



Cross-border safeguards for children in conflict with the law in the ASEAN REGION

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A colorful illustration of children holding a large white sign. On the left, a group of four children (a boy and three girls) are peeking over the top edge of the sign. On the right, a vertical line of four children is holding the sign up. The children are drawn in a simple, cartoonish style with large eyes and smiling faces. The background is white with a blue and grey decorative border on the left side.

**Legislative Framework
for Children in Conflict
with the Law with
Respects to Safeguards**



The Constitution of Malaysia guarantees everyone including children, equality before the law and freedom from arbitrary arrest and detention

In addition, the Child Act 2001 and its amendments 2016 provides certain safeguards for children in conflict with the law

The special juvenile justice protections generally apply to children below the age of 18.

They are also not apply to children charged with offences punishable by death (e.g. murder, drug trafficking and certain terrorism offences)

The Act provides safeguards to all children, irrespective of nationality, socio-economic status and religion

Minimum age of criminal responsibility is 10.

Also include *doli incapax* which states that a child who is above 10 but less than 12 years of age are not criminally responsible if “the child has insufficient maturity to understand and judge the nature and consequences of his/her conduct.”

Imprisonment can only be imposed on children over 14 years of age and must not be ordered if can be suitably dealt with in any other way.



The Act stipulates special procedures for dealing with children's cases at all stages of the criminal justice procedures

Arrest, detention and trial of any offence (subject to certain limitations) must be handled in accordance to the Act.

Where a specific issue is not addressed in the Act, reference is made under the Criminal Procedure Code

When a child is arrested, before questioning or recording any statement, the parent/guardian/relative and probation officer must be:

- informed of the arrest,
- the whereabouts of the child,
- ground of the child's arrest and
- the right to consult a counsel of the child's choice.

They are required not to be present while the child is being questioned.

Children in conflict with the law can be defended from the earliest possible stage (that is, from arrest) and investigation.

Pro-bono legal aid services are available from:

- **Legal Aid Bureau which is under the Legal Affairs Division in the Prime Minister Office.**
- **Bar Council Legal Aid Centre.**
- **Many children and their parents are not cognizant of the availability of the pro-bono legal aid services.**

The young offender has to be produced before a magistrate within 24 hours of the arrest

The Court must release the child on bond executed by his/her parents/guardian (with or without cash deposit) in an amount that the Court feels is sufficient to ensure that the child returns to the court for his/her hearing

No bail is permitted for grave crimes or in the best interest of the child.

The high rate of remand for minor offences are due to parents unable or unwilling to pay the bail.

The pre-trial detention should not exceed 6 months but quite a number of cases fail to meet the remand maximum period.

The presence of the parent/guardian at the hearing, the probation report and special sittings of the Court for children which are for the protection of the child are the causes for the delay in the hearing.

The Child (Amendment) Act 2015, which was passed by the Parliament in April 2016 requires the probation report to be ready within a month

Male children in conflict with the law, whether pre-trial detention or detention after sentencing, are kept separate from adult offenders.

Female children in conflict with the law stayed with adult female offenders due to lack of facilities.

In detention centres, male children below 12 years of age, stay with their mothers while those of 12 years and above stay with their fathers.

Most prisons where children in conflict with the law are placed have *sekolah integrity*. These schools provide education from “preschool” (for those who cannot read and write) to secondary level”


Prisons, probation hostels and approved schools provide educational and vocational training

These facilities are available to young offenders after sentencing but not to those in pre-trial detention.

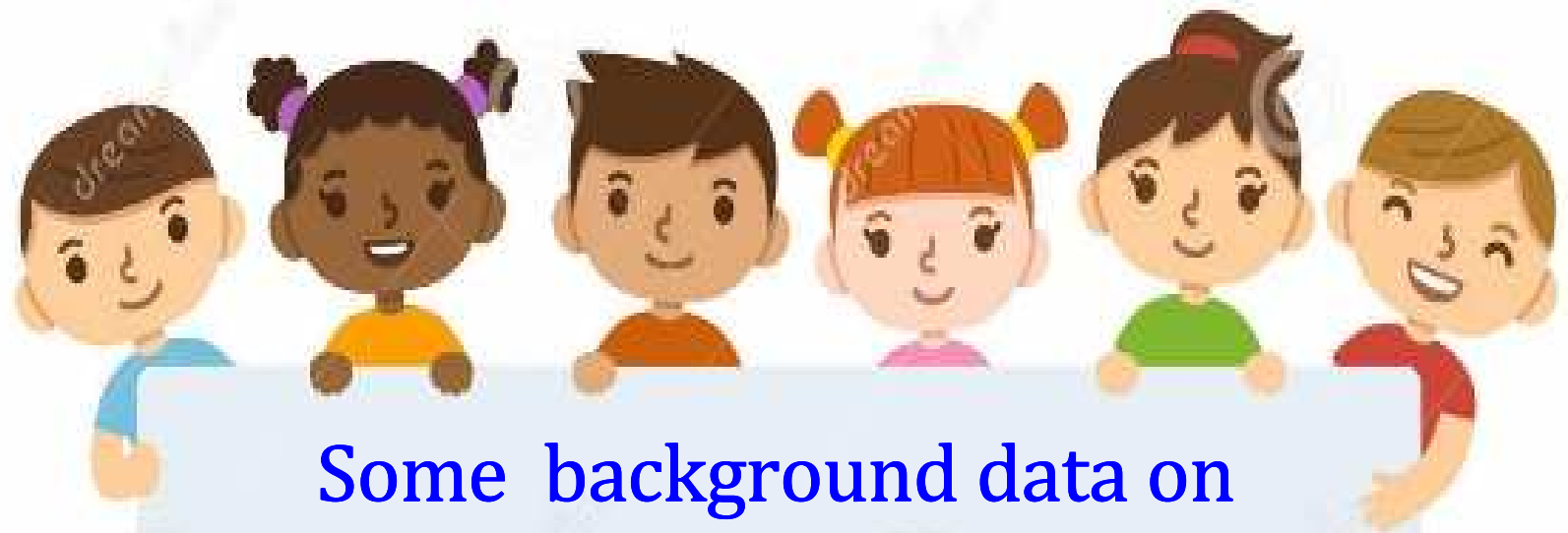
The report on the Children Under Remand Research has recommended for these facilities to be available to children in pre-trial detention.

Diversion

- **No formal programme through mediation or restorative approaches.**
- **Upon arrest and questioning, the police has the discretion to release young offenders for minor offences through warning or mediating an amiable resolution between the parties.**
- **The Public Prosecutor also has the discretion under the CPC to decide not to persecute or to advise the investigating officer to refer the child to the Department of Social Welfare for further action.**



**The Child (Amendment) Act 2015 states that
“ If the Court for Children by or before which
a child is found guilty of an offence, is of the
opinion that it is appropriate to do so, the
Court for Children may make an order
requiring the child to perform community
service ...”**



**Some background data on
children in conflict with the
law in Malaysia**

Study on Children under Remand

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Study on children under remand: Type of offences according to age

Offences	14 & below (33)		15 yrs (40)		16 yrs (44)		17 yrs (77)		18-21 (92)		Total 286	
	No	%	No	%	No	%	No	%	No	%	No	%
Beyond control	21	63.6	15	37.5	7	15.9	2	2.6	2	2.2	47	16.4
Taking drug	0	0.0	7	17.5	5	11.4	17	22.1	22	23.9	51	17.8
Possession of drug	1	3.0	4	10.0	4	9.1	13	16.9	17	18.5	39	13.6
Theft	6	18.2	4	10.0	7	15.9	12	15.6	8	8.7	37	12.9
Burglary	2	6.1	3	7.5	12	27.3	6	7.8	8	8.7	31	10.8
Rape	0	0.0	1	2.5	2	4.5	5	6.5	7	7.6	15	5.2
Possession of stolen property	2	6.1	3	7.5	2	4.5	4	5.2	3	3.3	14	4.9
Murder	0	0.0	0	0.0	3	6.8	6	7.8	4	4.3	13	4.5
Drug trafficking	0	0.0	0	0.0	0	0.0	4	5.2	4	4.3	8	2.8
Robbery	0	0.0	0	0.0	1	2.3	3	3.9	5	5.5	9	3.1
Fighting	1	3.0	0	0.0	0	0.0	1	1.3	1	1.1	3	1.0

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	No	%	No	%	No	%	No	%	No	%	No	%
Close proximity	0	0.0	0	0.0	0	0.0	0	0.0	3	3.3	3	1.0
Destroy of stolen property	0	0.0	0	0.0	0	0.0	1	1.3	2	2.2	3	1.0
Assault	0	0.0	0	0.0	0	0.0	1	1.3	1	1.1	2	0.7
No document	0	0.0	1	2.5	0	0.0	0	0.0	1	1.1	2	0.7
Possession of weapons	0	0.0	0	0.0	0	0.0	1	1.3	1	1.1	2	0.7
Sexual abuse	0	0.0	1	2.5	0	0.0	0	0.0	1	1.1	2	0.7
Escape from detention	0	0.0	0	0.0	1	2.3	0	0.0	0	0.0	1	0.3
Extortion	0	0.0	0	0.0	0	0.0	1	1.3	0	0.0	1	0.3
Sale of drugs	0	0.0	0	0.0	0	0.0	0	0.0	1	1.1	1	0.3
Snatched theft	0	0.0	1	2.5	0	0.0	0	0.0	0	0.0	1	0.3
Impersonation of police officer	0	0.0	0	0.0	0	0.0	0	0.0	1	1.1	1	0.3


Study on children under remand: Nationality of the Subject

Nationality	No	Percentage	Percentage
Malaysian	273	95.1	95.1
Indonesian	6	2.1	4.5
Filipino	7	2.4	
No information	1	0.4	0.4
Total	287	100	100

Department of Immigration's data on victims of trafficking disaggregated by gender and types of exploitation

	January to November 2015				
	Male Adult	Female Adult	Male Child	Female Child	Total
Sexual exploitation		54			54
Forced labour	4	21			25
Smuggling	58	15	2	1	76
Total	62	90	2	1	155

Source: Department of Immigration, 2015 Regional Review of the Management and Treatment of Trafficked Women and Children – Striving for Consistent, Comprehensive and Complementary Treatment: Conducting a Review



Currently, there are two gazetted Shelter Homes for children while three are for women and one for men. These Shelters are under the supervision of the Ministry of Women, Family and Community Development.

The Malaysian government has undertaken various steps, solely and in collaboration with NGOs and international agencies to address victim support, recovery and assistance.



**Malaysia Plan of
Action**

Malaysia's National Policy and Plan of Action, 2009 outlines a number of priority areas to reform the juvenile justice system. They include:

- **Create a child-friendly environment for all criminal justice system agencies, especially to provide support for witnesses and offenders**
- **Provide free legal aid services and counselling for children**
- **Develop special rehabilitative treatment programmes for child offenders**

...continue

- **Introduce diversion programmes (restorative justice, family conferencing, community service) for child in conflict with the law**
- **Develop standard and appropriate protection modules for all those working directly with children**



**Challenges towards
safeguarding the
rights of children in
conflict with the
law who are non-
Malaysians**



The safeguards stipulated in the Child Act are also applicable to children of all nationalities

In practice, some of the safeguards may not be applied to non-Malaysians and those without documents

Their parents/guardian are unlikely to be informed of their arrest

They are more unlikely to be released on bail and are therefore more likely to be held in detention pending trial



The vast majority of them are probably unaware of access to free legal assistance

Malaysia does not have a comprehensive specialized police response to children in conflict with the law.

Hence investigating officers have little understanding of children's rights and the necessary skills to handle children.

Inconsistent sentencing practices because the Child Act does not provide guidelines or standards for sentencing.



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At the national level

- **All children in conflict with the law, irrespective of nationalities have access to safeguards which are available.**
- **Parent/guardian, embassy representative (non-citizen) and/or probation officer must to be present and to participate in proceedings from the point of arrest.**
- **The right to pro-bono legal assistance must be clearly communicated to the young offender and her/his parent/guardian**

... At the national level

- **Deprivation of liberty should be the last resort. Formal programmes for alternative measures through restorative approaches to be introduced as soon as possible**
- **Setting up a special unit in the police force staffed with trained officers to handle child offenders in compliance with Part 2 Article 12 of the Beijing Rules.**
- **All personnel (e.g. social workers, enforcement officers and the judiciary) who handle children in conflict with the law must have specialized training and good understanding of the rights of children**

At the regional level

1. ACWC develops a declaration on the rights of children in conflict with the law. The reasons include:

- **All the 10 Members have ratified the Convention on the Rights of the Child but some of them have reservations which affect the rights of children in conflict with the law .**
- **Diversity in the legislative framework in AMS for children in conflict with the law**

... At the regional level

- **Age of criminality varies widely –ranging from 8 years of age to 15 years**
- **Definition of child varies in the juvenile justice system – while for most AMS, a child is a person below 18 years of age, in 2 AMS, it is defined as a person below 16 years**
- **Most of the AMS have instituted diversion but they vary widely, ranging from measures based on restorative principles with proper trained staff and facilities to traditional restorative justice models**

... At the regional level

- **Declaration will circumvent the ASEAN's way of respecting the sovereignty of ASEAN Member States**
- **The development of a Declaration on the Rights of Children in Conflict with the law will be supporting (b) Child sensitive justice system under Action 3: Legal Framework, Prosecution and Justice System of the ASEAN Regional Plan of Action on the Elimination of Violence Against Children**

... At the regional level

2. Since juvenile justice is one of the priority themes of ACWC 2016-2020 and as no project has been identified, ACWC can conduct a baseline study on the status of juvenile justice in AMS. From this study, the ACWC can establish standards for:

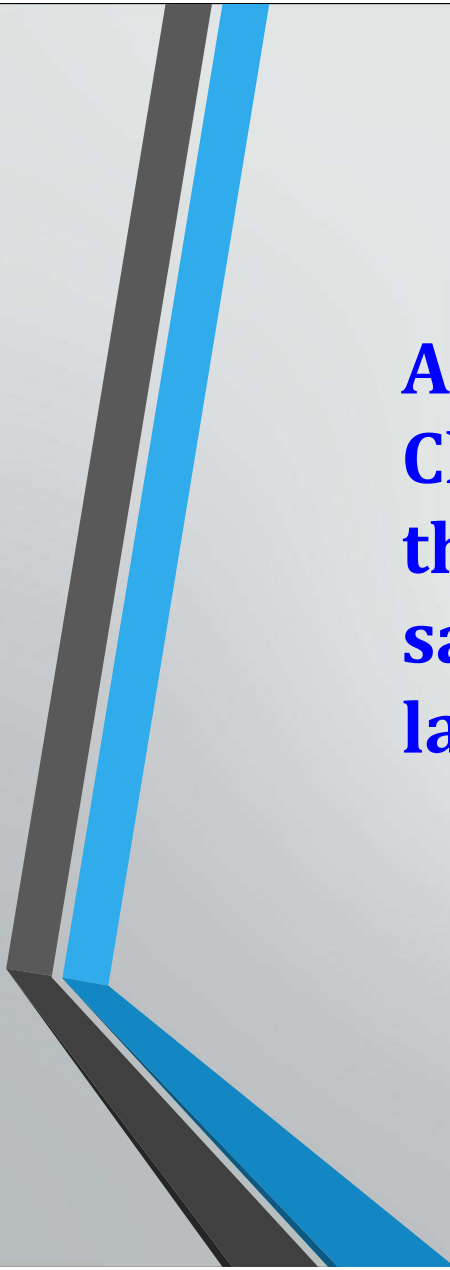
- **Making arrest and conducting investigations**
- **Guidelines for sentencing**
- **Guidelines for diversion**

Conclusion



Cross-border safeguards are provided for children in conflict with the law:

- **When the juvenile justice system in each ASEAN Member State respects the rights of children in conflict with the law and provides safeguards for them**
- **And the juvenile justice system applies equally to all children, irrespective of their nationalities**



**An ASEAN Declaration on the Rights of
Children in Conflict with the Law is one of
the means to achieve cross-border
safeguards for children in conflict with the
law in ASEAN**

Thank you

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