constitutes a good and comprehensive starting point as it covers both prevention and criminalization, involves a large number of concerned agencies in combating corruption, and underlines the importance of developing national indicators to monitor actual implementation on the ground, which is emphasized by comparative experiences also calling for the need to focus on securing sufficient financial and human resources for this purpose. Such experiences also call for a greater focus on sectoral approaches so as not to be limited to overarching legal and institutional approaches and for strengthening the role of civil society through specific tools and mechanisms. In addition, they also emphasize the indispensable need for adequate frameworks that are effective in coordinating implementation and ensuring proper monitoring and evaluation.

Transparency is the main weapon against corruption. Of course, it cannot prevent corruption but it becomes a much more difficult exercise when everything that is done by the judicial authority is in the openness of court proceedings under public scrutiny — with the parties present and through the eyes and ears of the media present.

## IV. ASSET RECOVERY

Regarding asset recovery of former regime leaders in foreign countries, Egypt encountered difficulties regarding what constitutes probable cause for accepting request for seizure of property, as the weight of evidence varies widely from one country to another. For instance, how circumstantial evidence weighed by the requested country. In addition, the recognition of judgements rendered in absentia is also a matter of question. Judgements rendered in Egypt in absentia have res judicata effect, unless they challenged and overruled. This leads us to think about a more efficient way of communicating with the requested country, in other words, "losing our ties" and communicating informally to overcome time and effort wasted in paperwork going back and forth, thus, preventing rejection of requests or at least becoming useless, especially when time is a vital factor. It is also recommended to have a unified template of mutual legal assis-

tance request recognized by competent authorities in different countries, thus reducing the probability of rejecting such requests. This can be either on a bilateral or multi-lateral basis.

## V. INTERNATIONAL COOPERATION

### A. Mutual Legal Assistance between Law Enforcement Agencies

Mutual legal assistance between law enforcement agencies is very important to fight against corruption and related crimes. Inter-agency communication through procedures of exchanging effective information, and sharing experiences in the case of corruption detection, investigation and prosecution may also be essential to enhance the understanding of all those involved in the fight against corruption.

### B. Mutual Legal Assistance (MLA) in Egypt

The Arab Republic of Egypt maintains continuous contacts with various countries of the world to intensify cooperation in the area of cross-border and corruption crimes, especially through conclusion of judicial cooperation conventions and treaties, ensuring extradition, as well as, judicial and mutual assistance agreements. In this context, Egypt has signed a number of bilateral agreements with several European and African States, such as Hungary, Poland, Romania, Italy, South Africa and Ukraine, in addition to cooperation agreements with most Arab States.

Legal and judicial international cooperation is regulated by multilateral agreements, regional agreements, bilateral agreements, national laws, as well as, rules of reciprocity and international courtesy. It is, however, difficult to determine which of these agreements is best serving international cooperation in legal and judicial matters, as each is concluded to meet demands existing at the time of its conclusion.

It is worth mentioning that Agreements ratified by the Egyptian Government have supremacy over national laws by virtue of the Egyptian Constitution with no need for any further action.

The request is to be forwarded through the designated channels, i.e. the Letter Rogatory and all legal assistance required, is to be submitted through the diplomatic channels, after which it is sent to the Ministry of Justice (MOJ) as the Central Authority for review and taking necessary measures for implementation of such assistance. Nevertheless, a Letter Rogatory can be addressed directly to the central authority, as the case may be in the bilateral or multilateral agreement.

In the Ministry of Justice, the International and Cultural Cooperation Department, a key organ of the Ministry of Justice of Egypt, is the Central Authority for international cooperation in legal matters. This department comprises a sufficient number of judiciary members and justice professionals, whose role, among others, is drafting, reviewing and executing legal assistance requests. This implies that technical legal issues in international matters are handled by judges and justice professionals not civil servants with legal background, as the case may be in other jurisdictions, thus, ensuring the quality of legal service provided in this respect.

An example of procedures followed regarding cooperation in criminal matters: a judicial authority in country X, a requesting country, directs a legal request to its Central Authority which forwards it to the Central Authority in Egypt (the Department of International and Cultural Cooperation at the Ministry of Justice), either directly or via diplomatic channels, as the case may be. The request, after being checked regarding conformity with threshold requirements for a mutual legal assistance request, is then directed to the competent authority to be duly executed, and then forwarded back to the requesting country. This process runs vice versa in cases of mutual legal assistance requested by the Egyptian authorities.

Regarding obstacles hindering efficient execution of mutual legal assistance requests or Letters Rogatory in Criminal matters, criminal activities are becoming more sophisticated and transnational in nature, taking advantage of modern technology. This requires, inevitably, a more flexible and speedy process in executing MLA requests.

## VI. CASE STUDY

### A. Introduction

I chose this case study, which is deeply related to corruption in public procurement, as the defendants were top senior government officials in Egypt.

### B. The Facts

In 2011, the public prosecution charged former Prime Minister of Egypt, former Minister of Finance and former Minister of Interior of profiteering from, and misusing their public position by, offering a third party (a Foreign Businessman) a benefit from their work; the second and third presented a report to the first to award importing metal plates for vehicles all over the country to a foreign company represented by the third party (the fourth defendant) by direct award with an overrated price. Also facilitated for a 3rd party, by abusing the power of public office, misappropriating public funds by obtaining the difference in value of similar plates' market price. They were also charged with charging citizens with undue charges to obtain licence plates.

### C. The First Instance Court Judgement

The primary court sentenced the first and the fourth defendant to a year in prison with hard labour and suspended implementation of the sentence for three years, and sentenced the second "in absentia" with aggravated imprisonment for ten years, and sentenced the third with aggravated imprisonment for five years. Moreover, the court ordered the removal of the first three defendants from their public positions and fined them with 92 million pounds.

### D. The Appellate Court Judgement

In 2013, the court of appeal overruled the primary court judgement on the ground that the judgement did not include evidence that the defendants misused their positions, and did not show the actions done by the defendants that shows their responsibility, and the role of the third defendant was just implementing the regulations assigned by the second one. Furthermore, the judgement did not show the criminal intention of the defendants to commit these crimes. Most importantly, the court referred to article 8 of The Public Tender Law 89/ 1998 which allows the Prime Minister in exceptional cases to permit contracting with direct award on his own discretion.

### E. The Second Trial Court

The case was remanded to the primary court to be adjudicated by another circuit. In 2015, the court found the defendants not guilty based upon Article 8 of The Public Tender Law 89/ 1998 as the court found that there were extreme circumstances that forced the Prime Minister to take such a decision. Furthermore, the court did not find any premediated intention by the first and third defendants, as they were not the ones who decided the financial terms of the contract.

## VII. CONCLUSION

1. The government should seek to communicate with the public and raise the awareness of its actions to curb corruption. Awareness raising can be fulfilled by public education programmes like printed advertising, information campaigns delivered through the mass media (including schools and universities). The goal is to change public attitudes: 'there is no reason for accepting corruption as a normal way of doing business and as an inevitable evil'.

2. The government should involve the public in anti-corruption efforts to ensure transparency, by engaging the public in government plans or measures through press conferences, and respond to public inquiries by all communications means and public meetings. The maxim "Justice must not only be done, but seen to be done" is one of the core principles.

3. Establishing a circuit or more in the criminal court specialized in corruption cases managed by an expert and specialized judges, developing special mechanisms concerning cases related to corruption and activating a conciliation system for low value cases.

4. Revising the national legislation to be in alignment with the UNCAC and the international treaties to

apply programmes for protecting whistle-blowers and obtaining statements from witnesses.

5. Supporting current initiatives to develop codes of conduct to reduce discretionary powers of officials, and to determine the rules of ethical behaviour concerning the public work whether in the judicial, administrative, political or social range.

6. Cooperating with the universities, research centres and think tanks that are concerned in Egypt and outside Egypt to provide comparative legal studies concerning combating corruption and money laundering, and translating legal studies worldwide to take advantage of the acquired experience of the other states in this field.

7. Article 8 in the Egyptian Tender Law should be amended to allow judicial review to decide whether the public procurement case deserves to be considered as an extreme circumstance or not, to prevent the misuse of the exception granted for the Prime Minister by law (as shown in the case above).

# THE PROCUREMENT SYSTEM IN FIJI ISLANDS

*Uttam Vijay Naidu**

## I. INTRODUCTION

Procurement plays an essential part in the delivery of public services. Fiji is a developing country and goods and services procured on behalf of the government agencies make up 20% to 40% of the Gross Domestic Product (GDP). It also accounts for a substantial part of the global economy. The Fiji Procurement Office was established on the 1st of August 2010 as stipulated under section 4 of the Procurement Regulation 2010. The Procurement Regulation has outlined strategies which intend to reduce wastage and eliminate fraudulent activities.

It also promotes the following objectives:

- Value for money
- Maximize economy and efficiency and ethical use of government resources
- Open and fair competition amongst suppliers and contractors
- Integrity, fairness and public confidence in the procurement process
- Achieving accountability and transparency in procedures relating to procurement.

Previous Tender Boards and their regulations have been amalgamated into one entity and one law in an effort to centralize procurement. Government reforms are ongoing to improve and attain the goals defined above.

## II. FUNCTIONS OF THE PROCUREMENT OFFICE

The main functions of the Fiji Procurement Office are to regulate and administer the procurement of goods, services and work for the government. This includes:

1. The formulation of appropriate procurement policies and processes that uphold the guiding principle of procurement.
2. The processing of all government tenders for goods, services and work valued over $50,000.00
3. The provision of secretariat support for the newly established Government Tender Board.
4. The provision of logistic support for administration and distribution for goods purchased from overseas.
5. Conducting compliance assessments of procurement functions and activities across the whole government.

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Previously, before the inception of the Procurement Office, there was the Government Supplies Department which was looking after the procurement aspect of the country. At that time, there was the warehousing and retail outlets provided by government for such goods and services but that has now phased out. Currently, with the Procurement Office functional, it provides insight to the process and functions involved when dealing with goods and services on behalf of the government. The procurement sector is still in the evolutionary stage at the moment and needs more awareness and expertise in the near future to maintain its functions in the proper manner.

## III. OFFENCES RELATED TO PROCUREMENT

It is always anticipated when there are goods or services in issue, it is most likely that persons involved in such transactions are persistent that their product, goods or services are acknowledged for their respective price. In order to be recognized, the provider at times may be involved in overt acts in order to facilitate that particular service or goods to be procured by the government. In doing so, they become involved in the commission of offences as listed below:

- Bribery
- Abuse of office
- Corrupt practices
- Forgery
- Fraud
- Falsification of documents
- Perjury
- Making of false declarations
- Destroying evidence
- Theft
- Obtaining financial advantage
- Conspiracy to defraud.
- Money laundering

## IV. INVESTIGATION

Investigations of such offences are very interesting despite being time consuming and painstaking. It involves the collation of documents as proof to be able to interrogate the perpetrators of the alleged crime. Initially, a report is lodged with the Police Department regarding the alleged offence. This is normally done after the agency itself has conducted an internal investigation to establish that an offence has been committed. There are various units in the Criminal Investigation Department that deal with certain types of offences. Once a report is lodged, an Investigating Officer is appointed by the department to investigate the case. The duties of the investigator are to initially understand the nature of the complaint. He/she then visits the respective office from where the complaint has been received to identify the contact persons and elicit from him/her all relevant information pertaining to the complaint. At times when there is a large scope of avenues required to be covered by the Investigator, then an investigating team is formed and assigned to assist the investigator in carrying out the tasks as required during the course of

investigation. The team assigned will be fully versed with the nature of the complaint, the urgency and the proposed outcome from that investigation.

The Investigator then prepares an investigation plan based on the information he/she has on hand in the first instance. According to the plan, he/she will obtain information on the systems and processes of the organization involved in the alleged offence. This will assist the investigator in the retrieval of the respective documents, tracking the persons involved, and determining actually where and how the offence was committed. It would also provide an overview as to what happened to the goods or services that were intended for a particular purpose and where they have been diverted. Recovery of the goods and documents are essential for prosecution. It is also the responsibility of the Investigating Officer to provide updates on the investigation to the respective complainants.

Once the plan is prepared, all members of the team will be briefed accordingly and designated their tasks respectively in order to finalize the investigation. The investigator and the Supervising Officer will always be cautious to ensure that relevant information is not leaked or passed off to any person who could disrupt the investigation or divert it into another direction. There will be a timeframe allocated to the investigator and likewise to each member of the team to complete in order to achieve their goals within the prescribed time.

# CONSPIRACY IN GOVERNMENT PROCUREMENT IN INDONESIA

*Amir Nurdianto**

## I. FOREWORD

Criminal provisions regarding corruption in Indonesia are regulated in Law no. 31 of 1999 on the Eradication of Corruption which was subsequently changed and supplemented by Law no. 20 of 2001. Legally, formulation and types of corruption regulated in Law no. 31 of 1999 in conjunction with Law no. 20 of 2001 can be grouped as follows:

- Any person who unlawfully enriches him- or herself or another person or a corporation (Article 2)
- Civil servants or state officials misusing authority to enrich themselves or another person or a corporation (Article 3)
- Everyone who participates in bribery (giving or promising anything) to civil servants or state officials, judges, lawyers (Articles 5 and 6)
- Business entities or individuals committing skullduggery (Article 7)
- Civil servants or state officials, individuals, or notaries who embezzle, falsify, eliminate, or destroy money, goods, certificates, letters or administrative lists (Articles 8, 9 and 10)
- Civil servants or state officials, individuals accepting a gift or pledge (Articles 11 and 12)
- Civil servants or state officials committing gratification (Article 12B)
- Any person who gives a gift or promises something to civil servants (Article 13)
- Other crimes related to corruption (Articles 21, 22, 23 and 24)

The laws regarding government procurement in Indonesia start with the release of Presidential Decree no. 80 of 2003 and others that now apply are Presidential Regulation no. 54 of 2010 which is then adjusted by Presidential Regulation no. 35 of 2011 (first amendment) and Presidential Regulation no. 70 of 2012 (second amendment).

According to article 1, point 1 of Presidential Regulation no. 54 of 2010, government procurement is an activity to obtain goods or service by ministries, agencies, local work units, or other institutions where the process starts from planning needs until completion of all activities to acquire goods or services.

Normatively, as stipulated in article 5 of Presidential Regulation no. 54 of 2010, principles of government procurement are efficient, effective, transparent, open, competitive, fair or not discriminatory and accountable. Those principles serve as general guidelines in implementation of government procurement in every stage of procurement carried out by respective government agencies.

In practice, in Indonesia government procurement is often seen as a process prone to acts of corruption with various types and modes of irregularities committed by parties associated with the process of government procurement. The process of government procurement is often used as a means to obtain

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personal or a group benefit by ignoring principles of government procurement that ultimately lead to financial losses to the state.

Based on the data handling of corruption cases by the Corruption Eradication Commision in the period 2004 until June 2016, 148 cases out of 514 cases handled by the CEC are corruption related to government procurement.

Corruption related to government procurement that has been identified is only part of the entire corruption related to government procurement occurring throughout Indonesia. That is, there is still a lot of corruption in government procurement which has not been revealed.

The government procurement process in Indonesia implemented in all sectors of development is scattered among various government agencies either at the central level or at regional level with a range of value scales of work budget. Supervision and control efforts over the government procurement process become very essential in order to prevent occurence of deviations which may result in leakage of budget to interests of a few people or certain groups. In addition, law enforcement efforts against the occurence of irregularities classified as corruption in government procurement also play an important role to provide a deterrent effect and demand accountability to individual perpetrators, and to maximize efforts to recover losses to the state caused by corruption in government procurement.

Therefore, the role of law enforcers becomes very important to be able to find and deal with corruption in government procurement as part of the effort to combat corruption and maximize efforts to recover losses to the state, and ensure that the government procurement process can run according to principles of government procurement for implementation of national development, for the benefit and welfare of all people of Indonesia.

## II. MAIN DISCUSSION

### A. Irregularities in the Implementation of Government Procurement

Corruption may occur in the stages of government procurement process from the budget planning stage, planning and preparation of procurement, implementation of procurement activities, handover of goods or services, payments as well as inspection or audit on the implementation of government procurement.

The pattern of irregularities that may occur in the government procurement stage which leads to corruption include:

- The preparation stage of procurement: for example the procurement planning activities inflate costs (mark up), directed to the interests of a product or provider of certain goods and services, unrealistic planning particularly from the point of execution time, the committee works behind closed doors, dishonest and controlled by certain parties, owner estimate (OE) is covered up when it should not be confidential, the base price is not standardized, technical specifications lead to a specific product, not standardized tender documents, tender documents are not complete.

- Stage of the procurement process: for example the announcement period is too short, material of announcement is incomplete and confusing (ambiguous), dissemination of flawed tender documents, during the pre-bid (*aanwijzing*) there are information restrictions by the committee so that only a certain group obtains complete information, the pre-bid (*aanwijzing*) was changed into a question and answer session, an attempt to block entry bid documents by certain elements so that certain participants are late in submitting a bid sheet, on the bid evaluation activities subtitution of documents is done by inserting a revised document into the initial document, the committee works behind closed doors, announcement of winning bidder only to a specific group, not entire refutation get response, sending of determination letter intentionally delayed in order to get kickbacks.

- Drafting and signing of the contract: for example signing of the contract without supporting documents (fictitious documents), the signing of contract is delayed due to performance bond that

does not exist.

- Execution of the contract and delivery of goods and services: for example, the goods delivered are not in accordance with specifications defined in the contract, signing of minutes of handover when work has not been completed, inspectors do not supervise properly and accidentally allow cheating conducted by the supplier.

Based on case studies of corruption in government procurement handled by the CEC, it can be identified that the problems surrounding government procurement are due to irregularities in the planning, implementation and monitoring or accountability of government procurement. Characteristics of corruption that commonly occur in government procurement that had been handled by the CEC, among others, are:

- Goods or services which are held genuinely not needed or not in accordance with requirements but a booking and deposit from the interested parties is not planned based on real needs.

- Specification of goods and services and owner estimate that should be made by procurement committee actually is a specification that is directed at a particular brand, at a price regulated and determined by interested parties. which inflates costs (mark up) or deflates costs (mark down) to benefit certain parties.

- Auction is supposed to be fair, open and based on competence but is instead set according to the scenario for the benefit of certain parties.

- Acceptance of a sum of money or goods in return (kickback) from provider of the goods to the sponsor, brokers and certain officials which led to the price of goods or services being increasingly bloated.

- Giving money or goods at a certain percentage, according to the value of government procurement projects, as a deposit or a tribute that must be paid by the procurement committee and project leader to superiors under the pretext as tactical funds or operational funds for the organization spending purposes.

**B. Handling Corruption Related to Government Procurement**

Tackling corruption related to government procurement is required to have sufficient understanding of principles and stages in government procurement in accordance with applicable provisions. Understanding and capability that will be necessary to be able to identify irregularities in the government procurement process is indicated as a form of corruption.

The process of building a case (case building) begins with handling of information (information handling) over allegations of corruption in government procurement. Information received should be immediately analysed to determine its quality by analysing the qualifications of information sources and reliability.

Information about alleged corruption in government procurement can be obtained from several sources including members of the procurement committee, the internal auditor or other internal source aware of any irregularities in the government procurement process, bidders who feel disappointed because they were treated unfairly in the process of government procurement, members of the non-governmental organizations or journalists who find indications of irregularities in the government procurement process, auditor- or examiner-found irregularities in the government procurement process which was examined or other parties. Information about alleged corruption in government procurement can also be obtained from the documents in the form of budget documents, government procurement schedules, government procurement announcements, government procurement documents, agreement documents or the government procurement contracts, documents of audit reports or examination report documents and other documents.

Furthermore, based on preliminary information about the alleged corruption in government procurement drafted several alternative of legal construction based on variety of possible irregularities in govern-

ment procurement which indicated as a form of corruption with attention to some point mark indication that may occur at any stage of process of government procurement.

The next step is collection of information material to reinforce an allegation or hypothesis on the indication of corruption in government procurement. Based on data and information collected, the most powerful legal construction to be proven on alleged acts of corruption in the government procurement is drawn.

The collection of information wherever possible should be conducted by not reaching out to the parties allegedly involved. Methods of collecting information among others can be done by finding and analysing information from open sources such as information and data that are open to the public or accessible to the public either directly or via internet such as auction announcements, auction winners, the announcement of procurement schedules and others. Collection of information may also be done by confirmation with information sources (complainants) or others who can be trusted after identification of information sources, or by direct observation of results of implementation of government procurement. Having obtained information about alleged corruption in government procurement and having gained confidence of the quality of information sources, the information can be improved in the preliminary investigation stage.

In the preliminary investigation stage, collecting information can be either closed or open which includes conducting interviews or inquiries to the parties associated with the government procurement process, clarifying testimony and documents that have been obtained, and analysing documents related to government procurement. Collection of information in this stage is intended to strengthen the legal construction that has been built by finding two items of evidence sufficient to corroborate their allegations on corruption in government procurement.

Collection of information at the level of investigation conducted openly with the aim of gathering sufficient evidence for fulfillment of elements in order to prove the alleged corruption in government procurement. The collection of information made through examination of witnesses, examination of suspects, expert examination, requesting data and financial transactions from financial service providers, asset tracking and a series of legal actions in the form of searches and seizure of evidence.

Efforts to collect evidence through a search related to government procurement are principally directed at main targets such as unit work offices or agencies in which the procurement process was carried out, offices of partners (the company winning the auction, auction participants, companies companion, suppliers, as well as broker offices) and suspect residences, and other places deemed necessary.

Search of offices or the implementing government procurement agency directed at the workspace of procurement officials (officials, procurement committee, admissions committee) with the goal of documents and files related to the procurement process and acceptance, mailing administration staff room, official secretary, finance and treasurer targeting the documents and files related to correspondence, financial transactions and payments, as well as other locations deemed necessary.

Searches in associate companies directed at boardrooms or company policymakers with target documents and files of strategic policies and agreements related to government procurement being followed, meeting rooms and secretary rooms targeting the minutes of meetings, marketing staff room and administration staff targeting the bid price and specification of goods, sales staff room, purchasing staff and inventory staff with the goal of documents and files related to sales, booking or purchase of goods and inventory records, finance staff room and accounting staff room targeting the documents and files related to financial transaction bookkeeping and company financial statements, as well as other locations deemed necessary.

Asset tracking in the form of cash, deposits, savings and other cash equivalents done as early as possible when the investigation was started because demand for such information requires considerable time and has a dependency on other parties such as financial service providers and Indonesian Financial Transaction Reports and Analysis Center (INTRAC). There is a need to build an integrated working system between investigators, financial service providers and INTRAC by assigning personnel who are

given specific responsibility to bring together and coordinate related to the financial data request so that all the information urgently needed by investigators and the progress of producing it can be tracked by financial service providers and INTRAC.

Blocking of assets is carried out if assets were found allegedly to originate or are the result of corruption that is obtained in *tempus* relevant to acts of corruption, acquisiton process involving the parties related to the corruption that occured and other factors.

Proving corruption in goverment procurement in Indonesia is basically the same as proving of crimes in general which is looking for material truth that is not only based on evidence submitted formally by the public prosecutor or the accused but pursued to find the real truth. Judges shall explore and work on the evidence submitted in order to prove that what the accused is charged with actually happened and that the offender is accountable for the actions.

This begins with proving the facts of the accused actions followed by application of material criminal law namely proving facts that such actions meet the elements of the offences charged. This is done in two stages:

- Disclosure of the facts by applying the law of criminal procedure, in this case the law of evidence.
- Analysis of the facts that have been proven by applying the facts to the elements of the offences charged under the theory of criminal law (material criminal law).

Judges in adjudicating should be able to consider the facts revealed at the hearing, analyse carefully whether there is a causal relationship between the facts that occured with actions of the accused, thus reaching the conclusion that under provisions of law such acts as indicted have been proven legally and convincingly. Rules governing such evidence are referred to as the law of evidence.

Evidence and strength of evidence in corruption cases in Indonesia is regulated in Article 26 and 26 A of Law no. 31 of 1999 as amended by Law no. 20 of 2001.

The strategy of criminal prosecution of corruption cases no longer uses conventional ways to pursue perpetrators but changes the paradigm to put forward pursuit of wealth proceeds of corruption. Imprisonment of perpetrators is still required but chasing wealth and impoverishing the accused have more preventive properties.

Referring to the United Nations Convention Against Corruption in 2003 and ratified on April 18, 2006 through Law no. 7 of 2006 on Ratification of the United Nations Convention Against Corruption in 2003 in Indonesia, several laws related to asset confiscation of proceeds of crime were enacted. Legislation among others are as follows:

- Law no. 31 of 1999 as amended by Law no. 20 of 2011 on the Eradication of Corruption
- Law no. 15 of 2002 as amended by Law no. 25 of 2003 on Money Laundering which has been repealed with the enactment of Law no. 8 of 2010.

The hunt for the proceeds of corruption started since investigation by seizing property associated directly or indirectly with corruption and expanded efforts of the imposition of sentences for additional compensation. Implementation of the criminal verdict of additional compensation has not taken precendece on implementation of imprisonment in lieu of criminal verdict additional compensation but is more aimed at authority to seize, auction off property belonging to the convicted for payment of compensation.

International cooperation for purposes of seizure and asset recovery as defined in the United Nations Convention Against Corruption needs to be realized with the countries concerned even though it is not easy to do because of the national interests of each country.

## III. CONCLUSION

A. The pattern of tackling corruption in goverment procurement must be in accordance with and understand the pattern of irregularities in implementation of government procurement. Handling of corruption in government procurement is one of the repressive efforts of law enforcement in order to eradicate corruption that not only aims to provide a deterrent effect and prosecute criminal responsibility of the perpetrators but also aims to maximize efforts to recover losses to the state arising from acts of corruption.

B. Prosecution of corruption cases of government procurement that is proportional and professional demands application of the law of evidence in disclosure of the facts and application of material criminal law, comprehension of interpretation or understanding of the elements of the crime and also the prosecutorial strategy of deprivation of the wealth of the accused.

# EFFECTIVE ANTI-CORRUPTION ENFORCEMENT IN THE AREA OF PUBLIC PROCUREMENT

*Lujaina Mohamed**

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## I. INTRODUCTION

While the well-renowned tourism industry of Maldives paints the country as the epitome of serenity and calmness, the island nation has been in the midst of chaos and uncertainty in the recent years.

The state audit report[1] published on 4th February 2016 exposed the biggest corruption scandal in the history of Maldives. The report confirmed the embezzlement of $79 million through the state-owned Maldives Marketing and Public Relations Corporation (MMPRC). Equally unsettling, was the conviction of the first democratically elected leader of Maldives on a terror-related charge, which led to severe condemnation from the international community on the basis that the trial process contravenes international fair trial standards and that the conviction was politically motivated, along with allegations that the judicial system of Maldives is compromised[2].

The Global Corruption Barometer 2013[3] survey revealed that 97 per cent of the respondents believe corruption to be a threat in the public sector of Maldives. According to the survey, the Parliament, followed closely by political parties and the Judiciary is perceived to be the most corrupt institution of the country.

Undoubtedly the country is in dire need to re-enforce the current methods of combating corruption in order to reach the full potential of social and economic development of the small island nation and to gain public confidence in its constitution.

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[1] http://audit.gov.mv/assets/Uploads/MMPRC-Special-Audit-Report-2016.pdf

[2] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15915&LangID=E

[3] http://transparency.mv/wp-content/uploads/2013/12/FINAL-TM-POSTER-ENG.pdf

**A. Anti-Corruption Commission of Maldives (ACC)**

The Maldivian legal system is currently governed by the Constitution of 2008 which mandates the establishment of an independent statutory institution to combat corruption.[4] Hence, the Anti-Corruption Commission Act[5] (hereafter referred to as the ACC Act) was enacted; and The Anti-Corruption Commission (hereafter referred to as ACC) was established on 16th October 2008. The ACC is an independent legal entity, possessing power to sue, be sued and to make undertakings in its own capacity.[6]

1. Key Functions of the Anti-Corruption Commission

The ACC Act mandates the following obligations for the Commission:[7]

- To inquire into and investigate all allegations of corruption; any complaints, information, or suspicion of corruption must be investigated;
- To recommend further inquiries and investigations by other investigatory bodies, and to recommend prosecution of alleged offences to the Prosecutor General, where warranted;
- To carry out research on the prevention of corruption and to submit recommendations for improvement to relevant authorities regarding actions to be taken;
- To promote the values of honesty and integrity in the operations of the State, and to promote public awareness on the dangers of corruption;
- Conduct seminars, workshops and other programmes to enhance public awareness on the prevention and prohibition of corruption; conduct surveys and research to further this end and the publication of such surveys and research;
- Disclose information pursuant to the prevention and prohibition of corruption that require public disclosure and publish statements where necessary;
- Implement and monitor the implementation of the Prevention and Prohibition of Corruption Act and formulate and implement all rules necessary for the enforcement of the Act.

**B. Implementing UNCAC in Maldives**

Maldives acceded to the United Nations Convention against Corruption (hereafter referred to as UNCAC) on 22nd March 2007. The provisions of the convention are incorporated into the domestic law through amendments, by passing new laws or by adopting them into the administrative system. A review of implementation of the UNCAC[8] had been completed in 2015, which identifies the legal and institutional gap in effectively implementing the UNCAC.

**C. Legislation Relevant to Corruption Cases**

Currently three fundamental laws are used in the battle against corruption. The Prevention and Prohibition of Corruption Act[9] (hereafter referred to as PPC Act), which criminalizes specified acts of corruption committed by public officials; the ACC Act, which established and governs the ACC; and the newly enacted Penal Code[10] (hereafter referred to as the 'new Penal Code'), which replaced the age-old penal code of 1968, bringing forth revolutionary changes to the Criminal Justice System of the country.

Supplementary legislation that supports the anti-corruption framework of Maldives includes the Prevention of Money Laundering and Financing of Terrorism Act[11], Public Finance Act[12], Public Finance

[4] The Constitution of Maldives 2008: Article 199 (b)
[5] Act no 13/2008, the Anti-Corruption Commission Act
[6] Act no 13/2008, the Anti-Corruption Commission Act: Article 2
[7] Act no. 13/2008, Anti-Corruption Commission Act: Article 21
[8] http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1506809e.pdf
[9] Act no. 2/2000, Prevention and Prohibition of Corruption Act
[10] Act no. 9/2014, the Penal Code

Regulation of 2009 and Maldives Banking Act[13]. In 2015, two important international cooperation laws were enacted: the Law on Extradition,[14] and the Act on Mutual Legal Assistance in Criminal Matters.[15]

## II. MEASURES FOR DETECTION OF CORRUPTION

### A. Laws which Aid Early Detection of Corruption

Investigating allegations of corruption is the core responsibility of the ACC mandated under Article 21(a) of the ACC Act. Hence, ACC is under legal obligation to inquire into suspicions of corruption regardless of the source of information, which may include information obtained through media, public concerns, official reports or corrupt activities directly encountered by public officials.

However, a scant number of laws aid the early detection and prevention of corruption in the country.

1. Asset Declaration

Declaration of assets is a key tool in detecting corruption. In addition to increased transparency and public confidence, it would help monitor conflict of interests which may otherwise be left undetected. Annual asset declaration in the form of a general statement of all property and monies owned, business interests and all assets and liabilities is a constitutional obligation for the Executive, Members of the Cabinet, Members of the Parliament and Judges.[16] Unfortunately, due to the lack of legal provision criminalizing illicit enrichment, the fundamental purpose of asset declaration has been largely left unrealized.

2. Conflict of Interest

While asset declaration aids in detecting conflicts of interest, section 6.8 of the Public Finance Regulation[17] necessitates a written authorization from the ACC if a public office or governmental agency procures from a business that has a conflict of interest with any of its employees, henceforth, establishing an effective method of cross-checking the parties involved.

3. Legal Obligation which Assists in Detection of Corrupt Activities

Article 30 (a) of the Civil Service Commission Act obligates civil servants to report knowledge regarding breaches of law or regulation, as well as accusations of such breaches to the responsible director of their office. If the employee is dissatisfied with the outcome of the said complaint, Article 31 of the Act gives the employee the discretion to report the complaint to the civil service commission. These articles guide civil servants to take action when corrupt activities are observed, which in turn paves the path to detect and tackle corrupt activities in their first stage.

Furthermore, a False Statement given to a public official or a law enforcement office while performing an official function, with the intention to mislead is criminalized under Article 20 of the PPC Act and Article 521 (a) and (b) of the new Penal Code. These Articles, applicable not only to civil servants but also to every person within the jurisdiction of Maldives, acts as a strong incentive to give honest statements and to refrain from concealing relevant information.

### B. Methods of Gathering Information to Detect Corruption

Awareness and education programmes held by ACC encourage the general public to report all forms of information, complaints, suspicions, speculations or allegations of corrupt activities, which may be reported through a toll-free telephone line, e-mail, letter, or in person. The informant is given the choice of reporting cases anonymously.

Early detection of corruption is largely dependent on whistle-blowers. The Global Corruption Barometer 2013 survey revealed that, 11 per cent of respondents were reluctant to report an incidence of

[11] Act no. 10/2014, the Prevention of Money Laundering and Financing of Terrorism Act
[12] Act no. 3/2006, Public Finance Act
[13] Act no. 24/2010, Maldives Banking Act
[14] Act no. 1/2015, Extradition Act
[15] Act no. 2/2015, Mutual Legal Assistance in Criminal Matters Act
[16] The Constitution of Maldives 2008: Article 76, 120, 128 and 153
[17] Public Finance Regulation 2009, enacted through Article 49 of Act No. 3/2006, Public Finance Act

corruption, and of this, 22 per cent would not report for fear of the consequences.[18] Whistle-blowers are protected under Article 232 (b) of the new Penal Code and Article 18 of the PPC Act. Additionally, Article 41 of the Banking Act, Article 44 of the the Prevention of Money Laundering and Financing of Terrorism Act and Article 35 of the Maldivian Civil Service Act[19] provides protection for the employees of their relevant offices.

Suspicious Transaction Reports traced by the Financial Intelligence Unit (hereafter referred to as FIU) constitute one of the most significant methods of detecting corrupt activities. The FIU of Maldives is an operationally independent Unit within the Maldives Monetary Authority, established by Prevention of Money Laundering and Financing of Terrorism Act. The FIU forwards the respective intelligence information and Suspicious Transaction Reports to the Maldives Police Service.

### C. Non-legal Methods of Detecting Corruption

Although non-legal guidelines do not have the force of law, they embody a formal statement of behaviour expected of public officials, which brings together the government, businesses and civil society in the fight against corruption and plays an important role in understanding and identifying activities which may lead to corruption. A National Integrity Plan (NIP), recently initiated by the ACC formulates the ethics and conduct necessary to build a society free from corruption. Information sessions about NIP have been held in 44 institutions of the country to date.

## III. INVESTIGATION AND PREOSECUTION

### A. Investigation Process

Investigation of corruption in Maldives takes a reactive approach as opposed to a proactive approach where suspicious conduct is investigated before or during the commission of the offence. It is noteworthy that an effort is being made by the ACC to move towards a proactive investigation approach which may make the ongoing battle against corruption more successful in the future.

1. Initiating Corruption Cases

The investigation process of corruption cases begins with the Members of the Anti-Corruption Commission, who review complaints reported and decide whether the complaint falls under the mandate of the commission and warrants investigation. Additionally, commission members initiate some cases based on information or allegations of corruption.

Once the Commission decides that an allegation warrants investigation, a case is filed with the commission and assigned to an investigation team which ordinarily consists of three investigators, both from auditing and legal backgrounds.

2. Evidence Collection

Article 22 of the ACC Act gives the commission the power to obtain admissible evidence from institutions that fall within the jurisdiction of the Act. Due to the reactive approach to investigation, the ACC habitually relies on documentary evidence. As such search and seizure of documentary evidence is the main form of evidence collection. If documentary evidence proves to be insufficient the ACC has the power to summon witnesses and persons related to the investigation to obtain their statements. Furthermore, the PPC Act enables the ACC to confiscate undue properties, obtain information of bank account details and transactions, as well as freeze suspicious bank accounts through a court order.[20]

Forensic investigations for cases investigated by the ACC are undertaken by the Forensic Science Department of Maldives Police Services (MPS) under the Memorandum of Understanding between ACC and MPS. Covert investigation techniques have not been used in an investigation of a corruption case to date.

3. Consolidating the Findings of the Investigation

After evidence collection, the investigation team then analyses the data collected to prepare an Investi-

[18] http://transparency.mv/wp-content/uploads/2013/12/FINAL-TM-POSTER-ENG.pdf
[19] Act No. 5/2007, Maldivian Civil Service Act
[20] Act no. 2/2000, Prevention and Prohibition of Corruption Act: Article 24, 25 and 26

gation Report. Investigation Reports are based on the evidence collected, relevant findings of administrative or procedural mismanagements, recommendations for correctional measures, as well as the conclusion reached by the investigation team as to whether the case has sufficient evidence for prosecution. This report is submitted to the Members of the Commission who, based on evidence presented, take the final decision whether or not to prosecute.

Article 25(b) of the ACC Act states that, upon completion of an investigation, the Commission shall forward the case to the Prosecutor General's Office for prosecution if the case is one which involves an offence of corruption, and the Commission believes that sufficient evidence has been obtained to bring a conviction at trial.

**B. Prosecution**

1. Introduction of the Prosecutor General's Office of Maldives

The Prosecutor General's Office was established on 7th August 2008 under Article 220 (a) of the Constitution.[21] The responsibilities of the Prosecutor General include supervision of prosecution of all criminal cases; institution and conduction of criminal proceedings in respect of any alleged offence; to take over, review and continue proceedings; and at his discretion, to discontinue any criminal proceedings at any stage prior to judgement by a court of law.[22]

2. Prosecution in Cases of Corruption

According to the constitutional responsibilities of the Prosecutor General, the sole decision to prosecute in cases investigated by the ACC is vested with the Prosecutor General. Prosecution guidelines, formulated by the Attorney General provide the basis to determine the type or gravity of cases that warrant prosecution.

**C. Adjudication and Trial Procedure**

1. Introduction to the Judicial System of Maldives

The Constitution of Maldives vests its judicial power in the Supreme Court, High Court and the trial courts established by law. The Constitution states that Judges shall be independent, and subject only to the Constitution and the law. When deciding matters on which the Constitution or the law is silent, Judges are directed to consider Islamic *Shari'ah*. The Constitution further states that in the performance of their judicial functions, Judges must apply the Constitution and the law impartially and without fear, favour or prejudice.[23]

2. Standard of Proof for Criminal Offences

The standard of proof for criminal offences in Maldives is laid out in the Constitution of Maldives[24] and in the new Penal Code[25] to be, proof of the defendants' guilt *beyond reasonable doubt*. Offences related to corruption are criminal offences for which the prosecution must prove the defendants' guilt beyond reasonable doubt.

3. Conviction Rate of Cases Involving Corruption

The conviction rate of corruption cases in Maldives is mortifying. Thus far, there has been only one successful conviction of a corruption case. In *Ismail Abdul Hameed v PG* (2011) the Supreme Court upheld the decision of the High Court and the accused was found guilty under Article 12 of the PPC Act for the offence of conferring an undue advantage.

4. Legal Penalties for Offences Involving Corruption

Under the new Penal Code the level of culpability for criminal offences is determined by adding the number of aggravating factors and subtracting the number of mitigating factors in accordance with Article 1002 of the new Penal Code.

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[21] The Constitution of Maldives 2008: Article 220 (a) of the Constitution states that there shall be an impartial Prosecutor Generals of Maldives.
[22] The Constitution of Maldives 2008: Article 223 (c) and (g)
[23] Constitution of the Maldives 2008: Article 141 and 142
[24] Constitution of the Maldives 2008: Article 51(h)
[25] Act no. 9/2014, the Penal Code: Article 15

The following table[26] shows the penalty for the main offences related to corruption in the public sector, under the new Penal Code.

| Article No. | Offence | Grading | Baseline Sentence | Maximum Sentence |
|---|---|---|---|---|
| 510 | Bribery | Class 3 Felony | 3y, 2m, 12d | 8 years |
| 511 | Influencing Official Conduct | Class 4 or 5, Felony | 1y, 7m, 6d, or 9m, 18d | 4 years |
| 512 | Official Misuse | Class 1 Misdemeanour | 4m, 24d | 1 years |
| 513 | Misuse of Governmental information or Authority to obtain a benefit | Class 4 Felony | 1y, 7m, 6d, or, 9m, 18d | 4 years |
| 310 | Forgery | Class 5 Felony | 9m, 18d | 2 years |
| 310 | Counterfeiting | Class 4 Felony | 1y, 7m, 6d | 4 years |
| 311 | Tampering with Writing, Record, or Device | Class 5 Felony | 9m, 18d | 2 years |
| 315 | Rigging Publicly exhibited contest or Public Bid | Class 4 or 5, Felony | 1y, 7m, 6d, or, 9m, 18d | 4 years |

As a general principle, the new Penal Code does not apply to offences occurring or committed prior to 16th July 2015, when it came into effect. However, the new penal code states that in determining a sentence where the sentence prescribed for the offence under the new Penal Code is less than the sentence prescribed under the previous Act, the penalty for the offence shall be prescribed in accordance with the rules specified in the new Penal Code.

## IV. PUBLIC PROCUREMENT SYSTEM OF THE MALDIVES

Every year millions of dollars are spent on public procurement. The Public Procurement System (hereafter referred to as PPS) is one of the few sectors in which the whole country becomes a stakeholder. The large amount of investments in public procurement open the floodgates for corruption, especially when established rules of best practice are not adhered to, and when the PPS is not diligently monitored.

### A. Public Procurement System and Policies

1. Legal Framework of the PPS of Maldives

Two main laws govern the PPS of the country: the Public Finance Act,[27] and the Public Finance Regulation 2009[28] enacted under Article 49 of the Public Finance Act. The Public Finance Act mainly mandates the procedure for public expenditure, while the Public Finance Regulation, among other things, mandates the policies for public procurement. In 2010, Chapter 15 of the Public Finance Regulation named 'Public Procurement', based solely on public procurement policies, was introduced as an addendum to the said Regulation.

2. Main Policies Governing Public Procurement

The main policies of public procurement specified under the Public Finance Regulation are as follows:[29]

- If the total value of goods purchased is less than MVR 1,000 (US$65.15) such items may be purchased at a reasonable market price.

[26] Law no. 6/2014: Article 1002 (b): (1) Years (y). A year is a period of 365 days.
(2) Months (m). A month is a period of 30 days.
(3) Days (d). A day is a period of 24 hours.

[27] Act no. 3/2006, Public Finance Act

[28] Public Finance Regulation 2009

[29] Public Finance Regulation 2009: Chapter 8

- If the total value of goods purchased is between MVR 1,000 (US$65.15) and MVR 25,000 (US$1628.66) an informal Request for Quotation shall be made in order to obtain at least three quotations. The goods shall be purchased from the lowest priced technically acceptable offer.

- If the total value of services obtained is less than MVR 25,000 (US$1628.66) an informal Request for Quotation shall be made in order to obtain at least three quotations. The service shall be awarded to the lowest priced technically acceptable offer. The reason for selecting a particular party shall be documented and signed by a public official.

- If the total value of the goods purchased or the services obtained is between MVR 25,000 (US$1628.66) and MVR 1,500,000 (US$ 97,719.87) a formal invitation is made to submit a bid, followed by a meeting between the relevant government venture and interested parties, during which detailed information of the requirements, the scope of work and the criteria for evaluation is shared in writing with interested parties. Bids shall be opened in the presence of all interested parties and shall be evaluated by the tender evaluation committee of the relevant public office, in accordance with their obligations under Public Finance Regulation and the evaluation criteria stipulated in the bid information paper. The work shall be awarded to the bidder who obtains the highest score.

- If the total value of the goods purchased or the services obtained is higher than MVR 1,500,000 (US$ 97,719.87), the tender documents and proposals shall be submitted to the Nation Tender Board. The board evaluates the documents submitted and awards the bid to the most economically advantageous tender.

3. Corruption in Public Procurement

The largest number of cases handled by the ACC are related to procurement.[30] In 2015, 855 cases were registered in the ACC, of which 287 cases were related to public procurement; a total number of 871 cases were completed within the year, of which 256 cases were related to public procurement.

**B. Ismail Abdul Hameed v PG (2011)**

*Ismail Abdul Hameed v PG (2011)* is the only successful case of conviction under the PPC Act. The facts of the case are not related to the initial procurement procedure. The reason for conviction is mostly founded on misleading and false documentation, after the project had been awarded.

Ismail Abdul Hameed was accused of using his position as the Director of Waste Management Section of the Male' Municipality to confer an undue advantage to a company named Island Logistics, in the procurement and importation of a barge from the said company.

The Waste Management Section entered into an agreement with Island Logistics on 19th October 2007, to purchase a barge. According to the agreement the barge was to be delivered to Male', Maldives port within 90 days upon signing the agreement. 50 per cent of the agreed price was to be paid within 14 days after signing the agreement, and the remaining to be paid within 14 days after receiving the barge.

However, Island Logistics failed to deliver the vessel within 90 days in accordance with the agreement. Before the barge was delivered, Island Logistics requested Ismail Abdul Hameed to sign the protocol of delivery and acceptance of the vessel, claiming that it was required by the advising bank for the LC of the said business transaction. Ismail Abdul Hameed signed the requested protocol of delivery and acceptance claiming that the barge was delivered on 28th April 2008, as scheduled in the agreement. The barge was delivered a year after the scheduled date, on 23rd October 2008.

The Criminal Court ruled that the documentary evidence presented to the court proved beyond reasonable doubt that Ismail Abdul Hameed acted with clear foresight of the consequences of his action, therefore intentionally and was found guilty under Article 12 of the PPC Act and sentenced to eighteen month's banishment.

[30] http://acc.gov.mv/en/wp-content/uploads/2016/05/Stat-Book-2015.pdf

The case was appealed to the High Court and the Supreme Court. The decision of the Criminal Court was upheld by both courts.

Although Ismail Abdul Hameed was sentenced to eighteen month's banishment, the sentence was in fact not carried out. Instead, he spent one year under house arrest. As banishment was a punishment meted out by the judiciary before the new Penal Code came in to effect, it was a sentence generally carried out on first-time offenders. The sentence is believed to be disproportionate to the offence and lacking in the deterrence factor much needed to prevent acts of corruption.

## V. CONCLUSION

Although numerous cases of corruption are investigated by the ACC every year, the lack of successful convictions and the continuing predicament of corruption in the Maldives, are clear indications of the magnitude of the task ahead of us. In my view, official research is crucial in identifying the reasons why the country is unable to move towards the desired outcome, which would enable us to build a robust plan of action to ensure a successful outcome in the battle against corruption.

# THE CRIMINAL JUSTICE RESPONSE TO CORRUPTION IN UZBEKISTAN

*Abdurakhmanov Ulugbek**

## I. ANTI-CORRUPTION POLICY

Uzbekistan is a presidential republic that has a bicameral Parliament (*Oliy Majlis*). With 18 points out of 100, Uzbekistan is ranked 166 among 175 countries that took part in the latest Transparency International's Corruption Perception Index in 2014. At the same time, Uzbekistan holds the highest position out of the countries of Central Asia in the rating of the Basel Anti-Money Laundering Index 2015. With a rating of 5.11 Uzbekistan holds 107th place and is between Uruguay (5,13) and Spain (5,02). This rating assesses the risks of money laundering, among them the risks of corruption.

The fight against corruption remains to be the primary focus of government authorities in Uzbekistan. The political will to fight corruption is evident from ratification of the UN Convention against Corruption in 2008 and accession to the Istanbul Action Plan in 2010.

The UN Convention against Corruption states that "the prevention and eradication of corruption is a responsibility of all States." Article 5 of the Convention provides that "each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies."

Based on this Convention, Uzbekistan has provided six directions of anti-corruption policy:

- legislative, including the adoption of laws and legislative provisions;
- institutional, namely the creation of specialized inter-institutional groups;
- educational and academic, special academic programmes on countering corruption;
- awareness, outreach and publishing, designed to educate the public about the government's anti-corruption efforts;
- monitoring of the anti-corruption policy;
- international.

On May 18, 2015, the Cabinet of Ministers of Uzbekistan approved the Comprehensive Plan of Action for the practical implementation of anti-corruption measures. The Plan was developed by the General Prosecutor's Office, the principal developer, and the Ministry of Justice. The Plan includes measures on the anti-corruption policies and some aspects of preventing corruption. The Plan includes activities such as conducting specialized and scientific research and surveys on corruption, developing and implementing educational programmes on countering corruption for secondary and higher educational institutions, training government officials, adopting measures preventing corruption within state 'bodies, introducing government hotlines, measures to raise awareness, developing measures on the competitive selection in the recruitment to work for the public administration, and the Code of Ethics for public servants. The responsibility for coordinating the execution of the Plan lies with the General Prosecutor's Office and the Ministry of Justice.

*Deputy Prosecutor, District Public Prosecutor's Office of Tashkent City, Uzbekistan.

## II. SPECIALIZED CORRUPTION PREVENTION INSTITUTIONS

Pursuant to the Comprehensive Plan in accordance with a Cabinet of Ministers' decision in June 2015, the inter-institutional working group on promoting improvement of organizational, practical and regulatory frameworks for combating corruption was established. The inter-institutional working group has the following objectives:

- monitoring the implementation of anti-corruption measures;
- implementing legal propaganda and interacting with civil society institutions on combating corruption;
- making proposals for the improvement of organizational, practical and regulatory frameworks for combating corruption.

The General Prosecutor's Office of Uzbekistan is a specialized body which is responsible for coordination of national anti-corruption policy and implementation of measures to prevent corruption. Since 2012 the General Prosecutor's Office has been studying causes and conditions conducive to corruption in different spheres. Until today this work has covered such areas as public education, health, and tax, higher and secondary special education, the use of gas and electricity, the banking sector, land use, public procurement etc. As a result, the General Prosecutor's Office made presentations to these agencies and entities on how to eliminate the causes and conditions that had contributed to the commission of offences.

Based on the Law on Prevention of Offences, which came into force on 15 August 2014, the Coordinating Council for Crime Prevention was established. The role of this Council is to coordinate activities of state bodies in the area of prevention of crimes, including corruption-related crimes.

## III. LEGISLATION SYSTEM AND REFORMS IN COMBATING CORRUPTION

Uzbekistan is taking step-by-step measures towards criminalization of corruption offences and combating it. Along these lines, reforms aimed at reducing the state's role in the economy, introduction of "one-stop-shop" for provision of state services to enterprises and electronization of the government, strengthening the Parliament's role, adopting laws, such as the Law on Openness of Activities of State Authorities and Government Bodies (May 5, 2014) have had a significant role in combating corruption.

The national legislation of Uzbekistan has set up liability for a series of corruption offences. For example, article 210 of the Criminal Code, bribe-taking, includes material assets or pecuniary benefits: "illegal acceptance with knowledge by an official, directly or through an intermediary, of material assets, or deriving pecuniary benefits for performance or nonperformance in the interest of the bribe giver of a specific action, which such an official should or could have committed using his/her official position." A similar description is provided in Article 211 of the Criminal Code, bribe-giving.

According to international standards, one of the elements of bribery is undue advantage that includes non-material benefits (i.e. benefit not constituting or represented by a physical object and of a value which cannot be precisely measured) and/or non-pecuniary benefits (i.e. not relating to or consisting of money).

It is of great interest for me to study Japanese legislation and experience concerning these norms in order to further implement international standards to our legislation.

Article 21 of the UN Convention against Corruption includes bribery in the private sector as a non-mandatory offence. Similar provisions are contained in the Council of Europe Criminal Law Convention on Corruption (Articles 7-8).

Up until the adoption of the law of 20 August 2015 on introducing the amendments and additions to certain legal acts of the Republic of Uzbekistan aimed at further strengthening protection of private property, entrepreneurs and removing obstacles for their speedy development, criminal legislation of Uzbekistan did not regulate corruption offences in the private sector separately, but relevant provisions were

applicable to employees of the private sector as well. In accordance with this Law, a new chapter was added to the Criminal Code, providing, inter alia, for liability for various offences among them: commercial bribery, bribery of an official of commercial or non-governmental organization; abuse of powers by the official of a commercial or other non-governmental organization.

Liability of Legal Persons is being introduced to our legislation.

Based on the results of analyses of criminal cases, investigated by the General Prosecutor's Office against employees of legal entities for economic crimes, the General Prosecutor's Office has developed a draft Law on Amendments and Additions to the Criminal, Criminal Procedure and Penitentiary Codes of the Republic of Uzbekistan aimed at introducing criminal law regulations in relation to legal persons.

The analyses show that in the period of 2009-2011, 297 employees of legal entities were repeatedly prosecuted for violations of legislation. The study showed that officials of legal persons were prosecuted, mainly under Articles 167 (Theft by Embezzlement or Misappropriation), 168 (Fraud), 182 (Violation of the Customs Legislation), 210 (Bribetaking), 211 (Bribe-giving), 242 (Organization of a Criminal Community), 243 (Legalization of Proceeds of Crime) of the Criminal Code. The draft law contains provisions providing legal basis for liability of legal persons, the range of subjects, types of measures of criminal law that can be applied to legal persons, grounds for and terms of convictions of legal persons, criminal procedural mechanisms for the involvement of legal persons in criminal cases as an accused, the defendant, as well as the procedure for application of criminal law measures. Getting acquainted with the legislation of Japan in this field, I will have an opportunity to elaborate valuable proposals to the proposed draft law.

One of the important reforms made towards fighting corruption was adoption of the Law on Amendments and Additions to the articles of the Criminal Code of the Republic of Uzbekistan, providing for the liability for giving bribes and mediation in bribery, which came into force on May 15, 2014. The reason for such amendments was that persons, who instigate bribery, mediate in bribery or directly give bribes, often avoid liability, which has a negative impact on the effectiveness of the prevention of such crimes.

Under the old wording of Articles 211-212 of the Criminal Code (giving bribes and mediation) the person who has given a bribe or has provided mediation in bribery, shall be exempt from criminal liability, if such bribe was extorted from him/her and such person has voluntarily reported the incident after the commission of criminal acts, has sincerely repented and actively contributed to solving the crime. The presence of these rules promoted commitment of crimes because any person could, by inciting a civil servant by means of bribery to achieve the desired benefits (e.g. be awarded a contract), and subsequently report it to the police and evade responsibility, while keeping the previously acquired benefits. For more efficient prevention of such types of bribery, the period during which the briber can report to law enforcement after the crime was specified (1 month), after which he/she shall be subject to criminal liability. In addition, the penalties for active bribery and mediation in bribery were increased and are now equal to those for bribe-taking.

Article 50 of the UN Convention against Corruption provides for the use of special investigative techniques (SIT) in the fight against corruption. To effectively fight corruption, SIT's should be used, in particular, controlled delivery, electronic or other forms of surveillance and undercover operations, in a manner that would make the evidence gathered by such methods admissible in court.

On December 25, 2012, the Law of the Republic of Uzbekistan on Operative and Investigative Activities was adopted, which came into force in December 2013. The purpose of the law is to regulate relations in the field of operational and investigative activities, to create legal basis for operational and investigative activities of law enforcement bodies, as well as the guarantees to ensure protection of the rights and freedoms of citizens during the operative and investigative activities. The Law systematized norms that had previously been scattered in a number of legal acts regulating the issue.

It should be noted that in Uzbekistan, there is no separate dedicated law enforcement institution for corruption cases. Anti-corruption specialization exists within the bodies of inquiry, preliminary investigation and criminal prosecution, which are the following:

- the body responsible for the investigation of corruption cases — the Unit for Combating Organized Crime and Corruption under the General Prosecutor's Office and its territorial divisions;

- the Department for Combating Fiscal and Foreign Currency Crimes and Legalization of Criminal Income under the General Prosecutor's Office of the Republic of Uzbekistan.

The investigative jurisdiction of a criminal case is determined under the Article 345 of the Criminal Procedure Code, according to which corruption offences and cases involving crimes by certain categories of officials lie within the competence of the investigators of the prosecution service. As mentioned above, a number of legal acts have been adopted since the independence that have an anti-corruption component, but in order to create a stable foundation in combating corruption, a Law on Combating Corruption should be adopted.

## IV. PUBLIC PROCUREMENT

The regulation of Public Procurement in Uzbekistan is also of great importance in preventing corruption. Today the issues of public procurement are governed by the norms of the Civil Code, the Budget Code, a number of Decrees of the President of the Republic of Uzbekistan, Resolutions of the Cabinet of Ministers, etc. In this way, public procurement is regulated by various legal acts.

At the same time, in part because there is no single body with regulatory, supervisory and coordinating powers in the field of public procurement, there is no single approach, and not all stages and aspects of public procurement are governed. Furthermore, the various legal documents are poorly coordinated with each other and contain gaps.

Upon realistic assessment of the weaknesses of the existing system, currently Uzbekistan is conducting a serious and a large amount of work with the purpose to improve the legislative framework of public procurement. The concept for the development and improvement of the public procurement system in the Republic of Uzbekistan during 2015-2025 and the draft Law on Public Procurement have been developed, and a number of the aforementioned subordinate acts that are currently regulating government procurement are being regularly reviewed.

The draft law provides for the creation of a framework law that will establish the basic concepts and principles of public procurement, the powers of government agencies, the stages of procurement, procedure for appeals, monitoring, etc. This law involves the development of a number of subordinate acts and documents that will detail the regulation of various aspects of procurement and that will significantly improve, will streamline and simplify the legal framework of procurement.

Article 9 of the UN Convention against Corruption stipulates that in public procurement and management of public finances, Member States shall take the necessary measures to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making and that are effective in preventing corruption. The UN Convention against Corruption highlights four major requirements for public procurement:

- public dissemination of information;

- establishment, in advance, of the terms of purchase and their publication;

- clear criteria for decision-making on public procurement and effective internal control and appeals;

- the requirements regarding personnel responsible for procurement, including declaration of interest and professional training.

These principles are incorporated in the concept of further development of public procurement during 2015-2025, and in the draft law on public procurement.

The Government Commission on public procurement under the Cabinet of Ministers was established on February 7, 2011 by Presidential Resolution. Its duties include:

- implementation of systematic control over intended use of the funds from the state budget and other centralized sources, as well as compliance with the legislation on public procurement;
- continuous monitoring of the efficiency of public procurement, development and adoption of necessary measures for its improvement;
- creating favourable conditions for active and large-scale involvement of small businesses in the process of public procurement;
- contributing to the professional development of representatives of all entities involved in the tender and the stock exchange bids, the introduction of international norms and standards.

Uzbekistan has a special information portal of the Uzbek Republican Commodity Exchange (UZEX) (www.dxarid.uzex.uz) for potential bidders, which contains information about the placement of state orders for the procurement of goods (works, services). According to UNDP analysis, the strength of the public procurement system in Uzbekistan is in the creation of a single information portal and in posting of all procurement announcements on it.

In addition, the portal is used to purchase most of the goods and services not exceeding the equivalent of USD 100,000, by the state bodies and budget organizations. The system was examined by the World Bank, and it was recommended for use in the Bank's projects for small purchases.

Regarding the requirements for the elimination of conflict of interest and ethical rules with respect to decision-makers in public procurement, it is necessary to note that such requirements are provided in the Regulation on the competitive bidding in capital construction in the territory of the Republic of Uzbekistan, approved by the Cabinet of Ministers on July 3, 2003. This revised Regulation fixed the above-mentioned fundamental requirements, but these principles should cover all types of state procurement. The Law on public procurement that is under development and the relevant subordinate regulations, if necessary, will regulate the issue of conflict of interest and compliance with the rules of ethics in a more systematic way.

Regarding conflict of interest, I would like to note that during my practice I witnessed a criminal case related to public procurement. Specifically, the government decided to construct a new college in one of the regions of Uzbekistan and gave relevant announcement to interested organizations. The head of the company that was responsible for the execution of this order (company #1) concluded a contract with another company, which belonged to a wife of the head of company After conclusion of a contract, the Prosecutor General's Office revealed this fact and as a result of prosecution the head of company #1 was prosecuted for misuse of his powers and the contract was annulled.

Adoption of the Code of public servants' ethics served to prevent situations where an interested person informs the relevant body about such cases in order to avoid negative results.

Bearing in mind the aforementioned, it is worth noting that legislation and experience of Japan, the Japanese approach to combating corruption, is of great interest to the Prosecutor General's Office of Uzbekistan. During the programme period, I am keen on studying:

- the scope of a special law on combating corruption;
- measures taken on anti-corruption education and training;
- the body that is specialized in combating corruption, its functions and role in this sphere.

During my work as a prosecutor I investigated more than 100 criminal cases (more than 20 concerning corruption) and participated in more than 2,000 criminal cases in criminal courts, among them more than

100 cases related to corruption. I hope that my experience will be useful to enrich the programme by discussing and comparing the legal institutions and practices with other participants in this sphere.

In conclusion, I want to underline that the study of this experience will have great practical and theoretical significance and creates a great opportunity to propose on the basis of Japanese experience amendments to our national legislation and bring it in line with international standards, including the requirements of the UN Convention against Corruption and the Istanbul Action Plan.

# REPORTS OF THE PROGRAMME

## *GROUP 1*
## TACKLING CORRUPTION IN PUBLIC PROCUREMENT

| | | |
|---|---|---|
| ***Chairperson*** | Mr. Ulugbek Abdurakhmanov | (Uzbekistan) |
| ***Co-Chairperson*** | Mr. Asitha Anthony | (Sri Lanka) |
| ***Rapporteur*** | Ms. Lujaina Mohamed | (Maldives) |
| ***Co-Rapporteur*** | Mr. Alhousseiny Traore | (Mali) |
| ***Co-Rapporteur*** | Mr. Basilio Thomas Wani | (South Sudan) |
| ***Members*** | Mr. Sangay Jamtsho | (Bhutan) |
| | Mr. Amir Nurdianto | (Indonesia) |
| | Ms. Hatsue Aono | (Japan) |
| | Mr. Aung Myo | (Myanmar) |
| | Ms. Zhovnytska Alina | (Ukraine) |
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| ***Co-Adviser*** | Mr. Perrin Lucas | (UNAFEI) |

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## I. INTRODUCTION

The group started its discussion on 28th October 2016. The group elected by consensus, Mr. Ulugbek Abdurakhmanov as its Chairperson, Mr. Asitha Anthony as its Co-Chairperson, Ms. Lujaina Mohamed as its Rapporteur, and Mr. Alhousseiny Traore and Mr. Basilio Thomas Wani as its Co-Rapporteurs.

### A. Preface and Justification

Why are legal instruments necessary to combat corruption in the area of public procurement? Why should the group discuss this matter? Simply because we see that there is a need to combat corruption to enable every country to effectively use its resources for development and welfare of its people, to ensure that the deterrent measures are used to fight corruption, punish the offenders and restore people's trust in their governments.

### B. Methodology

The group decided to dedicate its sessions to discuss the topic: "Tackling Corruption in Public Procurement". Under the aforementioned topic, the group decided to focus on the following:

1. Effective methods of investigation

2. Prosecution and trial

3. Other measures for combating corruption, i.e. public awareness and international relations

## II. SUMMARY OF DISCUSSIONS

### A. Basic Principles

All members of the group agreed upon the following basic principles that should be observed in the fight against corruption:

- Principle of legality
- Protection of human rights
- Presumption of innocence
- Confidentiality
- Impartiality

### B. Effective Methods of Investigation

1. Actions Taken Prior to Commencing an Investigation

The group members discussed the importance of starting investigations with an investigation plan. Sri Lanka and Uzbekistan have obligations to make an investigation plan which has to be approved by the head of the investigating body. In all other participating countries, making an investigation plan is optional. However, all members agreed about the importance of beginning an investigation with a plan in order to complete the investigation in the most effective and efficient manner.

*(a) Pre-investigation or preliminary investigation*

The members discussed the pre-investigation methods used in their respective countries. Japan, Ukraine, Mali and Myanmar do not have a pre-investigation stage before initiating a criminal case. However, if sufficient evidence is not obtained in the preliminary stage of the criminal investigation, these countries may drop the case.

All other member countries have a pre-investigation stage before initiating a criminal case, where an investigation is carried out to determine if sufficient evidence can be obtained. If sufficient evidence cannot be obtained during the pre-investigation stage, a criminal case will not be initiated.

The members acknowledged the following advantages and disadvantages of conducting a pre-investigation before initiating a criminal case against suspects:

| **Advantages** | **Disadvantages** |
|---|---|
| - Sufficient evidence to warrant a conviction which ensures that the rights of the suspect are not infringed | - Difficulty in collecting sufficient evidence due to limited investigation powers |
| - Higher rate of conviction increases public confidence | - Possibility of abuse of power by investigators/ prosecutors |

*(b) Collecting evidence in the pre-investigation or preliminary stage*

The group acknowledged the following methods of collecting evidence in the pre-investigation or preliminary stage, to detect corruption in the area of public procurement:

- Gathering information such as tender documents from relevant institutions
- Surveillance: wire-tapping, GPS tracking, etc.
- Seeking expert opinions
- Obtaining testimony/statements from witnesses such as suppliers, competitors, etc.

Japan, Sri Lanka, Uzbekistan, Ukraine, Maldives and South Sudan have the authority to obtain bank records of suspects without a warrant from the judge. Japan, Mali and Uzbekistan use surveillance techniques during this stage.

In some countries, there is a necessity to use surveillance techniques like wire-tapping without a warrant. In some countries judges as well as prosecutors have the power to issue warrants for surveillance. Most members agreed that wire-tapping is a violation of the right to privacy and that a warrant from a judge is necessary to protect the rights of the suspects. Some members agreed that it is not a violation if the warrant is issued by a judge.

South Sudan, Bhutan, Myanmar, Maldives and Japan currently do not use wire-tapping during investigation. During the first stage these countries employ confidential methods to gather information and evidence from relevant institutions and obtain expert opinions if necessary.

In addition to the above-mentioned methods of investigation, Sri Lanka, Indonesia, Mali, Ukraine and Uzbekistan use wire-tapping techniques during the first stage of investigation. Indonesia, Uzbekistan and Sri Lanka do not need a court order to start a wire-tapping operation. However, the power is monitored by strict internal regulations that determine the use of wire-tapping.

2. Investigation Stage

All group members agreed that basic investigative actions used to investigate corruption cases in the area of public procurement should include but not be limited to the following:

- Forming an investigation team
- Arresting suspects and travel banning
- Search and seizure
- Examining and interrogating witnesses (involved parties, members of tendering committee, etc.)
- Confronting and interrogating suspects
- Freezing and control of assets
- Obtaining information about the lifestyle and expenditures of suspects
- Ensuring witness and whistle-blower protection
- Seeking comprehensive expert opinions

The group discussed the merits of suspending the accused from his position of office if sufficient evidence is obtained. Most members agreed that this is an important administrative sanction to prevent further abuse of power, but not an investigative action. Some members believe that arrest of the suspect is sufficient to achieve the same objective.

3. Important Aspects of the Investigation

The group discussed important aspects in investigating corruption cases related to public procurement. The consensus of these aspects are as follows:

*(a) Power to arrest a suspect*

All members discussed the power to arrest in their respective countries. The group agreed that although the power to arrest infringes the right to freedom, arresting a suspect in a corruption case is justified in order to achieve the objectives of the investigation. In some countries, the prosecutor has the authority to issue warrants. The group agreed that the best practice would be to give powers only to the judges to issue a warrant in regard to the rights of the suspect.

*(b) Right to legal counsel (lawyer)*

In all member countries, the state provides legal aid to defendants during the trial stage, when needed. Although suspects have the right to counsel in the investigation stage in all member countries, in most countries the state does not provide legal aid to defendants in this stage. In Uzbekistan, Ukraine and, depending on the nature of the offence, in Japan, legal aid is granted to the suspect, when necessary, in the investigation stage.

Uzbekistan, Ukraine and Indonesia (depending on the nature of the offence) are obligated to arrange a meeting with the defendant and the defence counsel to ensure that the defendant is given proper representation. The defendant has the option to refuse counsel afterwards.

The group has different opinions on whether the state should provide legal aid before trial in the investigation stage. Some members feel that state funded legal aid is not necessary during the investigation stage because the court will consider the validity of all evidence presented and the defendant is provided proper legal representation during trial. Other members feel that this places the suspects who cannot afford legal counsel in a vulnerable position and that not all suspects will have an equal opportunity to defend their positions.

*(c) Plea bargaining*

The group discussed the plea-bargaining practices of the participating countries. In Sri Lanka, Maldives and Ukraine, depending on the weight of the evidence presented and importance of the case, the prosecutors have the discretion to offer a complete dismissal of all charges against a defendant. In Sri Lanka, such defendants are given the same protection as witnesses, and the defendant will not face any form of administrative sanctions.

Currently, South Sudan and Japan do not have a plea-bargaining practice. Mali and Indonesia do not have the legislative power for plea bargaining. However, the prosecutor may negotiate with the judge to offer a plea bargain depending on the evidence presented by the defendant.

All other participating countries in the group have the legislative authority to plea bargain. All participants agree that plea bargaining is a useful tool for investigation in cases where there is insufficient evidence and depending on the significance of the case.

*(d) Video recording*

The group discussed the merits of having statutory provisions which make video recording compulsory. Members had different opinions about the subject. Some believe that video recording should be made compulsory to protect the position of the prosecutor and to ensure evidence had been obtained without coercion; other participants believe that the matter should be left to the discretion of the prosecutor.

*(e) Remedial measures*

The participants discussed the remedial measures employed in their countries. In South Sudan, Mali, Uzbekistan and Maldives, after the investigation is completed the investigation body makes a review of preventive measures and irregularities observed during the investigation and sends recommendations to relevant institutions. In Indonesia, Mali and Myanmar, investigators periodically makes analytic reports about governmental institutions to identify and resolve actions that may lead to corruption.

Currently, Ukraine, Japan and Sri Lanka do not have legislative remedial measures. Some members believe that remedial measures do not need to be legislative, as they are not part of the investigation. Other members believe that deterrence from corruption is one of the most important aspects to combat corruption and should be given statutory force.

## C. Prosecution and Trial

1. Power to Dismiss Criminal Charges

In South Sudan, Mali, and Myanmar, after a criminal case is initiated, if new evidence confirms the innocence of the defendant, prosecutors do not have the authority to dismiss the charges against the defendant during the trial. However, in this case the judge has the power to dismiss the charges. Members of these countries believe that prosecutors should not have the authority to dismiss charges after initiat-

ing a criminal case, as this will be an intrusion into the roles of the judge.

In other member countries, the prosecutor has the authority to drop a case in light of new evidence, even after a criminal case is initiated. Although the prosecutors in some countries have this authority, it is not used in practice. Members from these countries believe that prosecutors should be able to drop charges in such cases as the prosecutor is the party pressing charges.

2. Time Limitations in the Trial Process

In all countries except Uzbekistan, there is no time limitation system for the trial process. In Indonesia, there is a time limitation when the accused is detained.

Members have different views about fixing a time limit for trial. Some members believe that time limitation should be in the legislation provided with some conditions because time limitation can expedite the trial process and protect the rights of the parties involved.

Other members disagreed with the idea of a statutory time limitation because, a trial that takes place too quickly may lead to wrongful convictions, and may not be practical given the current judiciary system of most countries and the workload of judges in their countries.

3. Combined Civil and Criminal Trials

In most member countries, the civil and criminal charges are brought together in one trial. In Japan, Maldives and Bhutan, civil charges are brought after the criminal procedures, while Sri Lanka is currently making amendments to enable combined civil and criminal trials. All members acknowledged that a combined civil and criminal trial will expedite the trial process and secure the rights of the parties involved.

4. Adjudication and Right to Appeal

In Uzbekistan, judges have the power to withhold adjudication and send a case back for further investigation. In all other member countries, judges can either convict or acquit the defendant and do not have the option to send a case back for further investigation. All parties agreed that judges should only have the authority to either convict or acquit the defendant. Uzbekistan is currently making amendments in their legislation to remove the power of judges to send a case back during trial.

In most participating countries, the victim in a corruption case cannot appeal criminal charges because corruption is viewed as a crime against the state. Most members believe that the victim does not need this right because the prosecutor represents the victim, and if there is a chance of a successful appeal, the prosecutor will appeal on behalf of the victim. In Uzbekistan and Ukraine all parties, including the victim, have this right to appeal.

**D. Other Measures for Combating Corruption**

1. Public Awareness

The group discussed the following methods of raising public awareness to combat corruption in the area of public procurement.

- To establish one website to unify the effort against corruption within the country. This website shall include information about bills and legislation related to corruption, an action plan to fight corruption, information about corruption cases, information about public procurement, a 24-hour hotline, online consultation, etc.

- To educate children and young adults in schools and universities about corruption, i.e., morality, values and integrity. Indonesia and Bhutan already enforce this form of education. All participants believe that education related to corruption from an early stage of child development is necessary to find a long-term solution to corruption

- Develop a practical action plan to fight corruption based on research and analysis

- To establish an independent non-governmental organization dedicated to fighting corruption and

represent the citizens of the country on issues related to corruption. Currently two member countries, Indonesia and Ukraine, have an independent and non-governmental organization that work against corruption. Some members believe that such an organization may become an obstacle to the government.

- Mass media: general information should be given to the media about cases being investigated to deter corruption. Most members believe that the media should focus on both prevention and deterrence of corruption. Some members believe that the focus should be on prevention of corruption because if corruption is prevented deterrence will not be a prevalent issue.

2. International Cooperation

*(a) Problems encountered*

The group discussed the common problems encountered in providing international cooperation in corruption cases related to public procurement. The main issues highlighted during the discussion were as follows:

- The use of slow methods of transmitting information, e.g., through formal diplomatic channels.
- Different legal systems or criminal justice standards, such as dual criminality or due process requirements.
- Burdensome legal procedures, such as difficult processes for obtaining bank records.
- Poor communication or weak law enforcement ties and networks between the countries involved.
- Insufficient resources, expertise or capacity for countries to respond to requests for Mutual Legal Assistance.

*(b) Solutions*

The group agreed on the following solutions for the aforementioned problems:

- Increasing direct bilateral communications and personal contact between law enforcement officials or central authorities in both requesting and responding countries.
- Using informal consultations and exchange of preliminary information between countries before seeking Mutual Legal Assistance.
- Creating a shared international electronic system that allows (a) secure exchange of information and documents, including submitting, managing and responding to Mutual Legal Assistance requests and (b) full information on Mutual Legal Assistance procedures, rules, forms and contact points, and to sign international treaties to enable this system to function efficiently.
- Utilizing international networks to exchange experiences and good practices, as well as to foster relationships between practitioners.
- Providing clear and accessible information on procedural requirements and rules for providing Mutual Legal Assistance in all countries.
- Regional organizations that enable direct formal contact between officials/heads of institutions in different countries to expedite the process.
- Amend legislation to enable the use of video conferencing and other IT technology to obtain testimony or statements directly from witnesses.

## III. CONCLUSION AND RECOMMENDATIONS

The group discussed the legal instruments of combating corruption in the area of public procurement

based on investigation, prosecution, the trial stage, international cooperation and public awareness. The group agreed that the basic principles in all countries are the same, despite the differences in legislation and practices of each country.

**A. Recommendations**

Upon constructive discussions, the group came up with the following recommendations:

1. Enact a special law on public procurement.

2. Exert joint efforts in combating corruption both in the public and private sectors.

3. Establishment of a website in each country which focuses on all issues related to corruption.

4. Establishment of an e-procurement system that ensures transparency.

5. Enact a special legislation to protect and reward whistle-blowers.

6. Establishment of a special global information system.

7. Encouraging collaboration between banking systems and states for asset recovery.

The group, in conclusion, unanimously agreed that the goal of tackling corruption in public procurement can be achieved only if all parties (state and society) are involved. Moreover, a strong political will of each country is crucial to trigger internal reforms and international cooperation.

## *GROUP 2*
## EFFECTIVE MEASURES IN INVESTIGATION OF CORRUPTION IN THE AREA OF PUBLIC PROCUREMENT

| | | |
|---|---|---|
| ***Chairperson*** | Mr. Wael Mohamed Khorshid | (Egypt) |
| ***Co-Chairperson*** | Mr. Rabizoda Ravshan Rabi | (Tajikistan) |
| ***Co-Chairperson*** | Ms. Claudia Maria Solis Hoffmann | (Honduras) |
| ***Rapporteur*** | Ms. Lillian Vevara | (Papua New Guinea) |
| ***Co-Rapporteur*** | Mr. Sengoka Geofrey Mndambi | (Tanzania) |
| ***Co-Rapporteur*** | Mr. Yuasa Kenta | (Japan) |
| ***Members*** | Mr. Sibounzom Bounlom | (Lao PDR) |
| | Ms. Diana Mayra Paico Guevara | (Peru) |
| | Mr. Pramod Kumar Shrestha Vaidya | (Nepal) |
| | Mr. Sugawara Hisaoki | (Japan) |
| ***Adviser*** | Prof. Yukawa Tsuyoshi | (UNAFEI) |

## I. INTRODUCTION

This report is the result of the joint effort of all members of Group Workshop 2. Members of Group 2 started their first session on 28th of October 2016 at 10:30 AM. Mr. Wael was elected as Chairperson and Mr. Rabizoda and Ms. Claudia as Co-Chairpersons while Ms. Lillian was elected as Rapporteur and both Mr. Mndambi and Mr. Yuasa as Co-Rapporteurs. The Group was required to choose a topic which carries the theme of 19th UNAFEI UNCAC Training Programme. After many discussions, all the members agreed to the topic of "Effective Measures in Investigating Corruption in the Area of Public Procurement".

## II. MEASURES FOR DETECTION AND PUNISHMENT IN RELATION TO CORRRUPTION IN THE AREA OF PUBLIC PROCUREMENT

### A. Intelligence Stage: Generating Leads for Investigation

During the group sessions, participants analysed their techniques of gathering information in order to establish reasons for investigation of corruption cases in the area of public procurement. The group agreed on the following as sources of intelligence methods and leads for investigation.

1. Audit Reports

Audit reports are one of the leads to identify crime and generate investigation in the countries mentioned above. Special bodies are established by law for public audits, and inspections include accounting reviews of records and physical inspections of premises. For instance, in Tajikistan the special body. which is called the Agency for State Financial Control and Fight with Corruption, has in its structure a financial control department, and that has been used to initiate investigation based on audit reports from the department.

2. Whistle-Blowers

The disclosure of the crime by an informant is one of the most common methods for investigating bodies to initiate investigation. Most of the country's main sources of information arise through this method. During the sessions, members found the importance of whistle-blowers, hence the need for the establishment or strengthening of whistle-blowers' protection laws in member countries. For instance, countries like Tanzania, Peru, Honduras and Japan (to some extent) have whistle-blowers' protection, while Egypt, Nepal, Lao PDR, Tajikistan and Papua New Guinea have no whistle-blower protection laws.

The group agreed to have whistle-blowers' protection laws to ensure whistle-blowers are well protected, which will promote and facilitate the reporting of organized crime, corruption offences, unethical conduct, illegal and dangerous activities and at the same time ensure protection against potential retaliation or victimization.

3. Media

All investigation authorities in the participants' countries use media to generate leads for investigation. What appears in the eyes of the general public through newspapers, radio and television must be considered seriously by our investigative bodies since they may carry information which link with activities of the enforcement bodies. Most of the participants explained how media helped them in initiating investigation of corruption cases; hence this group considered the method as one of the sources of intelligence reports.

4. Asset Declaration Reports

Another way of collecting intelligence reports is through asset declaration reports. In the participating countries, public officials are required to declare their wealth and assets upon entry into the public service or promotion to a position and have to make this declaration each year. From this declaration, investigators can compare the public officer's wealth with what he or she declared. All countries except Japan have established special bodies for dealing with the asset declarations of public officials.

5. Financial Intelligence Units (FIU)

Information of suspicious transactions collected and analysed by FIUs is transferred to investigation agencies for action. The intelligence is utilized by all participants' countries. It carries important information like criminal activities detected, the suspect's name, email address, domicile, place where withdrawal occurred and beneficial owners.

6. Annual Report of Public Procurement Regulatory Authority

In the area of public procurement, some countries establish authorities to control and audit public procurement operations. Each year they release annual reports of public procurement activities. Most of the time, reports identify embezzlement and misappropriation of public funds. Investigation agencies use the reports to initiate investigations of a specific entity as indicated in the report. However, countries such as Egypt, Japan and Papua New Guinea do not have reports from special public procurement bodies; hence they use other methods to obtain information.

7. Undercover Operations

All the participants' countries except Japan and Papua New Guinea apply undercover operations to detect corruption. An undercover agent identifies, during the course of the operation, corruption actions and reports secretly to investigative bodies for initiating investigation. The group agreed that undercover operations are one of the best methods of intelligence in the investigation of public procurement cases. All participants' countries using this method have successfully attained good results.

8. Hotline Call Centres

One of the effective ways for collecting intelligence is through customer hotline centres which are convenient for reporting corruption 24 hours a day. The members agreed that the use of a call centre reporting hotline should be established for dealing with any complaints that require prompt action as far as corruption allegations are concerned. Most of the countries in this group who have established call centres have succeeded in receiving intelligence reports which provide leads for investigation.

9. Best Practice

It is recommended that in countries with high corruption problems it is better to have an independent and specialized organization to fight and combat corruption using the leads mentioned above. In fact, ICAC in Hong Kong succeeded in decreasing corruption cases using its authority and power as a special body. At the same time, Japan is experiencing success in its way of fighting corruption without establishing and mandating any anti-corruption body. However, establishment of a specialized and independent anti-corruption body in line with UNCAC is needed to easily acquire the trust and cooperation of the general public and to concentrate on investigating corruption cases.

**B. Investigation Stage: Collecting Evidence**

The duties of the investigators and prosecutors are performed at this stage. The Group discussed the following methods applied in investigation of corruption cases in the area of public procurement and provide the best practices to be used.

1. Surveillance

After investigative bodies gather intelligence through the above-mentioned methods, another technique involves the monitoring of the activities of the suspects through electronic devices and physical tracking. When physical surveillance of a suspect becomes difficult, the installation of an electronic tracking device can be used. Honduras and Peru conduct surveillance to get more information about the lifestyle of the suspect, which enhances the investigation. In Hong Kong, the ICAC has a surveillance unit of over 120 surveillance agents, and they have made significant contributions to the success of a number of major cases. However, not all countries practice this technique.

2. Undercover

Participants from Honduras, Peru and Lao PDR pointed out that undercover investigation is well conducted as it allows the investigative team and the judge to literally see and hear the crime as it occurs. Therefore, the prosecutor should join with the investigators in formulating operation orders which will cover the elements of the crime being investigated, evidence of these elements if it can easily be obtained through an undercover operation and analysing the benefits of using undercover operations against the risks. The Group agreed that some important documents, records and taping can be taken through undercover operations to have solid evidence in court.

3. Collection of the Relevant Documents

Most of the countries agreed that the collection of relevant documents necessary to prove the case is one of the important investigative actions. During the investigation of corruption cases in the area of public procurement documents such as tender board minutes, invitations to tender, bidding companies and their profiles, valuation reports, tender awards, contracts between successful bidders and procuring entity must be collected and used as evidence.

4. Wiretapping/Call History

The monitoring of telephones, telegrams, cellular, faxes, internet communications and call histories are used by most of the enforcement officials of the participants' countries during investigation. Using this method of collecting evidence is widespread and effective for proving corruption-related crimes. In Japan, wiretapping is legally prohibited for corruption cases but call history is allowed.

5. Interviews of Witnesses and Suspects

In almost all participants' countries except Egypt, Lao PDR and Peru, investigation authorities cannot force a person to disclose the facts of the crime, but when a matter is in a court of law, a person who appears before investigators and discloses the facts cannot refuse to give his testimony before the court of law. In all countries when a witness refuses to appear before the court, the court will force the witness to appear.

All participants' countries agreed that witness protection measures are effective in the investigation of corruption cases. On another hand, suspect statements contain essential facts when taken properly according to the law. Japan demonstrates the use of confession which almost always results in conviction. The Group recommended the use of suspect statements as evidence, but certain rights such as the right to be silent and the right to have a lawyer must be given. Also during trial, suspects have the right to be represented. For instance, in Egypt, Honduras, Peru and Tajikistan, it is the duty of the prosecutors to make sure that defendant has a lawyer even before the beginning of the investigation. Honduras and Peru go further by placing a defence lawyer in every prosecutor's office, hence guaranteeing the defendant's access to a lawyer.

6. Immunity

Since corruption is conducted in secrecy, to have a person who disclosed the crime is an advantage to the investigation because it will help to catch the offender but also guarantee having a potential witness. Most of the countries reported offering immunity to the first offender to appear to disclose the crime, except Papua New Guinea and Japan. Since corruption, especially in this area of public procurement, is difficult to trace, offering immunity to the first person to reveal what is going on and his participation is important. As a Group, we recommend adoption and use of this method for the purpose of increasing ways of collecting evidence and tackling the problem of corruption by every possible means.

## III. ASSET RECOVERY IN THE AREA OF PUBLIC PROCUREMENT

### A. Investigation Measures to Identify, Trace, Freeze and Confiscate the Illicit Profits of Corruption in Relation to Public Procurement

Anti-corruption laws in each country deal with corruption crimes. In most of the participants' countries, their domestic laws provide for recovery of proceeds of crime or asset recovery. Some of these laws include the Criminal or Penal Code, Proceeds of Crime and Anti-Money Laundering, Mutual Legal Assistance, specific anti-corruption laws and other relevant and related legislation. These laws make provisions for restraining orders and confiscation orders, which are available to prevent an accused from benefitting from the proceeds of crime relating to corruption offences.

An application to a judge or court for a restraining order is normally applied for at the outset of the criminal proceedings, otherwise the accused may cause the assets/properties to be moved or dissipated and therefore no longer available to satisfy the confiscation order which is subsequently made.

Confiscation is usually difficult as most of the money has usually been transferred from the bank accounts prior to obtaining a conviction and, as such, most countries laws allow them to freeze assets during the investigation stage until such time as a conviction is obtained. In most countries, asset recovery requires an order from a judge.

### B. Difficulties in Asset Recovery in the Area of Public Procurement

Corruption crimes are more sophisticated and cross-border in nature. The two main difficulties or challenges identified are:

1. Jurisdiction Issues

A major problem in investigation and prosecution of corruption cases is the lack of international cooperation when corruption crimes relate to foreigners and international organizations. A requesting country will have to request assistance from the recipient country in evidence gathering. As much of the key evidence can only be gathered abroad, investigators from the requesting country do not have the authority to investigate abroad so they need help from the requested country. Also, the results of assistance in investigation in most cases are slow and sometimes not as expected by the requesting country and may not be admissible in court as evidence.

Further, in most cases, corruption offenders conceal the proceeds obtained through corruption crimes in overseas bank accounts which have strict confidentiality rules protecting customers' information from being obtained by investigation officials. It makes it more difficult where the bank is in a country where there is no agreement for international cooperation between the requesting country and the bank's country.

2. Differences in Legal Systems

International cooperation between countries, especially in terms of enforcement of foreign judgements of another country, is usually difficult due to the fact that countries have different legal systems. For instance, in some countries, requests for confiscation of assets of corruption crimes cannot be enforced until a judgement of conviction is firstly obtained by the requesting country.

3. Best Practice

In Honduras and Peru, asset recovery is non-conviction based as provided for in these two countries' domestic legislation. This means that in Honduras and Peru, proceedings for asset recovery can be opened/filed and determined by the judge even before the offender is charged or convicted of a corruption offence. The prosecutor only has to prove that the asset has been acquired as a result of the corruption crime. From their respectively shared experiences, it is clear that this practice increases the efficiency and effectiveness of the investigation and prosecution of corruption crimes, both inside their countries and abroad.

## IV. INTERNATIONAL COOPERATION

Under chapter IV of UNCAC, States Parties are obliged to assist one another in every aspect of the

fight against corruption, including prevention, investigation, and prosecution, the emphasis being laid on mutual legal assistance in the field of gathering information and transformation of evidence for use in prosecuting and extraditing offenders.

During the discussions, we found that all countries represented in this training programme have ratified the United Nations Convention Against Corruption (UNCAC), except Japan. Likewise, we also pointed out some other methods applicable at the international level, like the use of Interpol, because every member agrees that the existence of Interpol in his or her country can be helpful in assisting investigation.

**A. Interpol**

Interpol is an organization which is widely used all over the world to cooperate between countries in the field of gathering information and collecting evidence. For example, if a country wants to find a suspect, Interpol will be the fastest and most effective channel to use. Therefore, police officers seek Interpol assistance more than any other enforcement agencies.

**B. Mutual Legal Assistance**

All of the participants' countries are in contact with various countries of the world to intensify cooperation in the area of cross-border and corruption crimes, especially through conclusion of judicial cooperation conventions and treaties, ensuring extradition, as well as, judicial and mutual assistance agreements. In this context, most Latin American countries have subscribed to the Inter-American Convention against Corruption, which obliges countries who are Parties, to provide mutual legal assistance when necessary. Japan has entered into bilateral treaties with some jurisdictions like Hong Kong, the European Union, the United States, South Korea, Russia and China for the purpose of mutual legal assistance.

Almost all participating countries indicated that they faced challenges in requesting mutual legal assistance: According to article 46, paragraph 17, of UNCAC, a request should be executed in accordance with the domestic law of the requested State Party. In addition, the article also stated that it should also be executed in accordance with the procedures specified in the request. However, from a practical point of view the group members agreed on the importance of the existence of an international form of mutual legal assistance request that binds all the items needed for mutual legal assistance to avoid the refusal of the requested countries.

However, we consider that the United Nations Convention against Corruption urges international cooperation in article 46, paragraph 8, which states that the State Parties to the convention cannot refuse to provide mutual legal assistance on the grounds of bank secrecy. Thus, all the group participants agree that it is important to share and exchange information between each country represented here to provide better mechanisms in the field of research and prosecution. It is important to create only one international form for mutual legal assistance request to provide all the information needed to each country, to make the process easier and faster.

**C. Law Enforcement Cooperation**

All group members indicated that their respective countries have undertaken various forms of law enforcement cooperation. Most participants' countries are members of the Egmont Group, which enhances law enforcement cooperation and information sharing between FIUs.

**D. Reciprocity**

Most countries provide mutual legal assistance based upon reciprocity without treaties and agreements. When a country requests assistance from another country, it must clarify the items of reciprocity based upon the trusted relationship with the relevant authorities.

**E. Extradition**

All group members indicated that their respective countries have bilateral treaties in the field of extradition.

## V. PUBLIC–PRIVATE COOPERATION AGAINST CORRUPTION IN THE AREA OF PUBLIC PROCUREMENT

To promote public-private cooperation in the fight against corruption, various types of public awareness campaigns, such as media advisements and dramas, training programmes, education curriculum, seminars and workshops should be held in the participants' countries, including transparency of the public procurement procedures and its outcome and a code of conduct for the ethical behaviour of public officials, in order to promote public awareness on the detriments of corruption and its danger on the national economy of each country. The goal is to change the public's attitude: "there is no reason for accepting corruption as a normal way of conducting business and as an inevitable evil."

Best Practice:

Panama established the Regional Anti-corruption Academy for Central America and the Caribbean, requesting assistance from member states of UNCAC in order to develop the training curriculum, training programmes, to support the formal and informal networks and promote awareness in the region.

## VI. RECOMMENDATIONS

- Revising the national legislation to be in alignment with UNCAC and the international treaties to apply programmes for protecting whistle-blowers and obtaining statements from witnesses.
- Supporting current initiatives to develop codes of conduct to reduce discretionary powers of public officials, and to determine the rules of ethical behaviour concerning public work whether in the judicial, administrative, political or social arenas.
- Countries with high levels of corruption should establish a special, independent body with the authority to combat corruption at all stages from prevention to investigation and prosecution.
- The importance of creating only one international form for mutual legal assistance requests for the provision of all required information needed by each country for efficiency.
- Countries may seek informal ways of connecting with each other in the field of investigation, gathering information and sharing evidence to avoid wasting time and effort in paperwork.
- Encouraging countries to be a part of regional cooperation networks in the field of asset recovery.

## *GROUP 3*
# MEASURES OF DETECTION, PUNISHMENT AND INTERNATIONAL COOPERATION AGAINST CORRUPTION IN PUBLIC PROCUREMENT

| | | |
|---|---|---|
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## I. INTRODUCTION

The group workshop commenced on the 28th day of October 2016 under the guidance and advice of Professor Watanabe Ayuko and her assistant Mr. Fukuda Yuji. Mr. Uttam Vijay Naidu was unanimously appointed as the Chairperson, followed by the appointments of Mr. Edmond Emanuel Cooper as the Co-Chairperson, Ms. Chaing Sinath as Rapporteur and Mr. Nguyen Quoc Huy as Co-Rapporteur. Discussions were conducted under the theme of Measures of Detection, Punishment and International Cooperation against Corruption in Public Procurement. There was a total of 13 sessions.

Information compiled in the report was done in collaboration with views of participating members from the following countries: Bangladesh, Brazil, Cambodia, Fiji, Guyana, Japan, Kazakhstan, Kyrgyz Republic and Viet Nam. This report is prepared with consideration and understanding of the articles promulgated by UNCAC. The report is a combination of similar and diverse detection, investigation and legal practices in relation to corruption and tackling offences in public procurement with international cooperation.

## II. CONTENTS

### A. Intelligence Stage

1. Source of Information

As per group discussion, it was conclusively agreed that intelligence plays a very vital role when it comes to investigating cases of corruption in public procurement. Intelligence can be obtained in many forms; however, for countries like Kazakhstan, Kyrgyz Republic and Viet Nam, intelligence gathered or received through rumors is not considered for investigation. Kyrgyz Republic and Viet Nam do not consider anonymous letters as sources of information that may lead to investigation.

The group discussed the sources and avenues of how information, complaints or reports are lodged for investigation. Listed below are the actual versions of how information is received, documented and the initiation of the detection and investigation:

- Direct report — complainants come personally and lodge their complaint.
- Receipt of information or complaints via telephone, cell phone or text messages.
- Email or social media, as it is the present trend in technology.
- Written complaint with attached documents through mail, in the form of documents and

sometimes anonymous, but taken into consideration in some countries.

- Documents pertaining to alleged offences are at times received through government entities, the judiciary or other government agencies during audits, inspections, internal investigation or prosecution.

- At times, such issues are highlighted through media and investigation is inevitably conducted, the reason being that there are demands by members of the public for administration of justice.

- Whistle-blowers also play a vital role in assisting investigators and prosecutors by disseminating critical information which leads to successful investigation and conviction of corruption in public procurement.

- At times information is also received through reciprocal relationships with other countries which provide information on offenders while doing investigations in their own countries.

*(a) Conclusion*

Basically, these are several sources of intelligence or information that we utilize. However, some of countries are deprived of such intelligence, which greatly contributes to offenders going free after commission of corruption-related offences.

*(b) Recommendation*

Since corruption is committed in secrecy, it is hard to establish initial leads so therefore all sources of information should be taken into consideration. Even though experiences from the past have revealed that some anonymous letters are not true, it is appropriate to have all information analysed prior to the commencement of investigation in public procurement. Therefore, it is also recommended that a committee or panel be formed to scrutinize the anonymous letters before or during the detection or investigation of corruption in public procurement cases.

Further, it is very essential to inform the public that corruption in public procurement is a high-risk crime which should not be condoned. Therefore, creating confidence, promoting better relationships between citizens and public officials and receiving more accurate information from citizens are all important.

Countries which do not utilize anonymous letters or rumors as a source of information can reconsider the above issue as a recommendation to have better investigation of corruption in public procurement.

2. Methodology

The group discussed how intelligence is dealt with to provide successful detection, investigation and prosecution of offences of corrupt practices in public procurement. Due to the status quo of the participants being from various nations, there were different views of the methods for each country. The issues were discussed and noted as follows:

- According to Bangladesh and Kyrgyz Republic, there is a special unit/department in relation to corruption and the information received is verified to establish the credibility of the information with supporting detection evidence, the reason being that the above countries have a different view from other participants in relation to the stages of detection and investigation. In Cambodia, the Anti-corruption Unit is responsible for receiving information, verifying and initiating investigation.

- During the group discussion, it was also established that in Kyrgyz Republic upon receipt of information, there is a process of sorting out information into different categories. The anonymous complaints are put aside simply for the reason that it does not have a name. However, it is left to the initiative of the officer to follow up on the information if he/she is interested in the case. The remaining countries commence investigation after receipt of intelligence.

- The group noted that there is more than one independent/investigative agency in Brazil and Fiji

engaged in the investigation of corruption in public procurement cases. However, in Guyana, the police department is responsible for all investigations. In Japan, there are several agencies which are in charge of investigation of corruption cases in public procurement.

*(a) Conclusion*

There are differences and similarities in how investigations are conducted in relation to corruption in public procurement. Some are independent while others are interlinked through mutual arrangement or Memoranda of Understanding. The laws of various countries dictate the process in relation to investigation of procurement violations.

3. Response to Complaint

All participating members confirmed that they have a feedback policy whereby the complainant is informed of the progress of his or her complaint. After discussions on the issue, the group unanimously agreed that such practice will foster a healthy relationship between the complainant and the law enforcement agency, promote accountability and transparency which will enhance the trust and public support to combat corruption in public procurement.

**B. Detection and Investigation Stage**

1. Analyzing and Evaluating Information

This is a very important component of investigation concerning cases of corruption in relation to public procurement. Thorough understanding and appropriate evaluation will result in successful investigation and prosecution of corruption cases. It will also provide an indication of how credible and reliable the informant has been. This important aspect was supported by the group.

2. Types of Measures for Detection and Investigation

The group also discussed the special laws utilized for detection prior to investigation by Kazakhstan and Kyrgyz Republic. In total, they have 18 typologies for Kazakhstan and 21 for Kyrgyz Republic (Please refer to Index number I and II). A different approach is utilized for detection. The group also noted that in some countries, detection is the preliminary stage of confirming whether an offence has been committed or not and whether a full-scale investigation is warranted.

Also discussed were compulsory and non-compulsory measures such as search, seizure, arrest, checking bank account information for which the authorization from judge or prosecutor is required in some countries. Most participants confirmed that sting operations are important measures for corruption investigation and are allowed to be utilized in all participants' jurisdictions, except Japan. However, inducement to commit corruption offences is not permitted. In addition, the group raised the issue of tracker devices as one method of investigation, and it was noted that in Brazil, it is mandatory to obtain a court order to use such devices as a part of an investigation. The issue of using a tracker device and authority to use such devices in Japan is still pending decision of the Supreme Court.

3. Collating Evidence

During the process of detection and investigation, the investigator, in all countries, can obtain evidence from suspect's photographs, documents such as contract details, insurance, agreements, receipts, promissory notes, money transactions and even details of bank accounts from financial institutions. For such information, Brazil needs authorization from judges.

It was noted that for all countries in our group, the investigators have the power to obtain the bank account information of suspects regardless of any interruption or objection from the financial institutions, with the exception of Guyana where permission is sought from the bank.

All of the countries also can acquire reports pertaining to telephone and cell phone details of incoming and outgoing calls of suspected persons and material witnesses with addresses from service providers. This eases the task of locating the persons involved quickly and extracting important evidence to finalize the investigation successfully. All participants' countries, except Japan and Guyana, can conduct wiretapping as a method of investigation. In Brazil, investigators need to obtain the authorization of the court in advance, and, in Bangladesh, the result of the wiretapping can be used as intelligence but is not accepted at trial as evidence.

4. Recommendation

Considering the above characteristics of corruption crime, it is worthwhile considering the implementation of wiretapping as an investigation method in Guyana and Japan. On the other hand, wiretapping has a tendency to be misused and leads to a violation of privacy, and that is why Japan has not adopted wiretapping as an investigation method in corruption cases so far. Other countries need to implement preventive measures against the misuse of authority.

*(a) Interviews*

This is one of the major components of investigation which concerns the documentation of all information obtained from suspected persons involved in corruption cases. All notes taken must be within the guidelines provided by the relevant legislature of the said countries.

Normally, there are two common types currently practiced in all countries. They are by way of audio/video recording and preparing a transcript, and the other is by writing. All participants unanimously agreed to the methods utilized for compiling evidence in investigation files such as interviewing the ex-partner of the suspected person. Normally, the originals are retained as exhibits and presented in court at the time of trial where they are accepted and marked as court exhibits, with an exception in Brazil, Cambodia and Viet Nam, where the original documents are presented to the court in the first instance.

There are certain guidelines that are to be carefully considered while taking statements from suspected persons. The investigator has to be mindful and cautious that all statements are obtained voluntarily, without threat, promises, force or any form of inducement and of the true/free will of the person who is providing that evidence. This process sometimes creates difficulty in ascertaining the elements of the offence of corruption.

At times when this evidence is not properly obtained, there are allegations of abuse of power and use of violence by the investigator conducting the investigation. If the court views this violation or negligence as a serious breach of procedures, then the prosecution most likely will be unsuccessful.

*(b) Analyzing evidence obtained from investigation*

Once all evidence is obtained, the investigator analyses it and takes into account all the circumstances of the case, and then decides whether the evidence collected is sufficient and will enable the prosecution to prove its case beyond a reasonable doubt. If the evidence is adequate and does not have any pending rectification, then the investigation file with all the evidence will be submitted to the prosecutor to proceed with the case. However, Bangladesh has a special unit, namely the Legal and Prosecution Unit of the Anti-corruption Commission, which is comprised of experienced judges. That unit is responsible for perusing the file and thoroughly going through the evidence of the file and providing a report that there is sufficient evidence to secure a conviction. The file is then dispatched to the investigator and lawyer who will be pursuing the case in court.

## C. Prosecution

1. Legislation

All participants' countries have criminal procedure laws, criminal laws and anti-corruption laws as the basis of prosecution (Please refer to Index III).

2. Process and Procedure

Under normal proceedings, the procedures of all countries are the same, with the exception of Bangladesh, Japan and Brazil. Bangladesh has a specialized agency to prosecute corruption offences. Japan and Brazil have specialized prosecutors in corruption cases in some important jurisdictions.

In countries like Japan and Cambodia, prosecutors enjoy great discretion in exercising their duties whether to prosecute or not. For Brazil, the discussion is such that if the prosecutor finds that there is no evidence to establish a prima facie case, he may drop the case and send it to the judge. In this situation, if the judge disagrees, because in his view, there is sufficient evidence to proceed with the case, the judge submits the file to a group of senior prosecutors who will make the final decision. If this group finds that there is not sufficient evidence, the case will be closed. Otherwise, if the group finds that there is sufficient evidence, they will send the case to a new prosecutor who must commence prosecution.

In all participants' countries, the prosecutor can conduct supplementary investigation or direct investigators to conduct further investigation in relation to relevant facts.

In Kazakhstan, Kyrgyz Republic and Viet Nam, upon acquittal of the accused, the prosecuting officer and the investigator are subject to civil liability. If the ruling is against the State, including the prosecuting officer and the investigator, the designated department will initially pay the full amount. This amount will be recovered from the investigator and prosecutor's salary in installments.

**D. Punishment**

1. Court Proceedings

Most corruption proceedings are initiated in the regular courts. However, in Bangladesh, a specialized court has been established for the first instance proceedings. In practice, the defendant, in most cases, chooses to make an appeal to a higher court which is a general jurisdiction court where the caseload is high and leads to a lengthy process. This tactic is used by the person against whom the charge is filed to prolong the prosecution resulting in loss of vital witness evidence due to natural causes. The accused has all the rights to rebut the allegations or charges against him. The judge has the designated authority to dictate the proceedings giving reasons that there is sufficient evidence to prosecute the case. In some parts of Brazil, there are specialized prosecutors and judges appointed in corruption cases.

In all countries, appeals to higher-level courts can be done by the prosecutor or the accused. The time limitation for appeals is available.

**=> Advantages and disadvantages of having special judges and prosecutors:**

**- Advantages:**

- The specialized judges and prosecutors have specialized knowledge, which ensures speedy execution of justice in the trial.
- The State can demonstrate to the public its efforts to combat corruption.

**- Disadvantages:**

- There is still a lingering and prolonging of the corruption case.
- In Brazil, the specialized prosecutors and judges have excess work because of the complex nature of the case.

**- Recommendation:**

- The group agrees that the fundamental rights of the accused are infringed by delay of the trial process, especially in corruption cases. The whole society will endure prolonged suffering when justice is delayed. Therefore, the justice system needs to have a speedy trial in relation to the completion of the proceedings, such as a time limitation or strict timetable.

2. Types of Punishment

Punishment is in form of fines and imprisonment that can be suspended. The range of punishment differs in respect of each country. Viet Nam is the only country that has the death penalty for corruption in public procurement and other corruption-related crimes. In addition to the punishment described above, confiscation of proceeds of crime and the suspension of civil and political rights can also be imposed by the court as additional penalties.

**E. International Cooperation**

The discussion in the group pointed out that except Japan, all other participants' countries are members of UNCAC.

1. Mutual Legal Assistance

The group discussion showed that mutual legal assistance is an important tool to investigate corruption offences when an international element is involved such as collecting evidence, taking statements, monitoring, restraining and confiscating the proceeds of the crime. Absence or insufficiency of a foreign

country's assistance in this matter could lead to unsuccessful prosecution or loosing track of the crime proceeds.

Some countries such as Kyrgyz Republic and Kazakhstan cannot provide legal assistance in the absence of bilateral or multilateral treaties. However, in Cambodia, Guyana and Japan, legal assistance can be provided to another country based on domestic law. Similarly, on the basis of reciprocity, mutual legal assistance is possible in Brazil and Bangladesh in the absence of a bilateral or multilateral treaty.

The possibility of creating an international joint investigation team was also explored by the group. This would be a good concept since the issue of procurement violation is broad-based and for this reason, collection of evidence would be done more efficiently and timely. Sometimes it is necessary to conduct investigations simultaneously in different countries in order to achieve the best results, which MLA alone cannot accomplish.

2. Extradition

It was discussed by the group that extradition could be sought before and after the conviction of the wanted person. This measure facilitates the return of an alleged criminal to another country for the purpose of trial or enforcement of judgement.

Most participants' countries do not allow the extradition of their nationals, except Guyana and Fiji, where possibilities to extradite their nationals exist. For Japan and Viet Nam, bilateral or multilateral treaties could permit the extradition of their own nationals.

With regard to the possibility of extradition without bilateral or multilateral treaties, only Cambodia will extradite based on its own domestic law. Brazil needs the promise of reciprocity from the country requesting the extradition.

3. Recommendation

International joint investigation teams are a good method to conduct investigations simultaneously to bring about the best results, which would be beneficial for the participating countries if the legal framework to do so is enacted in legislation or if reciprocity creates such a position.

## III. CONCLUSION

It can be reasonably concluded from our extensive discussion that dealing with corruption crime is very important. In some countries, the issue of corruption crime is dealt with systematically and expeditiously while others are works in progress. It must be noted that for justice to be effective, it must be executed swiftly. Based on the diversity of various countries, it is evident that a best practice across the divide would be difficult to arrive at presently. A special institution to deal with corruption-related matters may be an option based on the strength of the economy of the participating countries; therefore, it is important for participating countries to promote the concept of international cooperation across the board with special attention to reciprocity and networking when investigating and prosecuting cases of corruption in public procurement.

## INDEX I
## LIST OF 18 TYPOLOGIES IN KAZAKHSTAN

Under Article 11 (Operative-search measures) of the Law of the Republic of Kazakhstan dated September 15, 1994 No 154-XIII about operative-search activities, the operational search actions are:

1) A survey of persons;
2) The establishment of open and secret relations with the citizens, their use in operational and investigative activities;
3) Introduction;
4) The use of behavioural models to simulate criminal activity;
5) The establishment of secret enterprises and organizations;
6) Controlled delivery;
7) The application of technical means to obtain information does not affect the legally protected privacy, home, personal and family secrets, as well as the confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph and other communications;
8) Inquiries;
9) Receiving samples;
10) Operational procurement;
11) The use of search dogs;
12) Search and identification of the person on the signs;
13) Search illegal removal of information devices;
14) Detection, covert fixation and removal of traces of illegal acts, their preliminary study;
15) Chasing a person who is committing or has committed a crime;
16) Implementation of the presence of witnesses of personal examination of detainees, withdrawal of their belongings and documents which may be relevant to the criminal activity, as well as the inspection of premises, workers, and other places, inspection of vehicles;
    In the course of the anti-terrorist operation personal examination and inspection of the luggage of the physical person, inspection of vehicles, including the use of technical means, can be made without the participation of witnesses;
17) Operations to capture armed criminals;
18) Observation.

## INDEX II
## LIST OF 21 TYPOLOGIES IN KYRGYZ REPUBLIC

Under Article 7 (About operative-search activity) of the Law of the Kyrgyz Republic dated October 16, 1998 №. 131 about operative-search activities, the operational search actions are:

1) A survey of citizens;
2) Inquiries;
3) Collecting samples for comparative analysis;
4) Test purchases;
5) The study of objects and documents;
6) Controlled delivery (delivery verification);
7) Identification of the person;
8) Inspection of premises, buildings, terrain and vehicles;
9) Control of postal, telegraph and other messages;
10) Tapping and recording, producing telephone and other communication devices;
11) Collection of information from technical communication channels;
12) The establishment of secret enterprises and organizations;
13) Operational implementation;
14) Operational monitoring;
15) Operational experiment;
16) Operational setting;

17) The application of technical means to obtain information does not affect the legally protected privacy, home, personal and family secrets, as well as the confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph and other communications;
18) Search of means of unlawful removal of information;
19) Operative search in networks and communication channels;
20) Silent Monitor and record conversations (with the use of video and audio equipment and (or) special technical equipment);
21) Obtaining information about connections between subscribers and (or) the subscriber units.

## INDEX III
## LEGISLATION OF ANTI-CORRUPTION IN PUBLIC PROCUREMENT

| | Country's name | Name of the laws |
|---|---|---|
| 1 | Bangladesh | - Anti-corruption Act 2004<br>- Anti-corruption Rules 2007<br>- Penal Code 1860<br>- Code of Criminal Procedure 1898<br>- Prevention of Corruption Act 1947<br>- Money Laundering Prevention Act 2012<br>- Public Procurement Act 2006<br>- Criminal Law (amendment Act) 1957<br>- Whistleblowers Act 2011<br>- Mutual Legal Assistance Act 2012 |
| 2 | Brazil | - Anti-corruption Law of 2013 (Law 12.826)<br>- Penal Code 1941<br>- Crimes against the National Financial System (Law 7492/86)<br>- Anti-money Laundering (Law 9613/98) |
| 3 | Cambodia | - Criminal Code 2009<br>- Code of Criminal Procedure 2007<br>- Anti-corruption Law 2010<br>- Law on Public Procurement 2012 |
| 4 | Fiji | - Crime Decree No 44/2009<br>- Criminal Procedure Decree No 45/2009<br>- Anti-corruption Promulgation 2007<br>- Public Procurement Promulgation 2010 |
| 5 | Guyana | - Criminal Law Procedure Act (Chapter 10:02)<br>- Criminal Law Offence Act (Chapter 10:01) |
| 6 | Kazakhstan | - The Criminal Code 2014 (CC)<br>- The Criminal Procedure Code 2014 (CPC)<br>- The Administrative Offences Code 2014 (CoAO)<br>- The Law on Civil Service 2015 |
| 7 | Kyrgyz | - The Constitution of the Kyrgyz Republic<br>- The Criminal Code of the Kyrgyz Republic<br>- Code of the Kyrgyz Republic on administrative responsibility<br>- The UN Convention against Corruption<br>- Law "On Combating Corruption" dated 08.08.2012, No 153<br>- Law "On public procurement" dated 03.04.2015, No 72 |
| 8 | Viet nam | - Penal Code 1999 (amended in 2009)<br>- Criminal Procedure Law 2003 |

| | | |
|---|---|---|
| 9 | Japan | - Penal Code<br>- Code of Criminal Procedure<br>- Act Concerning Elimination and Prevention of Involvement in Bid Rigging<br>- Unfair Competition Act<br>- Act on Prevention of Transfer of Criminal Proceeds, Political Funds Control Act |

# APPENDIX

## *COMMEMORATIVE PHOTOGRAPHS*

- ***164th International Training Course***
- ***19th UNAFEI UNCAC Training Programme***

# The 164th International Training Course

**Left to Right:**

**4th Row**

Ms. Iwakata (Staff), Ms. Hisa (JICA), Ms. Odagiri (Chef), Ms. Yamada (Staff), Ms. Hando (Staff), Mr. Ozawa (Staff), Ms. Oda (Staff), Mr. Ueki (Staff), Mr. Furuhashi (Staff), Mr. Ohno (Staff), Mr. Miyagawa (Staff), Ms. Ema (Staff)

**3rd Row**

Mr. Satomi (Japan), Mr. Dainaka (Japan), Ms. Riungu (Kenya), Mr. Nasario (Fiji), Ms. Sanchez (Philippines), Mr. Beugre (Cote d'Ivoire), Ms. Dentana (Papua New Guinea), Ms. Choijantsan (Mongolia), Ms. Roona (Maldives), Ms. Aguilar Baca (Peru), Mr. Abd Razak (Malaysia), Ms. Tjiroze (Namibia), Mr. Brungnerotto (Brazil), Mr. Kamiya (Japan)

**2nd Row**

Mr. Yanai (Japan), Mr. Perrin (Intern), Mr. Furukawa (Japan), Mr. Vosamuri (Fiji), Mr. Aung Myo Cohn (Myanmar), Ms. Martin (Namibia), Mr. Kelzang (Bhutan), Mr. Alqudah (Jordan), Mr. Shafayet (Bangladesh), Mr. Ahmed (Pakistan), Mr. Fujio (Japan), Mr. Kouame (Cote D'Ivoire), Mr. Sohn (Korea), Mr. Chan (Hong Kong), Mr. Alzoubi (Jordan), Ms. Almeida (Brazil), Mr. Furuhashi (Japan)

**1st Row**

Mr. Shojima (Staff), Mr. Jimbo (Staff), Prof. Hirano, Prof. Yukawa, Prof. Akashi, Mr. Prescott (United States), Director Senta, Mr. Okech (Kenya), Prof. Yamamoto, Prof. Minoura, Prof. Watanabe, Mr. Ito (Staff), Mr. Schmid (LA)

# The 19th UNAFEI UNCAC Training Programme

**Left to Right:**

**4th Row**

Ms. Ema (Staff), Ms. Iwakata (Staff), Ms. Odagiri (Chef), Ms. Yamada (Staff), Ms. Hando (Staff), Ms. Oda (Staff), Mr. Ueki (Staff), Mr. Furuhashi (Staff), Mr. Miyagawa (Staff), Mr. Ohno (Staff), Ms. Yamamoto (JICA), Ms. Ide (JICA)

**3rd Row**

Mr. Perrin (Intern), Mr. Fukuda (Intern), Mr. Nguyen (Viet Nam), Mr. Anthony (Sri Lanka), Mr. Takeda (Japan), Mr. Marx (Brazil), Mr. Bounlom (Lao PDR), Mr. Nurdianto (Indonesia), Mr. Jamtsho (Bhutan), Mr. Naidu (Fiji), Mr. Abdurakhmanov (Uzbekistan), Mr. Sugawara (Japan), Mr. Misawa (Japan), Mr. Shrestha Vaidya (Nepal)

**2nd Row**

Ms. Solis Hoffmann (Honduras), Ms. Mohamed (Maldives), Ms. Aono (Japan), Mr. Cooper (Guyana), Mr. Mndambi (Tanzania), Mr. Yuasa (Japan), Mr. Khorshid (Egypt), Ms. Khanam (Bangladesh), Ms. Vevara (Papua New Guinea), Mr. Traore (Mali), Ms. Paico Guevara (Peru), Ms. Zhovnytska (Ukraine), Ms. Chaing (Cambodia), Ms. Shaikhina (Kazakhstan), Mr. Aung Myo (Myanmar), Mr. Wani (South Sudan), Mr. Farkhadov (Kyrgyz Republic), Mr. Rabizoda (Tajikistan)

**1st Row**

Mr. Ito (Staff), Mr. Jimbo (Staff), Prof. Watanabe, Prof. Minoura, Prof. Akashi, Prof. Yamada, Mr. Vlassis (UNODC), Director Senta, Deputy Director Morinaga, Prof. Yukawa, Prof. Watanabe, Prof. Hirano, Prof. Yamamoto, Mr. Shojima (Staff), Mr. Schmid (LA)