

# ASSESSMENT OF THE ACCESS TO JUSTICE SYSTEM FOR UNDER-18S IN TANZANIA

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Assistance

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## INTRODUCTION

International instruments require that all individuals must be treated as equal before the law and that all should have an effective remedy against violations of the rights granted to them by the constitution, or by law, before competent national tribunals.<sup>1</sup> These rights, known collectively as ‘access to justice,’ are both fundamental human rights and a fundamental necessity for a well-functioning democratic State. The right of access to justice is enshrined in the Constitution of the United Republic of Tanzania.<sup>2</sup> Article 13(1) provides that all persons are equal before the law and are entitled without any discrimination to protection and equality before the law.

The purpose of this study, which forms a key component in the ongoing reform of the child justice system led by the Ministry for Constitutional and Legal Affairs in collaboration with UNICEF Tanzania, is to determine the extent to which children’s right of access to justice is implemented in Tanzania, especially in the light of the passing of the Law of the Child Act 2009.

The study, undertaken by Coram Children’s Legal Centre UK and NOLA, a Tanzanian NGO, over a six month period, involved a desk review of relevant legislation relation to access to justice, as well as extensive field work in 10 regions<sup>3</sup> to obtain quantitative and qualitative information from stakeholders at all levels of the justice system and from children themselves.

The terms of reference for the study required the team to:

- a) map the system: the laws, policies and institutional framework;

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<sup>1</sup> See Articles 7 and 8 Universal Declaration of Human Rights, Article 14 International Covenant on Civil and Political Rights and Article 7 of the African Charter on Human and Peoples’ Rights.

<sup>2</sup> Article 29 of the Constitution provides that every person in the United Republic has the right to enjoy fundamental human rights and may seek redress for violation of those rights while Article 30(3) states that ‘Any person alleging that any provision ... or any law concerning his right or duty owed to him has been, or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.’

<sup>3</sup> Arusha, Dar es Salaam, Dodoma, Kigoma, Kilimanjaro, Lindi, Manyara, Mara, Mwanza and Tanga (please note that Tanga was the location for a Focus Group Discussion only).

- b) evaluate the extent to which the system complies with international standards on paper and in practice;
- c) identify the strengths of the system;
- d) identify the capacity gaps in the system and the reasons for those gaps; and
- e) explore how these gaps would be most effectively addressed, recommending the most appropriate models and mechanisms to ensure that children have access to justice.

At the start of this study, we undertook an initial desk review of all relevant domestic laws and policies relating to access to justice in the criminal, civil, administrative and traditional systems of justice for children<sup>4</sup> in Tanzania. We have not therefore repeated the work undertaken in this report.<sup>5</sup>

## **2. METHODOLOGY OF THE STUDY**

Following the desk review, the research team developed tools to gather quantitative and qualitative data on how the system for access to justice for under-18s works in practice in Tanzania. A two-day training seminar was held in Dar es Salaam for all researchers to discuss the tools and the remit of the study, in order to ensure maximum benefit from the field research. Data was collected using semi-standardised interviews for children and adults and focus group discussions and questionnaires for children. These tools were used to collect information in 10 districts, including: Arusha, Dar es Salam, Dodoma, Hanang/ Babati, Kilimanjaro (Moshi Urban and Hai), Lindi, Magu, Mwanza, Serengeti and Tarime.

Data was collected from the following individuals were interviewed using semi-standardised interview schedules:

Group A: Local Level Government Officials (District Commissioners, District Executives, for example); Labour Officials; Social Welfare Officers; Police

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<sup>4</sup> A child is defined for the purposes of this study in accordance with Article 1 of the UN Convention on the Rights of the Child as a person under the age of 18.

<sup>5</sup> The Desk Review maybe obtained from Coram Children’s Legal Centre on [clc@essex.ac.uk](mailto:clc@essex.ac.uk).

Officers (including representatives from Gender and Children Desks);  
Prosecutors; Judges and Tribunal Members;

Group B: Community Justice Facilitators; NGOs and FBOs and Legal Aid  
Organisations;

Group C: Parents and Influential People; Children in Children's Homes;  
Children who have received NGO Services

In total, 265 professionals were interviewed across the 10 research areas at local and national levels. A complete list of all participants is appended to this report. In all, 328 children participated in the research for this report through focus group discussions, interviews and questionnaires. Focus group discussions were conducted with 200 children. The focus groups were designed to provide a baseline understanding of children's awareness of legal issues, their legal rights and who they consult when their rights are infringed. In addition to the focus group discussions, researchers conducted individual interviews with 34 children in children's homes and a further 30 children who were selected because they had received NGO services. Questionnaires were handed out to and completed by 70 children, six of whom also participated in the focus group discussion.

Researchers also distributed data sheets to almost all participants in interviews. The purpose of these data sheets was to gather standardised information on the number of cases of children each organisation or entity had dealt with in the previous year and to find out about the outcomes of these cases. These sheets were completed by only a few participants. It was extremely difficult to collect data from most interviewees: mostly because organisations did not record data on children, or if it was recorded, the data was not easily accessible. Overall, there appeared to be a system-wide lack of data collection and data sharing.

We would like to record our thanks to all our interviewees, both professionals working in the justice system or with children, as well as the children themselves. All gave freely and willingly of their time to enable us to understand how children access justice in practice. Their contributions were invaluable.

### 3. ACCESS TO JUSTICE

Although access to justice is an issue that is currently a subject of much discussion in developing states, including Tanzania, there is no specific definition of what constitutes or amounts to ‘access to justice’ in international instruments or standards. The definition provided by UNDP, and which is accepted for the purposes of this study, defines access to justice as: *“the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.”*<sup>6</sup>

Access to justice by children is seen as equally important to that of adults and as a vital part of the UN mandate to reduce poverty and fulfil children’s rights.<sup>7</sup> The UN Common Approach to Justice for Children expands on this definition:

“Access to justice can be defined as the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards (including the CRC)..... Lack of access to justice is a defining attribute of poverty and an impediment to poverty eradication and gender equality. Proper access to justice requires legal empowerment of all children: all should be enabled to claim their rights, through legal and other services such as child rights education or advice and support from knowledgeable adults.”<sup>8</sup>

The legal framework for access to justice for children can be found in a wide range of international human rights instruments. Several international instruments provide the legal framework for access to justice for children, including: the Universal Declaration of Human Rights;<sup>9</sup> the UN Convention on the Rights of the Child;<sup>10</sup> the

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<sup>6</sup> UNDP, *Programming for Justice: A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice*, 2005, 5. Note that for this consultancy we will look at criminal, civil, administrative and informal justice mechanisms.

<sup>7</sup> UN Common Approach to Justice for Children, March 2008.

<sup>8</sup> *Ibid*

<sup>9</sup> Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

<sup>10</sup> G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990.



International Covenant on Civil and Political Rights;<sup>11</sup> the International Covenant on Economic, Social and Cultural Rights;<sup>12</sup> the UN Guidelines on Judicial Matters Involving Child Victims and the Witnesses of Crime;<sup>13</sup> the UN Guidelines for Action on Children in the Criminal Justice System; the UN Guidelines on the Role of Prosecutors;<sup>14</sup> the UN Standard Minimum Rules for the Treatment of Prisoners;<sup>15</sup> the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;<sup>16</sup> the UN Basic Principles on the Independence of the Judiciary;<sup>17</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules");<sup>18</sup> the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules");<sup>19</sup> Guidelines for Action on Children in the Criminal Justice System;<sup>20</sup> Basic Principles on the Role of Lawyers, 1990<sup>21</sup> and the UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 1988.<sup>22</sup>

Regionally, there are also a number of instruments that contain important provisions on access to justice, including the African (Banjul) Charter on Human and People's Rights 1987;<sup>23</sup> the African Charter on the Rights and Welfare of the Child;<sup>24</sup> the African Commission on Human and Peoples' Rights Principles and Guidelines on the

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<sup>11</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976

<sup>12</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

<sup>13</sup> G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, **U.N. Doc. A/44/49 (1989)**, *entered into force* Sept. 2 1990.

<sup>14</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>15</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

<sup>16</sup> Adopted by General Assembly resolution 40/34 of 29 November 1985.

<sup>17</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>18</sup> G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985).

<sup>19</sup> G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990)

<sup>20</sup> 1997/30. Administration of juvenile justice, 21 July 1997.

<sup>21</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

<sup>22</sup> *Adopted by General Assembly resolution 43/173 of 9 December 1988*

<sup>23</sup> Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

<sup>24</sup> OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

Right to a Fair Trial and Legal Assistance in Africa, 2001<sup>25</sup> and the Dakar Declaration and Recommendations.<sup>26</sup> The African Commission on Human and Peoples' Rights has also produced several resolutions and sets of principles relating to the issue.<sup>27</sup>

Essentially, in order to fulfil international standards, access to justice for children requires that there be both a child-sensitive fully functional justice system on the one hand and, on the other, that children be provided with information and support that will enable them to claim their rights and obtain redress.<sup>28</sup> A child-sensitive justice system requires that there be clear laws that set out rights and entitlements,<sup>29</sup> impartial tribunals, courts and judges, the availability of legal aid, lawyers and child-sensitive procedures that facilitate access and enable children to navigate their way through the system.<sup>30</sup> A child sensitive system that enables children to access justice and seek redress for violations of their rights will not be sufficient however, if children are not aware of their legal rights and do not know where, how or from whom to seek assistance. Thus access to justice also requires that the system makes provision for the raising of awareness of children's rights, awareness of the different mechanisms by which they might seek redress for violation of their rights and awareness of how to seek necessary assistance to access those rights. It requires that children have access to:

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<sup>25</sup> Adopted by the African Commission on Human and Peoples' Rights, 2001.

<sup>26</sup> According to the Declaration and Recommendations: "The African Commission on Human and Peoples' Rights ("the Commission") in collaboration with the African Society of International and Comparative Law and Interights organised a seminar on the right to fair trial from 9-11 September 1999 in Dakar, Senegal."

<sup>27</sup> For example, ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001 Adopted by the African Commission on Human and Peoples' Rights, 2001; Dakar Declaration and Recommendations According to the Declaration and Recommendations: "The African Commission on Human and Peoples' Rights ("the Commission") in collaboration with the African Society of International and Comparative Law and Interights organised a seminar on the right to fair trial from 9-11 September 1999 in Dakar, Senegal."

<sup>28</sup> See Ann Grandjean: No Rights without Accountability: Promoting Access to Justice for Children, Legal Empowerment Working Papers No 10 [www.idlo.int/ENGLISH/External/IPLEWP.asp](http://www.idlo.int/ENGLISH/External/IPLEWP.asp)

<sup>29</sup> These should include the civil and political rights as well as social, cultural and economic rights contained in the UN Convention on the Rights of the Child Committee on the Rights of the Child, General Comment No 5, General Measures of Implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 (2003) Part V (25).

<sup>30</sup> Anne Grandjean: No Rights without Accountability: Promoting Access to Justice for Children, Legal Empowerment Working Papers No 10 [www.idlo.int/ENGLISH/External/IPLEWP.asp](http://www.idlo.int/ENGLISH/External/IPLEWP.asp)

- Information about rights, complaints mechanisms and procedures for addressing rights violations, and legal support to raise complaints and file cases;
- Remedies and support for children who are the victims of (or witnesses to) crimes;
- Remedies for children who have experienced rights abuses/ violations of their rights (both domestic and international);
- Legal assistance to children in civil and criminal cases; and
- Appropriate safeguards, including legal assistance, during the process for children in conflict with the law.

### **3.1 Challenges to access to justice**

The Concluding Observations to the most recent periodic report by the Tanzanian Government to the UN Committee on the Rights of the Child<sup>31</sup> and the Recommendations of the African Committee of Experts on the Rights and Welfare of the Child in their 2010 report on Tanzania<sup>32</sup> make clear that there are currently several obstacles to the full realisation of children's right of access to justice in Tanzania. These include:

- Lack of access to effective complaints mechanisms
- Lack of access to adequate remedies and support for victims of rights violations
- Lack of access to adequate legal assistance
- The lack of a system to ensure the child's right to be heard

In addition there are a number of other factors which weaken the justice system.

These include:

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<sup>31</sup> CRC/C/TZA/CO/2 (2006), paras 14-15; 39-40; 59-60; 65-66.

<sup>32</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC), Concluding Recommendations on the Republic of Tanzania Report on the Status and Implementation of the African Charter on the Rights and Welfare of the Child, 2010, p. 11.

- Long delays, prohibitive costs of using the system, lack of available and affordable legal representation that is reliable and has integrity;
- Abuse of authority and powers and weak enforcement of laws and implementation of orders and decrees;
- Severe limitation in existing remedies provided either by law or in practice.
- Gender bias and cultural attitudes towards children;
- Lack of de facto protection, especially for children;
- Lack of adequate information about what is supposed to exist under the law;
- What prevails in practice and limited popular knowledge of rights;
- Lack of an adequate legal aid system;
- Limited public participation in reform programmes;
- Excessive numbers of laws;
- Formalistic and expensive legal procedures in criminal and civil litigation; and
- Avoidance of the legal system due to economic reasons, fear of repercussions or reprisals or a sense of futility of purpose.<sup>33</sup>

There are yet more obstacles specific to children. These include lack of awareness of rights and law, lack of basic education, cultural attitudes, limited family and community support for children accessing justice, physical access difficulties, lack of resources and a lack of understanding about possible legal remedies. In addition, extra obstacles face those whose role it is to ensure or facilitate access to justice for children, including:

- Lack of training;
- Lack of resources;

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<sup>33</sup> UNDP, Access to Justice Practice Note, 9/3/2004, page 4.

- Lack of structures and organisational set backs;
- Lack of child-sensitive mechanisms;
- Corruption and bias within the system; and
- Lack of priority for children's cases.<sup>34</sup>

### ***3.2 Awareness of legal rights and remedies***

As seen above, access to justice requires that provision is made for the raising of awareness of children's rights, awareness of the different mechanisms by which they might seek redress for violation of their rights and awareness of how to seek necessary assistance to access those rights. Without an understanding of their rights or entitlements in law, children are unlikely to know when a right has been violated or that they could seek a remedy. This study would not be complete, therefore, without a baseline survey exploring what children know and understand about their rights. We surveyed a group of 200 children, the vast majority of whom were vulnerable children, as it is this group of children who are the most likely to be in need of access to justice. We also undertook a focus group exercise in three State schools, with children who did not have the same high level of vulnerability. We accept that our sample is not a representative sample of all children in Tanzania but is a useful indicator in assessing levels of knowledge. In order to obtain children's views, the team used both focus group discussions and individual interviews.

### ***3.3 Focus group discussion findings***

The focus group discussion tool was broken into four main questions: 1) What legal issues matter to you? 2) Who should children go to for legal help or advice? 3) Is legal help and advice for children good or bad? And 4) Is it easy or hard for children to get legal advice? Children were selected for participation from retention homes, children's homes, NGOs and schools and their responses analysed in these groups. The children's responses to the focus group questions provide a strong indication of

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<sup>34</sup> Anne Grandjean: No Rights without Accountability; promoting access to justice for children.

their awareness of legal rights and remedies. A full methodology and analysis of the focus groups is included in this report at Annex 2.

The focus groups gave the researchers an opportunity to assess children's baseline awareness of the rights and who they could consult or seek help from when their rights were violated. According to the participants in the study, the most important legal issues to them were education, concerns relating to lack of family care, healthcare and housing.

After asking children to think about broad issues for legal advice, the team asked children to think specifically about four situations. These were presented to children using words and pictures: in situation 1, a child was falsely accused of theft and was facing a court hearing; in situation 2, a child had been forcibly evicted by a neighbour; in situation 3, a child was being unfairly targeted by a teacher and, in situation 4, a child had been abused by a stranger, had approached the police and no action had been taken. A considerable proportion of the children saw the issues raised by these scenarios as family or community issues rather than legal issues and overall had a low awareness of legal rights and where to go to seek assistance. Even where a situation obviously called for legal advice and representation, few children from the schools, and none from NGOs, suggested that the child should consult a lawyer, whereas this was a popular answer for children in children's homes and from retention homes. We anticipated that the final scenario, in which a child had suffered abuse, would be recognised by children as one that called for the involvement of the police and the protection of the child's rights through the criminal system. In the event, few children suggested contacting either the police, and even fewer suggested consulting or seeking help from a lawyer or a child rights organisation to protect the rights of the child.

Where the situation was linked to a civil issue such as land or education, children in children's homes or retention homes frequently suggested that the child go to see a lawyer or involved law enforcement. Children in retention homes were aware of and mentioned going to a Social Welfare Officer (SWO), indicating that they have a raised awareness of the role of SWOs compare to other groups, but that is not surprising as

they are cared for directly by social welfare officers. While children in NGOs, schools and children's homes suggested going to law enforcement for the civil issues, this was not the case with children from retention homes, perhaps due to a lack of trust in the police and a better understanding that the police deal with criminal and not civil issues. Interestingly, as with criminal incidents, very few children considered seeking legal advice either from a lawyer or a child rights organisation, a reflection of the low level of visibility to children of these two sources of help.

In all cases, the first choice of assistance after parents, relatives or the community tended to be the police, even when the legal issue raised by the scenario was not a criminal issue. Children did not pick lawyers, NGOs or children's rights organisations as a group from whom they would seek assistance as a matter of course, but very much as an exception. In none of the scenarios did children choose to consult lawyers in more than 29% of cases.<sup>35</sup> This, allied to the fact that many think it very hard to access a lawyer, raises questions as to how much access to justice children have. It was also interesting to see that children considered going to the court as an option but clearly without consulting a lawyer first. In addition, CHRAGG was only mentioned as a possible source of assistance by a very small number of retention home children, indicating that there is little knowledge of its existence or functions.

In general, those children who it is reasonable to assume had had most interaction with civil and criminal systems: those within Retention Homes and in Children's Homes, gave the highest number of discrete answers, perhaps demonstrating their greater exposure to legal issues such as crime or child protection and homelessness. Children in retention homes, perhaps not surprisingly, picked the police as a source of help far less than other children, preferring to rely on civil options such as the social welfare officers or local authorities. This may indicate a greater understanding of roles than displayed by other children, especially where civil rather than criminal issues are involved.

After asking participants to think about what children should do if their rights are violated, we asked children to "tell us why" they thought legal advice was a good

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<sup>35</sup> Children's home answers to Situation One and Retention home children's answers to Situation One.

thing and what would make legal advice better for children. Many children in schools felt legal education should be provided to children in schools, while children in retention homes wanted legal advice and lawyers made available to them while detained. A general theme of children was that they would like to be more aware of their rights, more knowledgeable about when their rights were being violated and empowered to seek redress. Children were also aware of the disparities between different groups of children and recognised that support and legal aid was not widely available to the most vulnerable groups.

Researchers asked children whether it was easy or hard for children to get legal advice and help. Responses to this varied dramatically. Half of the NGO children thought it was 'middle', while the other half thought it was 'very easy'. However, nearly half of children in retention homes and children's homes stated that it was very hard to get legal advice. Children in schools were polarised with 39% saying it was very easy to get legal advice and the same number saying it was very hard. The variation in data is interesting: it is significant that the majority of children in the most vulnerable situations, those at the children's homes and those in retention schools who are the most likely to have needed legal advice, said that it was hard or very hard to get advice. This is likely to reflect the lack of access to legal advice for this particular group of children.

The inevitable conclusion from this survey is that children's awareness of rights, law and the legal system is low and needs to be increased. There is a dearth of easily accessible literature on children's rights and the law relating to children. Not all NGOs working with children have a copy of the Law of the Child Act and even fewer have received training on the Act. The Act is not available in Kiswahili and this remains a significant barrier to awareness-raising.

**We would recommend that the school syllabus should include a specific module on children's rights and common legal issues for children, in both criminal and civil law, as well as information about the legal system. We would encourage NGOs to combine to produce this information for children that could be distributed country**



**wide, through schools, churches, mosques, youth clubs etc including information about the Law of the Child Act.**

#### **4. THE CURRENT JUDICIAL SYSTEM**

##### ***4.1 The court structure***

Under Article 107A of the Constitution, the Judiciary is the ‘authority with final decision in dispensation of justice in the United Republic of Tanzania.’ The Court system includes (in order of superiority):

- The Court of Appeal, established under Article 117 of the Constitution
- The High Court, established under Article 107 of the Constitution;<sup>36</sup>
- Resident Magistrates Courts, established under the Magistrates Court Act, 1984;
- District Courts, established under the Magistrates Court Act, 1984;
- Primary Courts, established under the Magistrates Court Act, 1984;
- Juvenile Courts (established under Section 97 of the Law of the Child Act, 2009)
- Subject specific tribunals, such as the District Land and Housing Tribunal and the Labour Reconciliation Board

Both the High Court and the Court of Appeal have unlimited original and inherent jurisdiction over all criminal and civil matters unless otherwise provided in law.<sup>37</sup>

The High Court also exercises original jurisdiction over matters of a constitutional nature. There is a right of appeal from the High Court to the Court of Appeal.

##### ***Primary courts***

The lower courts in Tanzania are established under the Magistrates Court Act, 1984. These include primary courts, resident magistrates courts, juvenile courts and district courts. The Primary Courts are the lowest courts in the formal judicial system. A

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<sup>36</sup> The High Court has established 10 sub-registries in different zones of the country.

<sup>37</sup> Article 108(2)

Primary Court has the jurisdiction to hear and determine the following cases within the relevant district:<sup>38</sup>

- Civil claims arising out of customary law or Islamic law;
- All matrimonial proceedings relating to civil and Christian marriages;
- Cases relating to the administration of deceased's estates where the law applicable to the administration or distribution of, or the succession to, the estate is customary law or, Islamic law.<sup>39</sup>

Each district should have at least one primary courts.<sup>40</sup> According to the Ministry of Constitutional and Legal Affairs there were 898 primary courts located in 102 districts in 2008, while according to the Tanzania Network of Legal Aid Providers, "In 2009 there were 1105 Primary Courts for 11,000 villages."<sup>41</sup> Primary courts are presided over by a magistrate, who sits with at least two assessors.<sup>42</sup> Assessors are appointed by villages, and serve an initial term of one year. The language of the court is Kiswahili. The primary courts are supervised by a resident Magistrate-in-Charge, appointed by the Chief Justice. In practice, however, it is unclear how much supervision is undertaken, due to the distances between courts and a lack of available transport. Although cases can be appealed from the primary courts to the district courts, few cases are appealed in practice. Primary courts are intended to be informal and to apply customary law. Lawyers are not permitted to represent parties when a case is heard before primary court, though a child can be assisted by a parent or relative.<sup>43</sup>

Although the Children and Young Persons Act 1937 gave district courts, and not primary courts, the jurisdiction to hear and determine juvenile cases, under powers

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<sup>38</sup> Section 3 of the Magistrates Court Act.

<sup>39</sup> Section 18 of the Magistrates Court Act.

<sup>40</sup> Some new primary courts are being established where an administrative re-organisation of districts has left some without a primary court.

<sup>41</sup> TANLAP Strategic Plan 2010-2015.

<sup>42</sup> Magistrates Courts Act 1984, section 7.

<sup>43</sup> Magistrates Courts Act 1984 section 33.

given to him under the Act, the Chief Justice extended the jurisdiction over juvenile crime cases to the primary courts as well in 1964.<sup>44</sup>

The Law of the Child Act 2009 gives jurisdiction over juvenile crime cases to the juvenile court, but does not make it clear whether this jurisdiction is 'exclusive jurisdiction'. In other words, it is not entirely clear whether any other court retains jurisdiction over juvenile crime cases. Although the Law of the Child Act repeals the Children and Young Persons Act 1937, the Interpretation of Laws Act provides that where an Act (in this case, the Law of the Child Act) repeals an Act, any subsidiary legislation made under the repealed Act, and in operation immediately before the commencement of the repealing Act, continues to have effect for all purposes provided that it is consistent with the repealing Act. Taking into account the absence of any clear statement in the Law of the Child Act about whether the juvenile court has exclusive jurisdiction, the fact that there is only one juvenile court in the country at present and that Regulations have not as yet been issued under the Law of the Child Act setting out which courts are to have jurisdiction, it could be argued that the primary courts retain their jurisdiction to hear juvenile crime cases. Practice across the country varies from district to district. In some districts, the primary courts continue to hear cases, whereas in others all juvenile crime cases are heard by the district courts.<sup>45</sup>

### ***District courts***

District Courts are superior to primary courts and have jurisdiction to hear appeals from the primary courts. District courts should be established in every district, but at the time of writing: only 88 districts out of the 133 districts in Tanzania had established such courts.<sup>46</sup> However, the Chief Justice can commission a district court to exercise jurisdiction both within their own district, as well as in neighbouring

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<sup>44</sup> The power was contained in s.43 Children and Young Persons Act 1937. The Chief Justice extended jurisdiction to the primary courts to hear juvenile cases through Government Notice Number 640 of 1964 (The Children and Young Persons (Extension of Ordinance to Primary Courts) Order. The former Chief Justice reiterated the extension of jurisdiction to the primary courts in his article 'The Child and the Court' in the Tanzania Lawyer Journal February – May issue 1997, the Tanganyika Law Society.

<sup>45</sup> For further discussion on this issue, see section 10 of the report.

<sup>46</sup> TANLAP Strategic Plan 2010-2015.

districts, so that everyone has access to a district court.<sup>47</sup> The District Court has jurisdiction in both criminal and civil matters.<sup>48</sup> As mentioned above, the Children and Young Persons Act 1937 gave the district courts power to hear juvenile crime cases, and in the absence of juvenile courts country-wide, the district courts appear to have continued exercising that jurisdiction. It is not clear in law that the District Courts are empowered to hear juvenile cases as in this case the law granting them jurisdiction has been expressly repealed.

### ***Resident magistrates courts***

The third form of court is the Court of a Resident Magistrate. These are established by the Chief Justice.<sup>49</sup> Either Kiswahili or English may be spoken in both the District and Resident Magistrate's Courts, but the record and judgment of the Court must be in English.<sup>50</sup>

### ***Juvenile courts***

Section 97 of the Law of the Child Act 2009, established a juvenile court 'for the purposes of hearing and determining matters which relate to children'. All juvenile courts are presided over by a resident magistrate. Section 99 (1) of the Law of the Child Act gives the Chief Justice the power to make rules of procedure for the Juvenile Court. However, at the time of writing, in February 2012, the Chief Justice had not published any Rules of Procedure under the Act, and only one juvenile court is presently in operation, In Dar es Salaam. The Chief Justice has the power to designate any premises used by a primary court as a juvenile court (but a resident magistrate must still preside). At the present time, this power has not been exercised.

The juvenile court has the power to hear and determine

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<sup>47</sup> Section 4(5) of the Magistrates Court Act.

<sup>48</sup> See the Written Laws (Miscellaneous Amendment) Act No 25 of 2002, section 40. In the case of immovable property the district court has jurisdiction if the value does not exceed 150 million shillings and in other proceedings where the subject matter is capable of being estimated at a money value, in which the value of the subject matter does not exceed 100 million shillings.

<sup>49</sup> by an Order published in the Gazette

<sup>50</sup> Section 13 (2) of the Magistrates Court Act.

- a) Criminal charges against a child; and
- b) Applications relating to child care, maintenance and protection.

Wherever possible, the juvenile court should sit in a different building from the building ordinarily used for the hearing of cases by or against adults. The single existing juvenile court in Dar es Salaam does indeed have its own premises. The juvenile court sits in camera in judge's chambers. Neither the public nor the press are permitted to attend hearings.

In those areas where a juvenile court has not yet been established, jurisdiction over juvenile crime cases, continues to be exercised by both the district court and the primary court, depending upon the area. Just as with the juvenile court, cases heard in the district court are held in camera, in judge's chambers. Apart from the fact that there maybe other cases taking place at the same time within the court precincts, and thus children will be mixing with adults while waiting to enter court, there is little obvious difference for children between appearing before a juvenile court and a district court.

### **Specialist tribunals**

In addition to these Courts, some Tribunals, including, for example, the District Land and Housing Tribunal<sup>51</sup> and the Tax Tribunal are considered to be within the judicial system as they are linked through appeal to the judicial system. For example, an appeal from a District Land and Housing Tribunal case is made to the High Court (Land Division).<sup>52</sup>

Virtually all children's criminal and civil cases begin in the lower courts, and once the Law of the Child Act is fully implemented, juvenile crime cases and child protection cases will be heard by the Juvenile Court, rather than the Primary Courts or District Courts. The High Court will, however, continue to exercise its inherent jurisdiction

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<sup>51</sup> Established under the Courts (Land Disputes Settlements) Act 2002

<sup>52</sup> The Courts (Land Disputes Settlements) Act 2002, Section 38,

over children, allowing it to take cases where there are complex issues that cannot be addressed under the current law.

In all cases before the lower courts there is a right to appeal to the High Court, except for the Primary Court where the right of appeal is to the District Court. Both criminal and civil cases can further be appealed from the High Court to the Court of Appeal if conditions relating to appeal are met.<sup>53</sup>

#### ***4.2 Court fees and procedures***<sup>54</sup>

Under the Court Fees Rules, made under the Judicature and Application of Laws Act 1961, a Court to which any fee is payable may, for reasons of poverty or other good cause, remit such fee in whole or in part.<sup>55</sup> The Rules further provide that no fees shall be payable by a person who has been granted legal aid under the Legal Aid scheme of either the Faculty of Law, University of Dar es Salaam, the Tanganyika Law Society, the Tanzania Women Lawyer's Association or the Legal and Human Rights Centre in respect of proceedings instituted by or against the person. However, if the person is successful in the proceedings, the Court can direct him or her to pay the necessary court fees.<sup>56</sup>

The exemption from paying court fees is of very real importance. In all but the rarest cases, children do not have either sufficient income or capital to pay court fees, and without an exemption, the child would have to rely upon a legal aid provider to pay in order to initiate a civil case. Children will only be exempt, however, where they are represented by an organisation that holds such an exemption. Children who don't have the assistance of one of the exempt organisations will find it difficult to meet the fees and thus to make an application to court and access justice.

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<sup>53</sup> Further discussion of the right to appeal within the Tanzanian context is undertaken later in this review.

<sup>54</sup> We recognise there is some overlap with other sections and will review during re-drafting.

<sup>55</sup> Rule 8 of the Court Fees Rules made under Judicature and Application of Laws Act.

<sup>56</sup> The list of organisations provided with exemption is not exhaustive. Other organisations who provide legal aid have also been granted exemption from court fees, including NOLA, since 2002.

Children are not able to take a case to court in their own name but must do so through a next friend until they reach the age of 18.<sup>57</sup> Anyone of sound mind, who has attained majority can act as the next friend of a child provided that the interest of such person is not adverse to that of the child.<sup>58</sup> While such provisions are frequently found in common law countries to assist persons treated by the law as lacking in capacity, such a provision could, in certain circumstances, fail to meet international standards if it prevents the child's full enjoyment of the right to be heard, the right to non-discrimination and the right to have access to a remedy for the violation of their rights.

### **4.3 Judicial officers**

#### ***Judges and Magistrates***

Judges preside over hearings at the High Court and the Court of Appeal, resident magistrates over juvenile courts and district courts and magistrates over primary courts. Judges are accountable to the Judicial Services Commission.

At the time of writing of this report, there were 15 Court of Appeal judges (one vacancy remained unfilled) and 57 High Court judges who currently sit across 15 out of the 18 regions in Tanzania.<sup>59</sup> Judges hear both criminal and civil proceedings, though there is a separate commercial court. The Ministry of Constitutional and Legal Affairs has recently published a report '***Timely Justice for All: Challenges to Change***'<sup>60</sup> examining the functioning of the High Court of Dar es Salaam, and recommending major administrative and procedural changes to the management of cases in order to ensure effective access to justice within a reasonable time, and to address the undue delays and high number of hearings in cases.

Primary magistrates have not been required, until recently, to be legally qualified.

Primary court magistrates sit with at least two assessors in order to hear cases.

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<sup>57</sup> Article 4 Order XXXI, Section 1 of the Civil Procedure Code, No. 49 of 1966.

<sup>58</sup> For more information on the appointment of next friends and guardians, see section 12.

<sup>59</sup> We were informed by a High Court interviewee that it is the intention of the President to appoint another 10 High Court judges, though it was not clear where these judges would sit.

<sup>60</sup> MoCLA October 2011

Assessors are not legally qualified but are members of the community aged between 30 and 60 years of age<sup>61</sup> and are there to give community input and to assist with the understanding of customary law. The Minister has the power to make regulations in relation to assessors, their appointment and their remuneration. Assessors interviewed for this study were appointed by their communities, at village level. Provided that a person does not fall within the list of exempted people set out in s.8 of the Magistrates Courts Act, he or she may ask to be considered as an assessor. The villages submit their chosen candidates, details of which are passed to the magistrate who will then select candidates. Assessors are usually appointed for a year and can be considered for re-election. The general view was that being an assessor was not a job that people really liked to do, and as a result not many people volunteered for the post. As a result, an assessor can serve for a number of years.<sup>62</sup> None of the assessors that we met had received any training on children's issues.

#### ***Chairman (District Land and Housing Tribunal)***

The Chairman of a District Land and Housing Tribunal must be a 'legally qualified' person,<sup>63</sup> who will serve three year assignments, with the possibility of renewal. The Chairman is accompanied by at least two assessors and shares decision-making power with these assessors.

There is a widespread view amongst virtually all stakeholders in the justice system that there is currently a lack of human resources at all levels of the judicial system. According to an interview with the Chief Justice in April 2011, an additional 350 extra magistrates are needed in Tanzania to cover the courts currently in existence. Some magistrates sit in more than one court and '*currently, some Magistrates have to cover 2 courts that are 100 kms apart.*'<sup>64</sup> The lack of magistrates contributes to delay

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<sup>61</sup> Under the Magistrate Court Act 1984 section 8, a number of persons are exempted from liability to serve as assessors These include: Ministers and members of the National Assembly; Magistrates and judges; Persons actively discharging the duties of priests or ministers of their respective religion; physicians, surgeons, dentists and apothecaries in actual practice; Legal practitioners in actual practice; officers and men in the Armed Forces of the United Republic on full pay; persons disabled by mental infirmity' officers of the Police and Prison Services; and such other officers of the Government and such other persons as may be exempted by the Chief Justice from liability to serve.

<sup>62</sup> There does not appear to be a maximum time limit on serving as an assessor.

<sup>63</sup> Section 25, Courts Land Disputes Settlement Act, 2002.

<sup>64</sup> JJ interview with Chief Justice, 21<sup>st</sup> April 2011



in hearing cases, a delay exacerbated by inefficient administrative systems incorporated into the current Criminal Procedure Act and the Civil Procedure Act<sup>65</sup> and current practice in the courts.

#### ***4.4 Lawyers, legal officers and paralegals***

Tanzania suffers from a shortage of qualified lawyers. At the end of 2009 there were 1188 registered advocates in Tanzania, with the vast majority working in Dar es Salaam.<sup>66</sup> While this was a significant increase from the 723 registered advocates in 2007, it is still a small number to serve a population of 40 million: just 1 advocate per 33,670 persons.

There are a number of factors that have contributed to the low number of advocates. First, although law was the first Degree course to be offered in Tanzania, there was only one University, the University of Dar es Salaam, offering a law degree up until the mid-90s. Around 90 students graduated each year from the Law Faculty, but not all of these graduates went on to become practicing, registered advocates. There has been a significant increase in the number of universities now offering law degrees, and the number of graduates has increased considerably.

Up until 2007, the only way to become an advocate, having graduated in law, was through an internship organised through the chambers of the Attorney General, followed by six months of pupillage and then an oral interview conducted under a Panel of the Council on Legal Education, composed of representatives of the United Republic of Tanzania, the Attorney General of the United Republic, the Dean of the Faculty of Law of the University of Dar es Salaam and two representatives of the Tanganyika Law Society. A successful candidate was sworn in and enrolled as an Advocate of the High Court of Tanzania and the subordinate courts.

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<sup>65</sup> See *Timely Justice for All: A Challenge to Change*, Ministry of Constitutional and Legal Affairs, October 2011.

<sup>66</sup> Chart taken from *Access to Justice in Africa and Beyond*, Penal Reform International and Bluhm Legal Clinic of Northwestern University School of Law, 2007, p, 12 (data collected in 2007 through questionnaires).

Since 2007, a graduate wishing to become an advocate must take a one-year Practical Legal Training Programme offered by the Law School of Tanzania operating under the Ministry of Constitutional and Legal Affairs. The programme is hosted by the University of Dar es Salaam Faculty of Law. The programme involves both taught classes and a practice placement.

The fees for taking the Practical Legal Training Programme together with books and other incidental costs in 2008/9 amounted to approximately 4,450,000 TSH (or \$2,500). This is a considerable amount of money to find for most students and clearly an inhibiting factor for a proportion of graduates, particularly for those who do not choose to enter the commercial legal sector and thus are likely to earn only a moderate salary.

A number of law graduates working in the NGO sector have not taken the Practical Legal Training Programme, or have taken the course, but have not registered as an advocate. This group are referred to as legal officers. They can support advocates, can take and work with clients, but cannot represent clients in court.

Education institutions also offer an 'Ordinary Certificate in law' and an 'Ordinary Diploma'. In 2010, there were 302 enrolments for the Certificate and 552 for the Diploma. Many of the primary magistrates surveyed for this study were enrolled on either the Certificate or Diploma course following the requirement for them to have a legal qualification.

The lack of advocates, and particularly the lack of specialised advocates (most advocates take both civil and criminal cases) is an obstacle for children seeking to access justice, as is the geographical spread of advocates. Most advocates are based in Dar es Salaam and very few in rural areas. A small legal workforce inevitably contributes to delays in hearings: advocates are heavily booked and thus the court must wait till they are free. Advocates may also be double booked, have cases that have overrun and are continuing to be heard in court or, for other reasons, find

themselves unavailable. This in turn leads to dissatisfaction on the part of the public, and a diminished public confidence in the justice administration system.<sup>67</sup>

Paralegals can be found in many rural areas of the country. Although most paralegals have no legal training, do not have a law degree, and may not have received higher education, they provide legal advice and support, mainly in rural areas. They are not able to appear in court to represent clients. Some paralegal organisations in the rural areas are supported by a larger, city-based NGO, who provide training and support when asked.

#### **4.5 Training**

An assessment of training needs for the judiciary and magistrates has been undertaken by the Legal Sector Reform Programme, and a Judicial Training Institute is currently being built and will begin to operate in the near future. Overall, there is no regular training programme for the judiciary, but the lower down the judicial ladder, the less the training that seems to be received. Results from the field research indicated that magistrates receive only occasional training, perhaps once or twice a year. None interviewed for the purposes of this survey had received training on working with children in conflict with the law, child victims and witnesses or, more importantly, on the Law of the Child Act. Of the eight Courts of varying levels (from Primary Court to High Court) who were asked, none had received any training on the Law of the Child Act. One Primary Court Magistrate stated '*We were employed directly from the institute. We were given one month training on how to conduct sessions in court.*'<sup>68</sup> The specific consequences of this are discussed at later stages in the report, however, it bears mentioning at this stage, that the lack of training has a major impact on the speed of implementation of the Law of the Child Act, knowledge about its purpose and content and on the child-friendliness of cases involving children.

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<sup>67</sup> TANLAP Strategic Plan 2010-2015.

<sup>68</sup> Lindi Urban District Primary Court, 13<sup>th</sup> July 2011.

#### **4.6 Facilities and Resources**

During the field research for this study, researchers found, overwhelmingly, that the resources and facilities at all the Courts visited, other than the High Court, and the court building in Babeti, were extremely limited. The Court buildings themselves were often in an advanced state of disrepair with buildings visibly damaged due both to lack of maintenance and age, and frequently not water-tight. The interior of Court buildings was often sparsely furnished with basic tables and chairs. The judges' chambers were often small, with room for no more than 3-4 people to sit down. The courtrooms on the other hand were generally a good size but space was often taken up with left over case exhibits which nobody had moved, or broken furniture. In some of the courts we were informed that magistrates no longer sat in the large courtrooms, which were now being utilised as storerooms. Courts did not have adequate storage cupboards for files and there did not appear to be any organised filing systems for case files, making it extremely difficult to find files. The lack of storage meant that files were simply placed in piles in empty courtrooms, corridors or 'administrative' rooms. The paper and files used are of poor quality and the majority of files were gently rotting with the ink used so faded as to become unreadable. In some instances, case files could be seen piled on administrators or magistrates' desks without a formal or appropriate filing system or manner of ordering the cases. This inevitably presents both administrators and magistrates with a significant challenge in managing cases, Although some Courts had computers and IT systems,<sup>69</sup> others did not, with most magistrates relying purely on hand-written notes when handling cases. In addition, there appeared to be little or no budget for stationary, phones, or anything else, leaving magistrates largely dependent on their own resources.

Overall the court environment of the courts visited could not be described as child friendly. The set up of the rooms leaves child witnesses exposed and sitting in close proximity to the accused. In cases where the child was the defendant, it was difficult to see how chambers could accommodate the child, parents, prosecutor, social

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<sup>69</sup> Resident Magistrate at the Batemi District Court, 6<sup>th</sup> July 2011.

worker and the victims and witnesses given the lack of space, and we were informed that in many cases there was no room for the parents to attend. There are no separate court waiting rooms, with the risk that child victims and witnesses have to wait in the same area as defendants and their families, a practice that can be very intimidating for a child.

Transportation to the courts also presents a major challenge both for petitioners, witnesses and defendants, especially defendants remanded to retention homes. Courts are often located a long distance from where the parties and witnesses live, giving rise not only to transportation costs but also potentially to accommodation costs. Children would generally need to travel with their parents, increasing costs even further. In addition, families have to consider the extent to which they will lose income by taking time off work to travel to court and stay near the court while the case is on-going. Most children who are remanded to retention homes rely upon transport, which in most areas is organised by police services, to take them to court for review hearings and for trial. According to a Resident Magistrate in Hai, there is transportation to the Court once every week, though on occasions there are problems with the transport and a week is missed. Transport difficulties frequently result in hearings are adjourned with consequent delay for the child.

Poor administration and procedures lead to long delays. According to the judges and magistrates in our survey, cases can take up to two years to hear due to delays in investigation, availability of parties and transportation problems. This finding is replicated in the latest report from the Ministry of Constitutional and Legal Affairs, ***Timely Justice for All: Challenges for Change***,<sup>70</sup> which concludes that the judicial system is, at present, beset with problems associated with a lack of resources and human and financial capacity, leading to extreme delays and inefficiency.

Children face a range of challenges in accessing the formal justice system. First and foremost, it is difficult for children, whether they are the petitioner in a civil case or a

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<sup>70</sup> MoCLA, October 2011.

defendant, witness or victim in a criminal case to access the Courts physically. There is a lack of transportation to Courts, leading to a limited number of court sessions each week and there is a limited supply of magistrates, with the result that it can take a considerable time before a hearing takes place. Lack of transport and the failure of a party, the prosecution or the defence lawyer to attend at a listed hearing, also leads to adjournments and re-timetabling.

A further difficulty for children accessing justice is the lack of training on the Law of the Child Act for judges, magistrates and other professionals working with the Act. This together with the lack of translation of the Act into Kiswahili has resulted in a lack of knowledge and understanding of the purposes of the Act by the judiciary and court personnel, whose role it is to implement the Act.

In the remainder of this report, we make several recommendations regarding to the judicial system as relates to specific aspects of access to justice for children. The following recommendations are therefore discussed at greater length in subsequent sections:

- **Delay in hearing children’s cases needs to be reduced through changes to the court administration, the development of an effective and uniform system of case management and more efficient use of judicial time;**
- **File management procedures and practices should be developed and court officers trained on this so that files are easily accessible and data collected, in order to improve efficiency and oversight in cases;**
- **All judges and magistrates dealing with children’s cases should be made aware of the Law of the Child Act and a timetable set for training on the Act**

## **5. THE QUASI-JUDICIAL SYSTEM**

In addition to the judicial system, in Tanzania, a ‘quasi-judicial’ system exists through which statutory tribunals or councils resolve certain issues at a local level. These bodies are provided for under the Civil Procedure Act, 1966, Order VIII, which allows for alternative dispute resolution through various forms of settlements. The

Tribunals' specific formats and procedures are governed through their own Acts. Although there are several bodies that are active in the 'quasi-judicial system', those considered most closely in this study is the Ward Tribunal.<sup>71</sup> The Village Land Act also establishes Village Land Councils. In a number of the places that we went to, the jurisdiction of the Ward Tribunal and the Village Land Council appeared almost to be one and the same body, with little differentiation, though sitting at different levels.<sup>72</sup>

### **5.1. The Ward Tribunal**

Ward tribunals were established under the Ward Tribunal Act 1985, which provides for the creation of tribunals within local areas. It has a wide jurisdiction to hear complaints relating to social conflicts, divorce, inheritance and some criminal acts, including desertion of children, neglecting to provide food, concealing the birth of a child and abduction of a child under the age of 16. Although ward tribunals have a wide jurisdiction, few appear to deal with allegations of intra-familial abuse of children, most of the tribunals visited stating that this was not an issue within their ward.

The primary function of the ward tribunals is to 'secure peace and harmony in the area for which it is established'. The overriding principle governing Ward Tribunals is that they must '*seek to do justice to the parties and to reach a decision which will secure the peaceful and amicable resolution of the dispute, reconciliation of the parties and the furtherance of the social and economic interests of the village or ward as a whole in which the dispute originates.*'<sup>73</sup> The ward tribunal is required by the Act to attempt to settle disputes by mediating before exercising its compulsive jurisdiction.<sup>74</sup> At any stage during proceedings, a tribunal may adjourn in order to reach a 'just and amicable settlement' of the dispute.<sup>75</sup>

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<sup>71</sup> Under the Village Land Act, 1999, villages must also establish a Village Land Council "to mediate between and assist parties to arrive at a mutually acceptable solution on any matter concerning village land." (Section 60, Village Land Act, 1999).

<sup>72</sup> A Ward is made up of a number of villages

<sup>73</sup> Section 18 Ward Tribunals Act, 1985.

<sup>74</sup> Ward Tribunal Act 1985 s.8

<sup>75</sup> Section 8(2) Ward Tribunals Act 1985.

Proceedings before the tribunal are initiated by a person making either a written or an oral complaint to the 'the Secretary of the Tribunal, the Secretary of an appropriate authority or the Chairman of a Village Council.'<sup>76</sup> If the complainant or the person against whom the complaint is made is a child, the child is allowed to bring a parent or guardian to the Tribunal to assist him or her.<sup>77</sup>

Members of ward tribunals are appointed by the District Council, following an open application process, and generally serve one three year term of office, with the possibility to extend this for a second term.<sup>78</sup> The extent to which ward tribunals operate across the countries varies considerably with some being very busy and others barely used. Ward tribunals interviewed for this study reported meeting once a week in order to deal with their cases.<sup>79</sup> In general, tribunals consulted for this research said that they dealt with few cases over all. One tribunal is said to average 15 cases per year,<sup>80</sup> while two others stated they had only had one case since January 2011.<sup>81</sup>

The office of tribunal member is purely voluntary:<sup>82</sup> members are not paid and are not provided with any expenses. Officials reported using their own houses to store files and lacked resources even for paper to work with.<sup>83</sup> Their capacity and skills for the job are also low. In practice, members receive little training about their responsibilities or about the law they are to apply.<sup>84</sup> In the Makonde Ward Tribunal,

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<sup>76</sup>Section 11(3) Ward Tribunals Act 1985.

<sup>77</sup> Section 13(3) Ward Tribunals Act 1985.

<sup>78</sup> Legal Officer, District Council Magu, interview carried out 11<sup>th</sup> July 2011. According to Section 4(1)(a) of the Ward Tribunals Act, members of Tribunals consist of not less than 4 and not more than 8 members elected by the Ward Committee from among a list of names of persons resident in the Ward.

<sup>79</sup> E.g. Shigala Ward Tribunal, interview conducted 14<sup>th</sup> July 2011 and Mkula Ward Tribunal, interview conducted 14<sup>th</sup> July 2011.

<sup>80</sup> Shigala Ward Tribunal, interview conducted 14<sup>th</sup> July 2011.

<sup>81</sup> The low level of cases at the latter Tribunals is possibly because these two had only been established in January 2011, and, therefore, the community lacked awareness of them and their work.

<sup>82</sup> E.g. Babeti Ward Tribunal, interview conducted 7<sup>th</sup> July 2011.

<sup>83</sup> Legal Officer, District Council Magu, interview conducted 11<sup>th</sup> July 2011.

<sup>84</sup> Members of the Makonde Ward Tribunal (Lindi) stated that they had received three days of training in 2008 (interview carried out on 14<sup>th</sup> July 2011) while those interviewed at the Shigala Ward Tribunal (Mwanza) stated that they had had no capacity building or training at all (interview carried out on 14<sup>th</sup> July 2011).



members reported having three days of training at the beginning of their three year tenure, with no follow up training. In Msinjahill Ward, members felt that they were able to do their work because of their experience,<sup>85</sup> but elsewhere, members stated that they did not know their responsibilities.<sup>86</sup> None of the Ward Tribunal members interviewed for this study had received any training in working with children or on the Law of the Child Act 2009 in their role as Ward Tribunal members, though some members had received training from NGOs if they also held a position in another administrative or voluntary body. None of the ward tribunal offices visited had a copy of the Law of the Child Act, and in one case the ward tribunal had not even heard of the law.<sup>87</sup> The lack of training and lack of information regarding the law presents a barrier to children seeking access to justice and limits the effectiveness of ward tribunals.

The system of ward tribunals in theory provides a quicker and more accessible justice system for communities, including for children. By focusing on the community and on social harmony, the tribunals seek to deal with issues in an equitable manner, delivering justice without recourse to the judicial system. This form of 'local' justice could also be considered less intimidating for children, encouraging them to access this quasi-judicial system at a higher rate than they might the full judicial system. The fact that there is a tribunal in every Ward means that it is physically easy for children (and the community) to get to the tribunal building, compared to higher level courts.

Although under the Ward Tribunal Act 1985, any individual, including a child, has a right to bring a case, this study suggests that children rarely take advantage of the ward tribunal system. Ward tribunal members reported that they almost never have cases brought before them by children, but that children are involved indirectly as interested parties in cases.<sup>88</sup> Shigala Ward Tribunal stated that some children do come to complain about land issues, but such cases are forwarded to the District Land and Housing Tribunal. According to the Tribunal, 'more boys come to complain

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<sup>85</sup> Msinjahill Ward Tribunal (Lindi) interview carried out on 14<sup>th</sup> July 2011

<sup>86</sup> Makonde Ward Tribunal (Lindi) interview carried out on 14<sup>th</sup> July 2011.

<sup>87</sup> Shigala Ward Tribunal, interview conducted 14<sup>th</sup> July 2011

<sup>88</sup> Makonde Ward Tribunal (Lindi) interview carried out on 14<sup>th</sup> July 2011 and

than girls.’<sup>89</sup> There were very few reports of children coming to complain about lack of maintenance or the fact that they were unable to attend school due to the non-payment of fees. This may be because, in most cases, the mother makes a complaint on their behalf.

According to officials, there are several reasons why children do not access the tribunals directly. For example, children were said to have ‘low knowledge’ about where to report their problems.<sup>90</sup> They were also said to be reluctant to complain about their parents’ failure to support them financially ‘due to feeling that this would amount to dishonouring them.’<sup>91</sup> There was also a perception that children are not aware of their rights.<sup>92</sup> Further, it was reported that:

*it is very difficult for children to complain about issues considering the fact that children are cared for by parents or guardians who may be the oppressors and it is rather challenging for a child to complain of an issue against the said care givers. When a child is abused, a child would suffer and not report unless an adult member of the child’s family takes action.*<sup>93</sup>

Where children are involved in cases, it appears that they are not accorded any special treatment or provisions in the ward tribunals. The principles of the UN Convention on the Rights of the Child and particularly the Article 3 requirement that the child’s best interests should be a primary concern,<sup>94</sup> and the right of the child to be heard and his or her views known,<sup>95</sup> are not contained in the Ward Tribunals Act. The responses from the ward tribunals surveyed for this research provide a mixed view on how they deal with children. In Msinjahill Ward for example, the Tribunal receives ‘*issues of child maintenance. In such circumstances, we call the other parent and solve the issue accordingly. Here we look at the child’s best interest.*’<sup>96</sup> However, in another ward in Lindi, officials stated that children do not get special treatment

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<sup>89</sup> Shigala Ward Tribunal, interview 14<sup>th</sup> July 2011.

<sup>90</sup> Makonde Ward Tribunal (Lindi) interview carried out on 14<sup>th</sup> July 2011.

<sup>91</sup> Ng’haya Ward (Magu District) interview carried out on 15<sup>th</sup> July 2011

<sup>92</sup> Ng’haya Ward (Magu District) interview carried out on 15<sup>th</sup> July 2011

<sup>93</sup> Mkula Ward Tribunal, interview carried out 14<sup>th</sup> July 2011

<sup>94</sup> United Nations Convention on the Right of the Child, Article 3

<sup>95</sup> United Nations Convention on the Rights of the Child, Article 12.

<sup>96</sup> Msinjahill Ward Tribunal (Lindi) interview carried out on 14<sup>th</sup> July 2011

*'children also get equal right with adults. We don't consider particular issue of the particular class of people. We do justice.'*<sup>97</sup>

A few of the ward tribunals take their task of securing peace and harmony as giving them jurisdiction to sort out anti-social behaviour, or behaviour that could be treated as criminal if it was reported to the police. One of the Ward Councils in Babeti District informed us that they preferred to deal with children who had stolen maize from farms themselves, rather than referring the matter to the police. The Council said such cases were relatively common and that they would expect to see five cases like this per year.<sup>98</sup> They would use the opportunity to explain to the child that he or she was stealing food from other children, the usual outcome being for the child to apologise and make good in some way for the damage done.

*Dealing with children's cases in an ad hoc manner, while sometimes advantageous to the child can put the child's best interests at risk. The same Council told us of another case in which a child reported directly to them that the child's father was not paying school fees. The council took the father to the police, who locked him up for two days until he agreed to cooperate and pay the fees. The ward tribunal did not follow up to ascertain whether the father paid the school fees, nor did it seek to gauge the father's reaction to the child once released from police custody. In another case, a ward tribunal explained that when a report of abuse is received, a member of the ward tribunal will go and speak to the 'father' about the allegations and 'seek to put them in the right way of thinking.'<sup>99</sup> Again, there was no follow up to ensure the child's safety, no referral to social welfare and overall little understanding of family dynamics and child abuse, placing the child at risk.*

This type of ad hoc intervention, while aimed at resolving community problems also demonstrates the need for training at ward tribunal level.

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<sup>97</sup> Makonde Ward Tribunal (Lindi) interview carried out on 14<sup>th</sup> July 2011.

<sup>98</sup> Babeti District Ward Council, 7<sup>th</sup> July 2011.

<sup>99</sup> Hai District Ward Council interview 5<sup>th</sup> July 2011.

Although there are no provisions prohibiting the legal representation of children in ward tribunals, such representation is unknown. When a child is involved, either as a complainant or the person complained about, the Ward Tribunal Act provides that he or she may be accompanied by a parent, guardian, relative or friend who may, subject to the procedure adopted by the tribunal, assist the child in the examination or cross-examination of witnesses or the making of submissions to the Tribunal.<sup>100</sup> None of the members interviewed for this research stated that they used this provision, with one Tribunal stating that '*there is no special attention even if a child is involved.*'<sup>101</sup> Given the power of the ward tribunal to impose sanctions, albeit that these are limited, the child should have the right to representation in any hearing. Most of the ward tribunals participating in the survey stated that the sanctions were complied with, and if there was a problem with enforcement, the matter would be referred to the primary court.

Local community based justice exercised by elected members has its advantages: it is closer to the community in which the acts take place and therefore has a better understanding of context and circumstances. Such forms of justice can react quickly and can also 'sort out' issues before they reach a critical state and parties are entrenched in their views. There are, however, some disadvantages. Tribunal members live and work with the people that they are asked to give judgment on, making detachment and neutrality difficult. Community members can exert pressure on the Ward Tribunal members and it can be difficult to make a decision that will be unpopular with a section of the community. While some members of the ward tribunal felt that their role gave them status in the community, others felt that it led to a degree of ostracism and was uncomfortable. One ward tribunal member went so far as to state that they 'face hatred from society which does not respect their decisions.'<sup>102</sup>

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<sup>100</sup> Ward Tribunal Act 1985 section 13(3).

<sup>101</sup> Msinjahill Ward Tribunal (Lindi) interview carried out on 14<sup>th</sup> July 2011

<sup>102</sup> Shigala Ward Tribunal, interview 14<sup>th</sup> July 2011.

**We would recommend that members of ward tribunals are supported to a greater extent, through the provision of material support: water-tight meeting rooms, provision of files, storage facilities, paper and pens, but more importantly through training both on how to manage cases and on the relevant laws. All ward tribunal members should be provided with a copy of the Law of the Child Act in Kiswahili and with information on the Law and the impact that it will have on the work of the Ward Tribunal.**

## **6. EXECUTIVE ACTORS**

The main actors within the administrative system as it relates to children and access to justice are social welfare officers, who bear considerable responsibility to ensure children are protected and their rights promoted and safeguarded. Other actors include the police, labour officers, and other local government officials such as village executive officers and ward executive officers. As described in detail earlier in this report, the baseline study revealed that children have a high awareness of participants in the administrative system, with many children naming a local government official or social welfare officer as the first port of call where a child needs advice rather than a lawyer.

Section 94 of the Law of the Child Act places a duty on local government authorities to 'safeguard and promote the welfare of the child within its area of jurisdiction. Social welfare officers are mandated as the body in local government to undertake this task. This places social welfare officers at the core of the child protection system and the wider system for protecting and promoting children's rights. The new Law of the Child Act imposes a considerable number of responsibilities and duties upon social welfare officers. In the context of child protection, a social welfare officer is at the very forefront of identifying child abuse, violence, neglect and exploitation, taking appropriate steps to protect the child, including the taking of a

care or supervision order and then developing and implementing a care plan for the child.<sup>103</sup>

Social Welfare Officers work with other executive officers in carrying out their roles. For example, labour officers in the context of child labour. Labour officers themselves have the authority, under the Law of the Child Act, to inspect employers who are suspected of exploiting children through child labour and to carry enquiries to ensure the laws relating to child labour are being observed.<sup>104</sup> If a Labour Officer believes that there is a violation, a non-compliance order should be served on the employer and a report made on the matter to the Social Welfare Officer and the police.

The police are also expected, under the Law of the Child Act, to work with social welfare officers. Where there is a concern that a child is at risk, a court can authorise a “search and production order” which permits a social welfare officer, “with or without a police officer” to enter a premises and search for and remove a child.<sup>105</sup> The police are also under a duty to accompany social welfare officers when they enter a house to investigate suspected abuse of a child.

Cooperation between different executive offices of the local authority is essential for children’s rights to be protected. So too, are communication and joint working with the police, the ward tribunals, the courts and NGOs. However, the survey carried out for this study showed that coordination, communication and joint working between the different organisations was often lacking. A pilot inter-disciplinary child protection team has been set up in Hai District to address the lack of joint working. As yet it has not been evaluated but initially the results look promising, with increased awareness of the role of each office, easier referrals between bodies and an enhanced understanding of the Law of the Child Act.

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<sup>103</sup> For further discussion of child protection, see section 11.

<sup>104</sup> Section 85-86 Law of the Child Act.

<sup>105</sup> Section 29 Law of the Child Act.

Other than in Hai and Temeke Districts, we did not find evidence that executive officers who engaged in front line work with children and families had received a copy of the Law of the Child Act or any training on the Law. Once again, the lack of a Kiswahili translation of the Law has led to a low level of knowledge amongst front line practitioners, that needs to be remedied as a matter of urgency.

***We would recommend:***

- **In order to assist in the promotion and protection of children’s rights and access to justice, we recommend that training and awareness raising should be conducted to ensure that executive officers engaged in front line working with children and families are aware of the Law of the Child Act and of the role of Social Welfare Officer under the Act so that they can be assisted in carrying out their duties.**
  
- **Joint working protocols be established between the police and social welfare officers at national level with further protocols at local level if greater detail is required.**
  
- **That inter-disciplinary child protection teams are established in every district. This should include representatives from all executive departments working with children, members of the judicial system and NGOs.**

## **7. CURRENT INFORMAL/ TRADITIONAL SYSTEM**

Tanzania has a thriving informal and traditional system of seeking to resolve disputes at community level. The informal system consists of a number of different bodies, the existence of which depended largely on geographical area. The most relevant bodies for the purposes of this survey included most vulnerable children committees, community justice facilitators and village workers.

In the absence of access to legal advice and especially in rural areas, in the absence of access to the formal justice system, these informal, community mechanisms

constitute an easily accessible form of justice. In some areas, informal mechanisms are linked closely to the quasi-judicial system, working with, or overlapping with, that system. In some areas the informal justice system is also closely linked with executive officers, meeting frequently with social welfare officers.

Different areas have different bodies, some present in a large number of districts, others existing only in one or two areas. The survey for this study was undertaken in nine districts and reference has only been made to informal bodies that we found working in these areas. They may, of course, be yet other bodies in the areas that we did not visit, which perform the same functions. The extent to which informal bodies cooperate with executive bodies, and at what level, is again dependent upon geography, the local practices that have grown up and the personal relationship between members of these bodies.

Generally, the informal sector offers advice and dispute resolution through mediation. Unlike the formal and quasi-judicial system those working in the informal system have no power, and do not try, to impose a solution. Traditional systems, particularly those consisting of elders, also rely upon mediation to resolve disputes, but within a customary law and practices framework.

### ***7.1. Most vulnerable children committees***

The Most Vulnerable Children Committees (MVCC) aim at supporting children who are least likely to be able to access basic rights and needs, such as care, support and protection at community level. Co-ordinated by a National Steering Committee, the MVCCs were established in recognition of the fact that traditional safety nets, which used to be provided by extended family members and communities to children in the past, have faded away due to socio-economic factors and HIV/AIDS.



Approximately 5% of children living in Tanzania are regarded as most vulnerable children. The National Plan of Action for Most Vulnerable Children<sup>106</sup> defines them as children who live in a child-headed household; children in an elderly-headed household with nobody aged 20-59 years of age present; children with only one or no surviving parents; children with disabilities and children with one surviving parent living in very poor quality housing. The purpose of the MVCC is to ensure that the most vulnerable children are protected from harm and receive access to essential services. It provides support to families, to prevent separation, and to improve parenting skills and family organisation. While the Plan of Action states that the programme seeks to address all forms of child abuse, including child trafficking, child labour and commercial sex, and to ensure succession of property from parents to most vulnerable children, the survey found little evidence that members have sufficient capacity to achieve this.

The MVC structures in the districts are managed either by social welfare or by community development. Social welfare officers are not, however, present in all districts. In 2009, they were only present in 61 of the 133 districts. Community development however, has staff covering all district authorities and many wards.<sup>107</sup> MVCC are based at village level and ward level. In Hai District, each MVCC has ten elected members who are joined by 2 children of primary school age.

*'The child representatives are very vocal. The children's main worry is that the schools are not sufficiently well equipped. They ask the village to contribute.'*

MVCC member, Hai District

All members are volunteers and are appointed at village level and continue to be members 'unless they are not performing'. Members in Hai saw their primary role as reducing child poverty and viewed themselves as the first point of contact for children and family problems as there is only one community development officer for the entire ward.

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<sup>106</sup> See The National Costed Plan of Action for Most Vulnerable Children 2007-2010, Department of Social Welfare.

<sup>107</sup> Guga, Parry-Williams and Dunn, Mapping and assessment of formal and informal child protection structures, systems and services in Tanzania, UNICEF, April 2009 p 27.

Apart from providing some limited food and material goods, the MVCC members ensured that children's caretakers had adequate care-giving skills and were provided some practical experience in how to run a household, grow food and manage money.

*'We go to somebody's house if we hear that the child is living in rough conditions: the house isn't clean or the child isn't going to school or there isn't enough food. Go and speak to the mother and advise her that the child needs 3 meals a day and to mix types of food, not the same food for each meal. We explain to parents that children need to go to school. Look at where the child sleeps and look at the area where the child lives. Explain that the parent should grow vegetables if they have the land. If no livestock, try to advise them to get chickens so that the kids can have eggs. We return for a second visit to see whether they have sorted out the vegetable garden and the eggs. Generally people adhere to their advice.'*

*'If the child is in a difficult situation, I look to see whether this is due to neglect or lack of care or due to lack of resources. Sometimes the reason is not lack of resources but down to alcohol. We tell them what is expected of them as a parent on a one-to-one basis. We do a follow up and are then stricter on the need to change and tell them we will back to ensure change is taking place.'*

*'Some parents don't take children for medical care – they don't believe in it. Then what do we do? Make the parent take the child to hospital.'*

*'The MVCC reports to the Ward Executive Officer if there are continuing concerns about a family. He will call the parents in for a meeting. They will be warned that if they don't mend their ways they will be taken to court.'*

Comments from MVCC members, Hai District

MVCC members reported having easy access to families, probably due to a belief that they are able to help the family receive food (which in Hai District they were

unable to do). However, a report in 2009<sup>108</sup> found little evidence that MVC structures in UNICEF's seven learning districts (Hai, Mtwara Rural, Siha, Magu, Makete, Bagamoyo and Temeke) reduced abuse or contributed to children's protection. This may be a structural issue: it is perhaps unrealistic to expect that MVCC members would have a major impact on abuse reduction with so little training and without back up to assist them where they suspect abuse. However, MVCC members are ideally placed to act as 'eyes and ears' and as front-line child protection workers in the absence of a well-developed social welfare officer service. They fulfil a role that is quite similar to that of a health visitor in the UK: giving advice to parents on how to parent and care for their children. Given some extra training focusing on recognising child abuse, family dynamics and how to reduce abusive behaviour together with the development of joint working protocols with social welfare departments, they could provide a valuable resource. Without such front line practitioners in communities, visiting families, children and especially small children, are unlikely to have their rights protected and unlikely to be able to access justice unless they suffer such serious abuse that they come to the attention of the police.

In order to assist MVCC increase their role and in order to enhance children's protection and access to justice, **we would recommend that:**

- **MVCC officers should receive further training to enable them to identify children at risk.**
- **A memorandum of understanding should be developed between the MVC programme at national level and the Ministry for Social Welfare and Health and the Ministry for Community Development, Gender and Children;**
- **Local working protocols should be developed between local MVCC and the district Social Welfare Department or the Community Development Department which should cover the working relations between the bodies, the procedures for referral where a MVCC member has cause to believe**

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<sup>108</sup> Guga, Parry-Williams and Dunn, Mapping and assessment of formal and informal child protection structures, systems and services in Tanzania, UNICEF, April 2009

**that a child is suffering neglect or abuse that cannot be addressed purely by intervention from the MVCC and the support that will be offered**

- **The Ministry of Social Welfare and Health should devise a curriculum and arrange with MVCC for the delivery of child protection training**

## ***7.2. Community justice facilitators***

The Community Justice Facilitation Project was started by UNICEF in 2002 as a twin strategy to the MVC programme. The aim of the project was to enable trained community justice facilitators (CJF) to act as a focus for social issues related to most vulnerable children, and to provide a link between the village, ward and district social welfare officers, judicial and quasi-judicial bodies and other service providers. The project was developed in 17 districts and was extended to the seven learning districts of Hai, Mtwara Rural, Siha, Magu, Makete, Bagamoyo and Temeke. Training was provided by UNICEF.

CJF are responsible for filling reporting forms on their cases and submitting them to the Ward Executive Officer who, in turn, having made a compilation of the reports, submits them to the District Social Welfare Officer. Although a Report on Evaluation of Community Justice Facilitator Project in 2010 notes that 2 young people were appointed as CJF from each ward, we did not meet these young people during the survey.

CJF indicated that they spent anything from 3 hours a week to 2-3 days a week assisting people with a range of family and child problems. The CJF also appear to be a conduit for reporting other issues to the Ward Council or Tribunal or even NGOs for resolution. The range of issues dealt with by the CJF is wide: it includes working with families to ensure children attend school, inheritance issues and failure to pay child maintenance. The CJF are a valuable resource. They appear to have received significantly more training than most other community workers, and all knew and had received at least some training on the Law of the Child Act.

*'We received 10 days training from UNICEF. This enabled us to understand the responsibility of the courts and the police and making a will. It enabled us to signpost.'*

CJF, Hai

CJF expressed frustration at the limits placed on their work and ability to assist those who approached them. The CJF do not have an office that they are able to use, but work from home.

*'We don't have an office but just work in the streets. Don't even have ID cards... We have no facilities but were given a bike in 2007. We have no papers or pens.'*

CJF Magu

*'We see everyone at home or in their home. Transport is a big problem and we don't receive any assistance with paper or pens.'*

Sometimes if the issue is complicated, a CJF may suggest that the person seeks legal assistance and directs them to a NGO who will help. This most frequently occurs with issues of inheritance and neglect of the children due to lack of maintenance. But there was some dissatisfaction with the NGOs.

*'When we refer a case to NGO, it goes with a form containing details of the case. The NGO don't give feedback on the result of the referral, which we would like. Also, they don't give the form back and the CJF don't have the ability to make copies. We would like a copy of the form back. This makes it difficult to fill out a form with details of the complaint and provide it to the Social Welfare Department'*

CJF, Hai

All cases dealt with by CJF are reported to the Ward Council (which appears to be synonymous with the Ward Tribunal). If there is still an issue to be resolved, the Ward Council will address it, but it cannot, then the matter will go to the primary court.

It is unclear to what extent the community know of the role and functions of CJF. In Hai, the view was they CJF were well known and used. In Magu, on the other hand, a CJF commented that few in the village knew of her existence and that it would be preferable to have an office in the village where people could drop by. One of the most notable aspects of CJF volunteers was how much they enjoyed their job. With the exception of one CJF in Hai, all CJFs felt they were doing something worthwhile for their community and enjoyed the training.

*We are proud and pleased that we can follow the law and that we can set people right and ensure just treatment. We find the work satisfying.*

CJF, Hai

*It gives me status in the village – people ask for my advice and want me to act as a mediator.*

CJF, Hai

The CJF that we met during the survey for this report, showed very real commitment to their role. They have also, compared to other community groups received a considerable amount of training. Disappointment was expressed in the Evaluation Report that CJF had only given limited legal advice to children and women. But, given the purpose of the CJF, we consider that it would have been unrealistic to expect them to give anything more than the most basic legal advice.

However, we consider that in the same manner as MVC members, CJF are a valuable resource and their role and numbers could be extended. It is our opinion that with further training, and support from legal aid providers, some CJF could develop their existing role of providing basic legal advice, extend their remit and focus on providing paralegal services. Local CJF would need to ally themselves with a legal aid provider who could provide advice, training and supervision. We accept that this would need extra funding but take the view that CJF acting as paralegals in the villages offers the best chance of increasing regular local access to legal advice.

**We would recommend that:**

- **Current legal aid providers consider whether they could extend their services and use CJF to provide village or ward-based paralegal services. This would require extra training of CJF and supervision.**
- **Donors should be encouraged to commit funds to build upon the training already given to CJF and to make small amounts of money available to cover CJF expenses, including stationery, transport and information about the service that they can provide**
- **Village executive officers and ward executive officers should support the CJF by making a room available at set times of the week, so that the CJF could offer a drop-in service.**

### **7.3. Village Workers**

Village workers, who are community volunteers, work actively in Babeti district. The purpose of village workers was explained to us during the survey as:

*‘Educating people on their right, the rights of their children and land matters. We also ensure good governance by attending meetings and encouraging others in the community to attend and ask questions about the running of the village and the ward’*

Village worker, Magugu ward.

In Magugu Ward in Manyara, village workers are well organised and had taken a particularly wide role, taking on cases and reaching decisions that might be considered to fall within the remit of a paralegal or social welfare officer. The decision to take on such an interventionist role might reflect the fact that there is no MVCC and there is a high rate of dissatisfaction of village workers with the local executive departments. All the village workers interviewed in Magugu commented on how difficult it was to get a meeting with either a social welfare officer or with a health officer.

*‘If a child has been sexually abused and it has been reported to the police but the police have done nothing about it, we lean on the police to take action and arrest the perpetrator.’*

Village worker, Magugu ward

*'A woman who beat her son and caused damage to his bladder, did not take him to hospital. She kept him at home without any medical treatment. I took the child to hospital and then I went to the police. They arrested the woman and set her free while the child was still in hospital. I went back to the police and asked that she be re-arrested. She was convicted and imprisoned for 6 months. We placed the child under the guardianship of the Uncle. He has agreed to keep the child and to protect him from this mother. '*

Village worker Magugu Ward

The training given to village workers varied across the district. Some had received training twice a year, including training on the Law of the Child Act, as in the case of Magugu, while others had received no training at all. Some work closely with paralegal centres others do not. The major problems faced by village workers are the same as those facing community justice facilitators: a lack of transport and a lack of infrastructure. Most recognised that their work was not enough and that they needed to work closely with village, ward and district administrators, and that in the end their work mostly amounted to papering over the cracks as the infrastructure for ensuring the protection of children's rights to food, care, protection and education simply do not exist.

Our recommendations for the village workers is that they should be offered further training, support and supervision and be linked with a legal aid provider to, once again, offer local children access to services in a local setting. Village workers should be offered the chance to receive further legal training and act as paralegals linked to a legal aid provider, or to receive further social work training to enable them to act as para-social workers.

All the different community volunteers met during this survey were committed to their work. They undoubtedly help people through providing information and support, and are also able to refer children and their parents to providers who can



take further action to preserve their rights and to seek redress for violations. Community volunteers are particularly important in the rural areas. They are most effective, however, when they are trained, supported and are well networked with local administrative bodies and with the existing paralegal services.

**We would recommend that**

- **Local government be encouraged to review the local community bodies in their area, determine to what extent they could be rationalised or merged, and develop cooperation protocols with relevant bodies, such as social welfare, health and education to enable community bodies to work effectively.**
- **The donor community and existing NGOs consider how they could best contribute to developing the skill and capacity of community volunteers.**

**7.4. Village elders**

At the local level in Tanzania, village elders hold ‘councils’ in order to settle disputes among clan members. The traditional justice system is based on a system of community dispute resolution and begins, at the lowest level, with resolution within families and within clans. If clans are unable to settle issues, the issue may then be brought to the village tribal elders’ council, which comprises village elders who inherit the role.<sup>109</sup>

Researchers were able to interview two groups of village elders for this study: one from the Itununu village in Mugumu, Serengeti, and one from several villages in Tarime, Serengeti. According to the elders from Itununu Village, the council meets once a week and deals with issues such as fighting, theft, conflict, cheating, and civil claims. Village council proceedings involve bringing together the accused, the accuser and all witnesses.

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<sup>109</sup> Itununu Elders, interview 6<sup>th</sup> July 2011.

The elders from both groups explained that they enforce debts and ensure that people tell the truth during proceedings by requiring participants to swear on the skull of an important deceased member of the village. Supervision of the councils is undertaken by the village cabinet.<sup>110</sup>

Both sets of village elders explicitly said that they would not deal with cases involving children. In particular, it was recognised that children are afraid of elders and would therefore be unlikely to approach the elders with a problem. Instead, the family deals with problems involving children. Among the Itununu Villagers, child neglect is considered shameful while child abuse or child protection issues are regarded as being of minimal concern 'because of the clan system'. The wider group of elders from Tarime echoed this sentiment, with three elders explaining:

*'If it is the mother, the father would warn her not to; if both parents are involved, the clan or other family members would get involved; if they persist, we would follow informal procedures and report to the village or alienate the family.'*

However, their view was that this would happen very infrequently. This sentiment can be interpreted as revealing a close-knit society that is able to self-regulate and ensure justice. It can also, though, be interpreted as a denial that abuse of children occurs and that they have needs for protection that may conflict with the family. A system that protects the family and the clan is not always a system that protects the individual child.

Where a child is involved in a fight with another child, the Itununu elders stated that the case would be dealt with through the formal system. Similarly, if a child is raped, the village elders would not have any involvement in securing a settlement between parties as it "is for the police." The general rule, according to the elders was that children aged 5-12 would be dealt with by parents. Children 12-18 might be dealt with by the elders, but they preferred to deal only with cases where the person was 18 years old and above.

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<sup>110</sup> Although in this study researchers did not visit any 'Ritongo', these are noteworthy. A 'Ritongo' is a general meeting of 5-7 wards.

It was considered rare for inheritance cases involving children to reach the level of elders because this was more likely to be dealt with at the clan level. However, elders stated

*'if such a case was presented to us, we would ensure children's rights were upheld.'*

It is not apparent, though, what children's 'rights' are within the traditional community context. Within the traditional systems, children have limitations placed on them by customary law and practice, particularly in the context of the right to be heard. According to the group of elders from Tarime, a child would not have a choice who he or she would live with if a parent was absent as the clan would decide.

Village elders play a huge part in the culture and operation of some of Tanzania's communities. It is therefore essential that they are sensitised to issues of child abuse, violence against children and other child rights issues. The research shows that at present, the elders of the community have little positive influence upon access to justice for children and little understanding of children's rights. For example, in Itununu, the village elders stated *'we don't have child labour cases because most activities are in farming in clan lands. We have only had one child labour case in the village in five years.'*

This shows a lack of understanding of child labour. Children who are cattle tending may be made to work for long periods of time, at young ages, for no payment, in poor conditions and as a result receive little if any education. Although the village councils of elders may not be the ideal forum for children to access justice, there is little doubt that the rights of children would be better protected if the community leaders were aware of these rights.

**We recommend, therefore, that a training programme be developed by the Ministry of Social Welfare and Health or by the Ministry of Community Development, Gender and Health for village elders and other traditional forums, to assist members to get a better understanding of child law, children's rights, child**

**abuse and child labour. The training programme should also contain details of appropriate referral mechanisms to enable them to refer children’s cases to the correct agencies, as well as to promote the protection of child rights within the areas of their jurisdiction.**

## **8. LEGAL AID**

### **8.1. What is legal aid?**

The Lilongwe Declaration<sup>111</sup> defines ‘legal aid’ as including ‘legal advice, assistance, representation, education and mechanisms for alternative dispute resolution; and as including a wide range of stakeholders, such as non-governmental organisations, professional bodies and academic institutions’. As far as members of the public are concerned, legal aid is perhaps more helpfully described as the general term used to cover the provision of legal advice and representation at no cost, or at reduced cost, to individuals.

Legal aid is an essential element of the criminal justice system and is also seen as the foundation for the enjoyment of other rights, including the right to a fair trial as well as an important safeguard for ensuring fundamental fairness and public trust in the criminal justice process.<sup>112</sup> Legal aid in civil cases is no less important and is vital to poverty eradication and gender equality. Without free legal advice and representation, children will find it difficult to make an application to court to enforce their rights against an administrative body, or to defend themselves against a criminal charge and thus to access justice.

The draft UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provide that ‘States should recognise that the provision of legal aid is an

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<sup>111</sup> The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa was adopted by the Conference on Legal Aid in Criminal Justice: the Role of Lawyers and Other Service providers in Africa, held in Lilongwe from 22 to 24 November 2004. The text of the Declaration is available in Official Records of the Economic and Social Council, 2007, Supplement No 10 . The Declaration has been adopted by the African Commission on Human and People’s Rights and formally endorsed by ECOSOC. See (E/2007/30) Chap. 1, sect. B draft resolution VI, annexes 1 and II.

<sup>112</sup> See Draft UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 1

obligation for States,<sup>113</sup> and that States shall ensure that a comprehensive legal aid system is in place, which is independent, accessible, sustainable and credible. While these Principles and Guidelines are intended to apply to criminal cases, the African Charter on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>114</sup> also requires that the Government make civil legal aid available. Section G provides that

*'The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.'*

In most States, resource limitations mean that the provision of legal aid is available only to those who fall within certain criteria. The most common form of criteria is financial: applicants need to show that their income and capital falls below the set financial limits. Clients who fall within the criteria may receive legal advice and representation free of charge, or may be asked to make a contribution according to means. In the case of children, nearly all will be eligible as few children earn an income and even fewer have capital resources.<sup>115</sup> In some States, additional criteria may be imposed before legal aid for representation is granted. Legal aid may be restricted to cases where there is a reasonable prospect of success, known as the 'merit' test or to cases which fall within certain subject categories, a limitation generally referred to as 'scope'

The level of legal assistance offered varies from client to client according to the individual case. A child may only require legal information or legal advice from an advocate or paralegal, after which they are sufficiently informed to resolve the issue themselves. In other cases a greater level of help may be needed, such as when a child is being questioned by the police for an alleged offence, or where a child needs to negotiate a settlement of a dispute. A child who wishes to institute civil

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<sup>113</sup> Principle 1

<sup>114</sup> Adopted by the African Commission on Human and Peoples' Rights, 2001.

<sup>115</sup> In common law all children, once born, have legal personality but may need to make an application through a next friend or guardian.

proceedings, for instance in relation to an inheritance or a land dispute, may need help to prepare the court application, statements and documents. Yet others, such as children being prosecuted for a criminal offence, need representation throughout the proceedings and during the trial. Clearly, the nature of the legal aid will vary depending upon the nature of the case and the level of advice and representation required.

## **8.2 When must legal aid be provided by the State?**

### *Criminal cases*

The need for children to be granted legal assistance when they are alleged to, accused of or have committed a criminal offence is covered in a range of international instruments. The CRC requires States to ensure that every child deprived of his or her liberty has the right to prompt access to legal assistance.<sup>116</sup> This covers children who are temporarily detained at a police station as well as children who are placed in a retention home for a longer period of time. The CRC also requires the State to ensure that every child is provided with “legal or other appropriate assistance in the preparation of his or her defence”.<sup>117</sup> The African Charter on the Rights and Welfare of the Child similarly provides that every child accused of a crime shall be afforded legal assistance in the preparation and presentation of his defence.<sup>118</sup> Thus international standards require that the child has access to legal assistance at all times from the moment that a child is first detained by the police on suspicion of having committed an offence, right through to the end of the sentencing process.

While the CRC does not address the issue of whether or not a child should have a right to ‘free’ legal aid, Article 14 of the ICCPR enshrines the right to free legal assistance if the child or the parents does not have sufficient means to pay for a

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<sup>116</sup> Article 37(d) UN Convention on the Rights of the Child

<sup>117</sup> Article 40(2)(b)(ii) UN Convention on the Rights of the Child

<sup>118</sup> See Article 17(3)(c)(iii)

lawyer.<sup>119</sup> Further, the UN Committee on the Rights of the Child has recommended that such assistance be free of charge.<sup>120</sup>

The right to legal representation in criminal cases is recognised in Tanzanian law. The Law of the Child Act 2009,<sup>121</sup> which provides that in any proceedings before the juvenile court (the court with jurisdiction over criminal charges against a child), the child shall have a right to legal representation. The Act does not, however, contain provisions on how this right is to be implemented and, as yet, the Chief Justice has not yet published rules covering the procedure for obtaining or appointing a legal representative for the child.<sup>122</sup>

The current applicable law relating to the provision of legal representation in criminal cases is to be found in the Legal Aid (Criminal Proceedings) Act<sup>123</sup>. Section 3 of that Act, which covers both children and adults, provides that:

*‘Where in any proceedings, it appears to the certifying authority that it is desirable, in the interests of justice, that an accused should have legal aid in the preparation and conduct of his defence or appeal, as the case may be, and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have such legal aid and upon such certificate being issued, the Registrar shall, where it is practicable to do so, assign to the accused an advocate for the purpose of the preparation and conduct of his defence or appeal as the case may be’.*

‘Proceedings’ are defined by the Act as any criminal proceedings other than those in a primary court where a person is being tried for a criminal offence and includes an appeal against a decision of a district court. Children who are charged or tried by a juvenile court are covered by the term ‘proceedings’ but children who are tried for a criminal offence in the primary courts are not entitled to legal aid under these provisions. In addition, as a result of provisions contained in the Magistrates Courts

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<sup>119</sup> Article 14(3)(d) International Covenant on Civil and Political Rights

<sup>120</sup> See UN Committee on the Rights of the Child, General Comment No 10. CRC/C/GC10

<sup>121</sup> section 99(1)(f).

<sup>122</sup> See section xx below

<sup>123</sup> No 21 of 1969

Act 1984, they are not entitled in any event to be legally represented before the primary court when facing a criminal trial.<sup>124</sup> Such a prohibition is, of course, contrary to the provisions of the CRC, the ICCPR and the African Charter on the Rights and Welfare of the Child and is a severe restriction on children's access to justice.

The 'certifying authority' in any proceeding before the High Court, is the Chief Justice or the Judge of the High Court conducting the proceedings and, in the case of proceedings before the district court (or the juvenile court) it is, at present, the Chief Justice. Although the Legal Aid (Criminal Proceedings) Act permits legal aid to be provided in all criminal cases, in practice legal aid is only granted to accused persons charged in the High Court with capital offences (i.e. murder, manslaughter and treason), regardless of whether or not they are impecunious.<sup>125</sup> Field research conducted in both this study and in the Analysis of the Situation for Children in Conflict with the Law in Tanzania<sup>126</sup> has shown that, in line with this practice, it is virtually unknown for children to receive legal assistance when charged and tried for a criminal offence.

In order to implement their international obligations fully, the Tanzanian Government needs to ensure both in legislation and in practice that a child has:

- A right to legal advice at any time that he or she is detained;
- A right to legal representation when the child is alleged to or is being accused or recognised as having committing a criminal offence.
- A right to consult with his or her lawyer before being questioned and at any other time when proceedings are on-going;
- A right not to be questioned until a lawyer is present;

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<sup>124</sup> See Magistrates Courts Act 1984 section 33.

<sup>125</sup> This practice was noted in the Law Reform Commission Report on Private Legal Practice in 1985 and does not appear to have changed since.

<sup>126</sup> Ministry of Constitutional Affairs, compiled by the Children's Legal Centre and the National Organisation for Legal Assistance (NOLA) July 2011



- A right to free representation during criminal proceedings where the child cannot pay for representation.<sup>127</sup>

In addition, the Government has a responsibility under its international commitments to allocate necessary and sustainable resources to the legal aid system.<sup>128</sup>

### *Civil cases*

While there is no similar obligation in the CRC to provide legal aid in civil cases, as seen above, the African Charter on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>129</sup> provides that a party to a civil case has a right to legal assistance free of charge in civil cases where the interests of justice so require. While these Principles and Guidelines do not have the same status as the African Charter itself or the CRC, nevertheless they should not be ignored. There is no requirement in the Guidelines that the Government actually deliver legal aid itself, but there is a requirement that the Government enable parties to a civil case to access such legal assistance.

### **8.3 Non-government provision of legal aid**

The limited state-funded legal aid scheme for criminal cases and the lack of any formal state funded legal aid in civil cases, has led to the development of various forms of non-State legal aid schemes and programmes, some of which are available to children. Foreign development partners fund much of this provision. As a result, the provision of 'legal aid,' or free legal assistance offered varies across the country, as does the geographical availability of such services, the organisations and staff who offer it, and the nature and standard of provision.

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<sup>127</sup> See Hamilton: A Guide to Legislative Reform in Juvenile Justice, Children's Legal Centre and UNICEF NYC, May 2011

<sup>128</sup> See Draft UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 9.

<sup>129</sup> Adopted by the African Commission on Human and Peoples' Rights, 2001.

The only statutory body offering legal aid is the Tanganyika Law Society (the TLS),<sup>130</sup> the professional body that represents practising lawyers, known as advocates, in Tanzania. The TLS is the focal body under the Legal Sector Reform Programme and is responsible for establishing a Legal Aid Secretariat to manage funds and select NGOs who provide legal aid funding for this work. At the time of writing, however, the Legal Aid Secretariat had still to be established and funds were not being distributed to legal aid providers.

The TLS, which currently has 8 chapters: in Tanga, Arusha, Mbeya, Mwanza, Tabora, Dodoma, Kilimanjaro and Dar es Salaam, holds annual legal aid days funded through the Legal Sector Reform Programme, a practice begun in 2007.

The TLS also have their own legal aid fund, funded largely through advocate subscriptions. Following a legal aid day, or at any other time, a person can apply to the TLS Legal Assistance Committee. If legal aid is granted by the Committee, it will appoint and pay the lawyer. Only those persons who are resident in Tanzania, earn less than the minimum wage and have a 'plausible' legal case are eligible for legal assistance. A further criteria, is that the applicant must attend an oral interview at one of the chapter offices. The TLS do not keep figures on how many children apply for legal assistance, but interviewees at the TLS Arusha and the Dar es Salaam offices believed that this would be a very small number if any at all. The requirement to make a written application, and to travel to an office in one of the 8 chapter towns for an interview, is likely to pose a considerable barrier to children applying for legal assistance from this source. The TLS do not market the service specifically at children and it is highly unlikely that children are aware of the possibility of obtaining legal advice and representation from the TLS.

In Arusha, 105 potential clients turned up for the Legal Aid Day held in 2010, of which 8 were determined to be eligible for legal aid. The TLS estimates that approximately 20 applicants from the Arusha district are given legal aid in a year, none of which are children.

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<sup>130</sup> The Tanganyika Law Society is a statutory body regulated by the Tanganyika Law Society Act 2002.

It is possible for a child to go straight to a lawyer and ask to be represented free of charge (pro bono). However, there are clearly limits to the number of lawyers who are prepared to do this, and the number of cases that they can take. Once more, it would need significant confidence and knowledge on the part of a child to make an appointment with a lawyer and ask for such assistance. There was no evidence from the field study that any child had been represented pro bono in this manner.

Apart from the TLS, legal aid is provided by a wide range of organisations, nearly all of whom are registered as NGOs. The staffing of these organisations varies considerably. Some of these bodies employ lawyers who are advocates and members of the TLS and thus are qualified to represent a client in court. Others employ legal officers, who hold a law degree but may not have taken the Practical Legal Training Programme or been admitted to the Bar. Yet others rely purely upon paralegals, most of whom have no training or knowledge of law prior to joining the organisation.

Some organisations employ their staff and pay them, while others rely purely upon volunteers. A number of the organisations providing legal aid simply provide information, others offer advice and some assistance with the preparation of court applications, papers and documents. A limited number offer these services and also provide representation in court. Data from the TLS Paralegal Baseline Survey in 2010 showed that 95% of paralegal centres offered legal advice but only 32.1% prepared legal documents and wrote administrative letters.

The range of legal issues on which the NGOs offers assistance also varies significantly. Some, particularly those NGOs who work with women, focus their work on relatively narrow legal issues, generally civil matters relating to marriage, domestic violence, land disputes, inheritance and children. The bigger NGOs cover a far wider range of legal disputes, but again focus on civil cases. Very few of the NGOs visited or contacted represented clients facing criminal charges, and those that did would only take on such a case where there was a clear abuse of process. A number of reasons have been given as to why NGOs are engaged in providing legal aid in civil rather than, as might be expected, in criminal cases. Some NGOs see the provision of

legal aid for criminal cases as being the role of the Government and they are therefore reluctant to fulfil what is seen as a State function; others suggested that donors are not interested in criminal cases, though there appears to be little evidence of any lack of interest. Perhaps more realistically though, the focus may be related to the nature of the NGOs and their mission: several of the large legal aid providers and many of the paralegal organisations specialise in assisting women, whose major concerns are issues of domestic violence, maintenance, inheritance and property rather than crime. A further reason is likely to be that only advocates can represent children in front of the juvenile or district court and most NGOs have just a small number of advocates while the paralegal NGOs have none at all. Even if the NGO has advocates on its staff these are likely to be few in number and providing representation in criminal cases is resource heavy: it is time consuming, often involving a number of appearances, adjournments due to non appearance of witnesses or the defendant child from the retention home and long periods of waiting.

In addition to these reasons, in order to represent a child in court, NGOs need to be authorised to provide legal representation. Under the Judicature and Application of Laws Act, the Chief Justice of Tanzania may grant a legal aid certificate to any organisation that provides legal aid. Organisations without legal aid certificates can support children to access information and advice for legal or other proceedings in pre-trial proceedings, but without an advocate<sup>131</sup> cannot represent the child during the trial.

Court costs are not so much of an issue as advocate time. It is possible for NGOs to seek exemption from court fees. Under the Court Fees Rules made under the Judicature and Application of Laws Act, the Court to which any fee is payable may, for reasons of poverty or other good cause, remit such fee in whole or in part.<sup>132</sup> The Rules further provide that no fees shall be payable by a person who has been granted legal aid under the Legal Aid scheme of either the Faculty of Law, University

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<sup>131</sup> Advocate is a term used for admitted members of the bar who are allowed to represent clients in all courts except the primary courts while lawyers is a general term for a holder of a legal degree but not necessarily admitted to the bar.

<sup>132</sup> Rule 8 of the Court Fees Rules made under Judicature and Application of Laws Act.

of Dar es Salaam, the Tanganyika Law Society, the Tanzania Women Lawyer's Association or the Legal and Human Rights Centre in respect of proceedings instituted by or against the person. Further names have been added to the list since 2002 when the Rules were promulgated, including that of National Organisation for Legal Assistance. In addition, no costs will be awarded against the losing party if he or she is legally aided. However, if the person is successful in the proceedings, the Court can direct him or her to pay the necessary court fees. These provisions are extremely important in assisting children to access justice: they enable children to make an application to court without paying fees which would be beyond their means and, at the same time, remove the fear that a costs order might be imposed on them were they to lose the case.

#### **8.4 University legal aid clinics**

Across the common law world university law faculties have a long history of providing legal advice and legal representation to low income individuals and communities that are underserved by lawyers, or who have particular difficulty obtaining lawyers because of the nature of their legal problems.<sup>133</sup> The University of Dar es Salaam and the Open University of Tanzania both run legal clinics providing information and advice and, in the case of Dar es Salaam, representation.<sup>134</sup> The legal aid clinic operates one afternoon a week and takes between 30—50 cases. As with NGOs the emphasis is on civil cases, with the most common cases involving children relating to neglect, harm by family members and failure to provide maintenance. Where possible, the clinic uses alternative dispute resolution rather than resorting to court proceedings. The University operates both an eligibility and scope test to ration scarce legal aid resources, taking 'hardship cases', which involve vulnerable groups (children, tenants (not landlords), workers (not employers), and

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<sup>133</sup> For more detail on university law clinics see Chiroma: Making Justice Accessible to the Poor through Development Cooperation: A Case Study of the University of Maiduguri Law Clinic in Meinecke and Sippel (eds) *Administration of Justice in Africa: Effectiveness, Acceptance and Assistance*, 33<sup>rd</sup> Annual Conference of the African Law Association, Loccum, Germany November 30<sup>th</sup>-December 2<sup>nd</sup> 2007, Rudiger Koppe Verlag: Koln 2008.

<sup>134</sup> The University of Dar es Salaam was the first body to receive a legal aid certificate and its clients are exempted from the payment of Court fees. See above at page XX

women in matrimonial cases. Students take the cases with supervision from law faculty staff.

**University legal aid clinics are a good way to provide basic legal advice to vulnerable populations, and we would recommend that new law faculties consider establishing a legal clinic. We also recognise that legal clinics demand resources and can impose a significant burden on law faculty staff. Ideally, a member of staff should be appointed either part time or full time to run the legal clinic and ensure that good quality legal aid is provided.**

Table 1 below shows the staffing and geographical range of the NGOs visited during the field study. While the study was not able to interview all legal aid providers, we believe that we have managed to interview the larger and better known legal aid providers.

<b>Name</b>	<b>Employs advocates/ legal officers</b>	<b>Employs paralegals</b>	<b>Has volunteers working with employed staff</b>	<b>Has volunteer staff only</b>	<b>Exemption for payment of court fees?</b>	<b>Criminal and civil cases?</b>	<b>Represent clients in court?</b>	<b>Number of offices/ outreach</b>
<b>National organisation for legal assistance (NOLA)</b>	Yes  17 legal officers and 5 advocates outside Dar es Salaam			No	Yes	Almost exclusively civil	Yes	Dar es Salaam, Dodoma, Iringa, Kigoma, Mtwara, Mwanza, Mbeya. Tabora, Songea & Kasulu.
<b>Legal and Human Rights Centre</b>	Yes (12 lawyers in total across 2 offices) (2 advocates in	No	Yes (Arusha 4)	No	Yes	Civil –but would take a case for an accused child if clear abuse of	Yes but not main aim, 10 or less cases a year in Dar	Dar es Salaam and Arusha and mobile legal aid clinics

	Arusha ) 1 legal officer (Arusha)					process		
<b>WLAC</b>	Yes (15, 2 are advocates)	Yes (29)	Yes (4)	No	Yes	civil cases and criminal cases	Yes	Kinondoni (HQ) and SUWATA Dar es Salaam, Kasulu field office (Kasulu Kigoma region) and Muleba (Kagera region)
<b>TAWLA</b>				Yes 3 volunteer advocates and 12 volunteer paralegals	Yes	civil cases	Yes	Tanga, Arusha and Dodoma
<b>WILDAF</b>								
<b>NGUVU KAZI</b>	1 legal officer							Mwanza
<b>Wasehe-habise: Legal and Human Rights Assistance</b>	No	No	No	Yes	No	Civil but occasionally criminal	No	Mugumu, Serengeti
<b>Tarime Paralegals</b>	No	No	No	Yes (28 paralegals)	No	Civil but some	No	Other offices



						criminal		
<b>Kilimanjaro Women Information Exchange and Consultancy Organisation (KWIECO)</b>	Yes (4) and 3 non advocate lawyers	Yes, 8 (but check)	None	No		Criminal and civil	Yes	Kilimanjaro
<b>University of Dar es Salaam Legal Aid Clinic</b>				6 faculty members	Yes	Civil cases – and only ‘hardship’ cases and strategic litigation	Yes, in a limited number of cases	Dar es Salaam
<b>LIWOPAC</b>	No	Yes (8)	No	No		civil cases	No	Lindi
<b>BABETI LEGAL AID CENTRE</b>	No	No	No	Yes (3 paralegal and hoping to be joined by lawyer awaiting admission as advocate)	No	civil cases though help child victims of crime	No	Babeti

### **8.5. Mobile legal aid**

Most legal aid providers offer legal advice and assistance on a face-to-face basis, requiring those seeking legal aid to attend at the office of the legal aid provider. This is not overly burdensome for an adult in an urban area, provided that the legal aid provider's office is accessible by public transport. However, attending at an office presents a greater problem for children, while for both adults and children accessing an office in a rural area is a more difficult problem still. In order to address the difficulties for children in accessing justice in rural areas, the Legal and Human Rights Centre (LHRC) implemented a mobile legal aid clinic in Magu and Makete in 2009/10. Working with local community justice facilitators, the initial phase of the project involved offering clinics in three different areas of each of the two districts. After an initial day during which the purpose of the clinic was explained to villagers and information was given on human rights, child rights and child protection, a legal clinic was offered for a period of five days and then for a further period of 5 days a month later. Cases were followed up once the clinic had departed by local community justice facilitators with technical support from LHRC as necessary. A second phase of the project offered services in a further four wards in each of the districts.

The challenges facing the Mobile Legal Aid Clinic in assisting children access justice in the project areas included lack of an awareness of rights, a poor justice administration infrastructure, poverty and harmful customs and practices, including forced marriage of girls to obtain a bride price, selling children into prostitution, unlawful child labour and child headed households. The Mobile Legal Aid Clinic were able to provide legal assistance to 439 people during the first phase of the project, all of whom lived in rural areas and who were unlikely to have accessed legal assistance without the Clinic. Further, the communities reached attained a greater awareness of rights and the capacity and skill of local community justice facilitators was enhanced. The results of the project showed a clear need for legal services, but it was recognised that the Clinic needed to be present in the area for a much longer period of time to enable cases that were started during its outreach service to be concluded.

The evaluation of the Mobile Legal Aid Clinics concluded that the provision of legal aid in the project areas was both welcomed and needed, but that in order to make a real impact on access to justice for children, legal services needed to be continually rather than occasionally available. The project was funded by UNICEF for a limited period of time and when the funding ended, the mobile legal aid clinics ceased to operate.

The costs of running mobile legal aid clinics were higher than for a fixed office, including not only staff cost, but also transport costs, travel time, accommodation and subsistence costs.<sup>135</sup> While mobile legal aid clinics cost more, the service provided was clearly worthwhile and large numbers of clients were seen in a short time. The clinics proved their value and enabled children, parents and carers living in rural areas to access justice. Cost is, however, a significant factor that cannot be ignored. So too, is the need to provide a regular rather than an occasional service. **We conclude that at the present time, mobile legal aid clinics should not be reintroduced in the same manner, but that consideration be given to a mixed model which we believe would be more effective and more sustainable.**

**We would recommend that consideration be given to an amended model. NGOs, and particularly LHRC, WLAC, TAWLA and NOLA should be encouraged to skill up existing paralegals and community justice facilitators further, and to recruit new and train local paralegals in the rural areas. Funding should be sought for paralegals, who should work from home, using community facilities for meetings where necessary. Paralegals should be equipped with adequate office supplies, with a work mobile phone and where there is internet communication, with a computer. All paralegals should be under the supervision of an existing legal aid provider, and we would recommend that the current legal aid providers should agree which NGOs provide support and supervision to which areas. An advocate or legal officer should provide regular supervision, both through electronic means and through regular face-to-face supervision sessions with the paralegals. We would recommend that the supervising lawyer visit no less than once a month, travelling**

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<sup>135</sup> The cost of the project was approximately \$139,000 covering the years 2009/2010.

**to the outreach areas. This could be reduced to once every two months once the paralegals are established and where good communications are established**

### **8.6 Criteria for legal aid**

Some, but not all of the NGOs visited, have criteria on which they base a decision to take on a client and provide legal aid. Others offer legal assistance to anybody who attends at their offices. The larger NGOs and those that employ advocates employ financial criteria based on the level of income of the applicant. The TLS requires the person to be earning below the minimum wage before legal aid can be granted. The view of the Legal Aid Clinic at the University of Dar es Salaam was that this placed the threshold for accessing legal aid too high. Even where a person is earning the minimum wage, this is still an inadequate sum to enable him or her to pay legal fees.

LHRC operates additional criteria: before granting legal aid, it will consider whether the case would promote legal rights and is in the public interest. None of the bodies offering legal aid appeared to operate a 'scope' test. In other words, the subject matter of the legal complaint involved was not relevant in deciding whether to offer legal aid, except in so far as virtually none of the NGOs offered assistance to children suspected of a criminal offence. Those few that were willing to take such cases were rarely approached to do so.

The overwhelming majority of legal aid funding received by the NGO sector is expended on civil cases. An example of the range of cases taken by the LHRC shows that the predominant issues on which legal aid was expended were land, employment, probate and matrimonial cases (mainly a failure to pay maintenance). Criminal cases do not feature at all though children's issues form a minority category.

#### *Legal and Human Rights Centre*

New cases granted legal aid in 2010	Male	Female	Total	Percentage of total cases

Employment	407	92	499	20.65%
Matrimonial	141	290	431	17.83%
Land	446	288	734	30.37%
Contract	49	23	72	2.97%
Tort	62	29	91	3.76%
Insurance	37	18	55	2.28%
Probate	143	121	264	10.92%
Others	114	80	194	8.03%
Children's Rights	26	51	77	3.19%
Total	1425	992	2417	

A rather different spread of work was taken by KWIECO, which focuses on women and children's rights.

New cases granted legal aid 2010	Numbers	Percentage of total cases
Maintenance	110	77.46%
Rape (for victim)	8	5.63%
Sodomy (for victim)	3	2.11%
Inheritance	10	7.04%
Custody	8	5.63%
Juvenile crime	3	2.11%
Total	142	

In all 142 cases, a child was involved though the case was not necessarily taken by a child.

The TLS Paralegal Baseline Survey of 49 different paralegal centres is helpful in illustrating the work undertaken by paralegal centres, but it needs to be borne in mind that 45% of paralegal centres were set up by WLAC, and thus focus on women and children. Thus the spread of work cannot be taken as representing the needs of the population for legal advice and representation. Further, few paralegal centres offer assistance with criminal cases.

Matrimonial	35.7%
Land dispute cases	23.5%
Inheritance cases	15%
Child related cases	11.9%
Human rights cases	1.1%
Criminal cases	1.1%
Civil cases	1.8%
Unclassified cases	9.6%

The NGOs and paralegal bodies offering legal advice and assistance are funded by a wide range of donors. These include amongst others, SIDA, CIDA, the Embassy of Denmark, the Ford Foundation, UNICEF, The Lutheran Church of Germany, Norad-JURK, USAID, Sigrid Rausing Trust, and the LSRP.<sup>136</sup> Yet others exist on small local donations, voluntary staff and small fund raising activities. None of the providers have long term funding and, as a result, their ability to provide legal aid is insecure.

The Legal Sector Policy document issued by the Ministry of Constitutional and Legal Affairs in December 2010, recognises that there is a need for the Government to organise, prepare and implement a sustainable legal aid system in Tanzania. This, it is envisaged, will entail the organisation and procedures of delivering public guaranteed legal aid; and establishing the services of paralegals and NGOs that deliver state guaranteed legal aid.

In its 2009/2010 Report on the Legal Sector Reform Programme, the Government noted that the approved activities in 2009/2010 focused on enhancing the coordination mechanism for provision of legal aid services and preparation of a Code of Conduct for legal aid providers. The programme envisaged the TLS co-ordinating the main legal aid providers through a Legal Aid Secretariat, this has not at the time of writing been established. Legal aid providers have not been able to agree on the

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<sup>136</sup> In their 2009/2010 report the Ministry of Constitutional and Legal Affairs notes that Tshs 190,220,000 was distributed to 10 bodies: the African Institute of Comparative and International Law, Envirocare; Legal Aid Committee of the University of Dar es Salaam; Legal and Human Rights Centre; National Organisation of Legal Assistance; Open University of Tanzania Legal Aid Clinic; Tanzania Network of Legal Aid Providers, Tanzania Women Lawyers Association, Tanganyika Law Society and Women's Legal Aid Center. A report was to be submitted to TLS for onward reporting to the Ministry of Constitutional and Legal Affairs.

role or form that the Legal Aid Secretariat should take. As a result there is still a lack of co-ordination in the field of legal aid. There is no central body to set rules on eligibility of clients for legal aid or scope: in other words there is no agreement as to which cases should receive legal aid funding. In addition, the failure to agree a central body to take responsibility for legal aid has meant that a Code of Conduct for legal aid providers has not as yet been drafted and there are no minimum standards for providers. The lack of standards and a Code of Conduct places child clients at risk and potentially reduces their access to good quality legal services. In addition, there is still no agreement on how legal aid will be funded or provided in the future or how the government would allocate such money to those bodies that provide services on the ground.

However, the Government have established a Department of Public Legal Services within the Ministry of Constitutional and Legal Affairs, which, it is envisaged, will be developing a new Law on Legal Aid in 2012. In addition, the legal aid providers have commissioned a report on the efficacy of a legal aid network and have sponsored a draft bill on paralegals.

As part of an attempt to fill the current gap in legal aid funding by the government, DANIDA has provided funding for legal aid and paralegal services amounting to \$12.5m<sup>137</sup>. A fund management and grant administration service (the Legal Services Facility) has been established and will be the vehicle for channelling funds to legal aid providers from April 2012 in the absence of an established body responsible for delivery of legal aid in Tanzania. The fund will:

- Provide core funding to larger, well-established legal services providers, and will permit its funds to be sub-granted to smaller legal services providers, particularly in the rural areas;
- Provide grants to eligible organisations from both the mainland and Zanzibar;
- Liaise with, assist and/or complement other legal services provision initiatives, such as the legal aid network and the Department of Public Legal

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<sup>137</sup> The funding will be provided over a 3 year period, with a possible 2 year extension

Services with the aim of fostering full Government ownership to the provision of legal aid to all its citizens; and

- Develop an exit-strategy for the Facility

DANIDA envisages that the long term outcomes from the provision of this funding will be that:

- Legal aid and paralegal services are enhanced in quality and quantity and will cover all districts of the country thus improving access to justice for the poor and vulnerable;
- Government assumes responsibility for legal aid provision, including paralegals, formalised through legislation and institutionalised;
- Innovative approaches to legal services provision supported;
- Advocacy and legal skills of legal aid and paralegal service providers improved;
- Enhanced awareness about the role and importance of legal aid and paralegal services amongst public and private legal sector stakeholders.

The fund is not intended to benefit children specifically but they would fall within the category of 'the most vulnerable' and therefore would qualify as a priority group for legal aid. As is the case at the present, there is no intention to control the categories of work undertaken on legal aid funding by the NGOs. While the provision of funds for legal aid will undoubtedly help children to access justice, the establishment of yet another body, the Legal Services Facility who will decide which organisations receive legal aid funding, is to be regretted as potentially diluting the attempt to establish a national body for delivery of legal aid.

### ***8.7 Barriers to access to legal aid***

Although a number of organisations use the radio and leaflets to publicise legal rights and legal aid, at present, few children appear to be accessing legal aid. Legal



aid providers gave a number of reasons why children do not approach them, seeking assistance. These include lack of knowledge on the part of the child that their rights are being infringed and that this could be challenged; a cultural norm that problems should be dealt with by the family and not by outsiders; society's perception that children should not challenge their elders or those in authority and should sublimate their personal interests to those of the family and community; intimidation by family members and those who commit offences against children and lack of transport and consequent difficulty reaching the offices of legal aid providers. Other barriers relate to the organisation and manner of delivery of legal services for children. There were only 1188 qualified and registered advocates in Tanzania in December 2009,<sup>138</sup> most of whom are based in the big cities. There are very few advocates to be found in rural areas. Although there is a wider geographical spread of legal aid providers many of the more rural providers operate with just paralegal staff. While the paralegal providers we visited were dedicated and, as far as we can see, delivered a good service to their clients, the staff have little knowledge of law and have received only a small amount of training. They have limited access to lawyers and, as a result, are only able to offer a limited service to their clients.

Apart from these barriers, there are a number of other issues that affect children's access to legal aid and, as a result, their access to justice.

### ***8.8 Providers of legal aid***

We have not found it possible to determine either the number of legal aid providers in Tanzania nor the amount of money expended on legal aid nation-wide. There is no national register of legal aid providers and no requirement for bodies offering legal advice to register with any national body. We were informed by TANLAP that they have 27 members with another 40 applications from potential members, but it is unclear how many of these bodies (who are not listed in the annual report or on the TANLAP website) are actively offering legal aid. The Paralegal Baseline Survey carried out by the TLS in August 2010 identified 49 paralegal centres or groups with 850

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<sup>138</sup> The latest date for which the authors of the report were able to obtain figures

active paralegals. The lack of an easily accessible list of legal aid providers in Tanzania reduces access to justice for children and for those caring for them.

### **8.9 Child friendly legal aid**

Neither the Government nor the legal aid providers target legal aid services directly at children. Neither did we see any material aimed explicitly at children explaining legal aid, why children might want to seek it and how they could obtain such assistance. Guideline 2 of the draft UN Principles and Guidelines on Access to Legal Aid in Criminal Matters requires that States take appropriate measures to inform persons of their right to legal aid, its content, the availability of legal aid services, how to access them. Given our findings on children's knowledge of their rights, such information needs to be widely provided in a form that reflects children's age and maturity and in a language that they can understand. Legal aid providers also need training in communicating with children, in understanding the problems faced by children and the solutions to those problems. This is especially true for the paralegals, who may not have received formal education beyond the compulsory school years and who have received no or little legal training. Codes of conduct need to contain specific provisions on working with children, while legal aid providers need to consider how they vet lawyers and paralegals working with children to ensure the safety of children.<sup>139</sup>

A further issue is whether legal aid, and particularly legal representation, should be available for children who seek justice through the traditional or informal justice system as well as the formal justice system. It is not clear at present, to what extent children are accessing the informal system, but it would appear from our research that children are currently making very little use of the informal system. We did not come across any cases where NGOs supported children to access the traditional justice system or the ward tribunals or councils. We would encourage NGOs to review how they might use these systems to enable children to access justice and to ensure that legal aid is available.

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<sup>139</sup> See Draft UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems Guideline 9 para (iii)

### **8.10 Lack of criminal legal aid for children**

Nearly all legal aid resources, apart from Governmental legal aid under the Legal Aid (Criminal Proceedings) Act, are currently spent on civil legal aid. The expenditure of such a large proportion of legal aid money on civil cases, as against criminal cases, is unusual. The provision of civil legal aid is both important and necessary, especially as a measure to relieve poverty, to ensure protection of the child and to enable children to access their civil, economic, social and cultural rights. However, both the CRC and the ICCPR, as well as the African Charter, require that children be provided with free legal assistance when they are in conflict with the law. In most States, the majority of legal aid expenditure is on criminal cases, providing defendants who are at risk of losing their right to liberty with representation throughout criminal proceedings. Such expenditure is the exception in Tanzania and few NGO legal aid providers offer legal aid to children in conflict with the law. At present children do not know how to access legal aid when they are held at the police station, when they are charged, at the first hearing, in pre-trial detention or during their trial. Legal aid providers do not offer a 'duty lawyer' scheme for children either at the police station or at the courts. As a result, most children in conflict with the law go through proceedings without any legal advice or representation. We did not come across one case in which a child defendant was offered, or had, legal representation at his or her criminal trial. This is a cause for concern and leaves children who are alleged to have committed crimes without adequate access to justice. The lack of a State legal aid system providing legal assistance to children accused of a criminal offence means that the Government is not able to implement its international obligations fully. This failure was the subject of adverse comment in the Concluding Observations of the UN Committee on the Rights of the Child to the Government's periodic report in 2006,<sup>140</sup> in which it was recommended that the Government ensure that children were provided with access to legal aid.

The current practice of delivery of legal aid also has an impact on children.

### **8.11 Modes of delivery**

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<sup>140</sup> CRC/C/TZA/CO/2 21 June 2006, Para 70(f)

Legal aid services at present are on a face-to-face basis and require attendance at an office or in some limited areas, at a mobile legal aid clinic. We did not identify any providers offering advice on the telephone and web-based advice is not at present available. It is appreciated that access to computers is very limited, especially in the rural areas, and that web-based advice might be of limited use at this stage. However, many of the population have access to a phone, especially mobile phones, and more use should be made of 'hotlines,' especially free-phone hotlines to provide simple legal advice. At the time of writing the Ministry of Community Development, Gender and Children are developing a helpline with the assistance of other ministries, departments and agencies. It is not clear what form such a line will take, whether the line will be targeted primarily at children or at those who care for them or work with them. Neither is it clear what issues the line is intended to address. Ideally, a separate dedicated Child Law Line should be established that can provide legal advice on all issues of child law, especially to parents, carers, front line practitioners and professionals working with children. If it is not possible to set up two lines, and only a general helpline is established, we would recommend that the line employ an advocate or experienced legal officer/ paralegals to answer calls with specific legal content. If two lines are established, the general helpline should signpost callers to the dedicated Child Law line as necessary.

We have noted a new initiative to offer legal advice through text messaging, but feel that this should probably be limited to signposting available legal information and advice.

### ***8.12 Lack of targeting of legal aid services***

In all States, legal aid resources are finite and precious. At present there appears to be little debate and no decision on who should receive legal aid and in what circumstances. Funders largely leave legal aid providers to decide who will receive legal aid. While some providers impose financial or other criteria, others do not and legal aid is simply allocated to those who manage to find a provider and ask for assistance. Legal aid systems, as a rule, prioritise those who are most vulnerable and prioritise certain forms of action. Where a system prioritises certain groups, such as

children, the elderly, those with HIV, women, or certain forms of action such as a risk of being deprived of liberty, their home or land, their education or their child, legal aid providers generally take active measures to publicise and target services at these groups. The current practice of nearly all the legal aid providers in Tanzania at present can be described as passive rather than active. They wait for children to come to them rather than ensuring that they provide services to children most in need, particularly those children facing criminal charges and possible deprivation of liberty and children who are victims of abuse, neglect and exploitation. This practice, we conclude, particularly disadvantages children who for a variety of reasons are far less likely to approach legal aid providers than adults.

We would recommend that all legal aid providers should develop a marketing plan to ensure that their target groups are informed of the availability services

### ***8.13 Legal aid being used as a substitute for social welfare services***

In some of the districts visited, paralegal services worked very closely with social welfare services and the Community Development Departments. When faced with a difficult case, evidence from our study indicates that social welfare officers and community development officers often seek the assistance of legal aid providers, and particularly the rural paralegal providers, for resolution. While cooperative working is advantageous, many of the issues being referred do not require legal intervention. Such referrals are likely to reflect the low capacity and lack of resources of social welfare teams in some areas. The use of legal aid providers to undertake work which would normally be regarded as falling within the remit of social welfare is particularly noticeable in cases of child protection. The lack of knowledge and understanding on the part of social welfare officers of the powers available to them, and particularly the use of care and supervision orders under the Law of the Child Act, results in the legal aid provider rather than the social welfare officer seeking to reach a solution to protect the child. Joint training on child protection, which also involved the Gender and Children Desk, would be helpful in assisting social welfare and the police to understand their statutory duties and their separate roles. It would permit legal aid providers to focus on providing legal assistance to the child.

#### ***8.14 Is legal aid producing the desired outcomes?***

Neither the TLS nor the NGOs keep detailed data on legally aided cases. A few were able to provide us with statistics on the gender of those who were provided with legal aid services, but none were able to tell us how many children, of what age had approached the organisation for legal aid nor for what reason. For the few children who were clients, the NGOs were not able to tell us whether the child received advice only or had been represented before the court. In addition, while organisations were able to give us the occasional case history of a child who had been assisted, it was difficult for them to tell us the outcome of the case and few followed up children after they had ceased to be clients. The failure to record outcomes makes it difficult for organisations, and their funders, to determine whether the provision of legal aid, and the particular legal advice and representation given made a difference to the child client.

#### ***8.15 Is legal aid being effectively spent?***

It is impossible to determine how much legal aid is spent purely on providing legal advice, how much on assisting with the preparation of court papers and how much is spent on representation. Most funders do not appear to set targets for case numbers or cost per case. Rather a core grant is given for the provision of legal aid with few conditions on how cases are chosen, the level of legal assistance given or the balance between categories of cases. Funders wish to ensure that NGOs account appropriately for how they have spent their funds, but appear not to be greatly concerned with how effective the grant has been in improving access to justice, providing good quality legal services or the cost per case. The lack of data in any event, makes it impossible to determine cost per case. All of these factors are important as measures for determining whether legal aid funds are being spent effectively.

#### ***8.16 Quality of legal aid services***

Determining the number of children who have sought assistance from a legal aid provider and the quantity of work done is a comparatively straight-forward task

assuming that the legal aid provider keeps good records and has systems in place for retrieving data. Assessing the quality of legal aid, however, is a far more complex task. The TLS Paralegal Baseline Survey<sup>141</sup> noted that the level of performance of paralegal centres varied and was low in the more remote areas. Regional paralegal centres were of better quality than district centres.

None of the legal aid providers appear to engage in client feedback or seek feedback from the courts. Some were clearly highly regarded by the courts, both the district and the primary courts as well as by the ward tribunals. Legal aid providers would benefit, however, from knowing how children regarded the services provided and from some form of occasional peer review or external review.

### ***8.17 Registration and regulation***

An effective legal aid system should ensure that the legal services provided are of a good quality, are provided in accordance with high professional and ethical standards, and positively impact the lives of individual and vulnerable groups of children. However, determining whether Tanzanian legal aid providers meet this standard and provide effective legal aid is problematic. While the TLS imposes standards and regulation on advocates who offer legal aid services, NGOs offering legal aid are unregulated. There is no registration system, no minimum quality standards for service delivery and no monitoring of outcomes for NGO clients. Advocates employed by NGOs are bound by the TLS professional standards and the Code of Conduct. However, there is no national professional body for paralegals, no Code of Conduct and no professional standards. At present, due to the lack of supervision requirements, it is possible for an organisation to offer legal aid services without any trained lawyers overseeing the provision of advice, and with staff who have received little, if any, training. While many of the paralegal volunteers we met impressed us with their dedication to helping members of their community access justice, both they and the public would benefit if there was a regulatory system and a regulatory body ensuring adequate training and adequate standards of service delivery. It is essential that paralegals have access to training, that case records are

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<sup>141</sup> Para 4.1

kept and that their work is supervised and discussed to enable them to develop and provide the most the appropriate advice to clients.

### ***8.18 Training***

Due to the lack of a regulatory framework there are no minimum training and supervision requirements for paralegals. NGOs are not obliged to offer any training at all to their staff, and some do not do so, or only offer very limited training due to shortage of funds and geographical limitations. The Paralegal Baseline Survey highlights the lack of uniformity of training, with some paralegals receiving repeated training but others receiving only one training session. Over 80% of paralegals received training on Land Acts and the Law of Marriage Act but only 56% had received training on the Law of the Child Act. None had received training on criminal law. Only a limited number of paralegals had received skills training. Only 60% of paralegals received training on report writing, an essential skill for lawyers. There is no similar data on the training received by advocates and legal officers.

### ***8.19 Funding***

At present funding for legal aid is fragmented and a governmental policy paper on the framework for delivery of legal aid, as well as a law on legal aid, is still awaited. Funding for legal aid at the present time is piecemeal and involves a number of different funding organisations. Although discussions are currently taking place on setting up a Legal Aid Secretariat or Board, these have not at the time of writing, reached a conclusion as to the form and nature of the national body that will be responsible for overseeing the delivery of legal aid. There is no decision yet as to whether the body would be within the Ministry of Constitutional Affairs and Justice or a semi-independent or independent body. There is, though, a pressing need for a centralised body responsible for legal aid to ensure that children can access justice and that children's rights are implemented by the State.

### ***Recommendations***

#### ***a) Provision of information***



Given children's lack of knowledge about their rights and the work of the legal aid providers, a national information package should be developed and made widely available. Information about rights, the purpose of the legal aid providers and how to access a provider needs to be aimed particularly at children living in rural areas and at marginalised children, including street children, those living in children's homes, those out of education, those who are detained and refugee children. Information packages need to be embedded into school programmes, widely available at community level and regularly repeated on the radio and in television programmes. Information specifically for children in conflict with the law should be available at police stations, retention homes, in courts and at the approved school. The information needs to cover the right of a child to a legal representative and once again, should contain details of how to access a provider. The information needs to be provided in a way that children can understand, including illiterate children.<sup>142</sup> The Government should consider placing police and prosecutors under a duty to inform children of their right to legal advice and representation and should require police to contact a lawyer to attend at the police station

***b) Delivering legal aid***

At present legal aid is delivered through face-to-face contact. We would recommend

i) that a child law national hotline should be established with a free phone number. The number should be easily memorable and a wide advertising campaign will be necessary to promote the line. Ideally, government should fund the line, but for the present, donor funding should be sought. This line should not be the same as the free helpline that the Ministry of Community Development, Gender and Children are currently seeking to establish, but should be a dedicated line staffed by lawyers and paralegals providing advice to children, parents, carers and professionals working with children and families.

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<sup>142</sup> There are ways of conveying information through the use of pictures, cartoons and symbols that enable those who cannot read to nevertheless be provided with legal information.

ii) Building on the evaluation of mobile legal aid clinics, a mixed model of legal aid delivery should be developed to enable more children in rural areas to access legal services. Funders of legal aid should allocate funds to legal aid providers to recruit locally based paralegals and a legally qualified advocate to supervise them both remotely through the use of phone contact and internet and by regular visits.

*c) Criminal legal aid*

In order to enable the Tanzanian government to meet its international commitments and its statutory obligations under the Law of the Child Act, legal aid providers need to reconsider and rebalance their practice, to take on more criminal cases for children. We would recommend that, in order to assist this necessary change, a portion of legal aid funding should be earmarked to allow additional training for providers and for representation of children in conflict with the law throughout criminal proceedings. It is accepted that taking criminal cases will be costly and we recognise that a case involving representation in court takes more time than the provision of one-off legal advice. We would recommend that the TLS and NGOs should work with the police and the Ministry of Constitutional Affairs and Justice to set up 'duty lawyer' schemes in the police station, at the juvenile courts and at the retention home to ensure that children can access free legal assistance. Given the shortage of advocates, the duty lawyer schemes should be staffed by appropriate adults and paralegals at the police station (subject to regular supervision by an advocate) and by paralegals and advocates at the retention homes and the juvenile courts. We would also recommend that the Legal Sector Reform Programme should include the duty lawyer scheme as an 'activity' in their programme in 2012 and beyond.

*d) Data recording*

NGOs offering legal aid should establish a data recording system so that they can clearly identify the number of children offered legal assistance each year, the gender and age of the child, the circumstances that led to the child to seek legal aid, the level of service provided and the outcome achieved for the child. NGOs

should also develop a means of recording the cost of the service provided to children. All of this information is essential to the provision of an effective legal aid system and to ensuring access to justice. We would encourage the Department of Public Legal Services to develop and provide free data recording software to legal aid providers to enable them to complete this task.

*e) Increasing the capacity of legal aid providers*

Various studies and reports have commented on the low number of registered advocates in Tanzania. Many of the registered advocates undertake mainly commercial work or the higher levels of criminal work and there are few available to take legal aid work or to work in rural areas. There is a need to increase the number of trained lawyers and advocates willing to work for legal aid providers and in rural areas. The Government and funders, as well as the TLS, should consider offering short term incentives, such as scholarships at universities, reduction of fees or internships, or travel and subsistence grants for those willing to live in rural areas/ work with NGOs for a period of a one or two years. To ensure that more children can be assisted, we would also recommend that funders set aside a portion of their legal aid funding for recruitment and training of paralegals based in rural areas. Paralegals should be able to provide legal assistance to persons arrested, detained, suspected or charged with a crime, particularly in police stations or other detention centres.

*f) Regulatory bodies*

There needs to be a new regulatory body for legal officers and paralegals. This body should be responsible for setting standards for training, including core competencies, and for drafting a Code of Conduct for non-advocates offering legal services. Any Code of Conduct needs to address the issue of a child's competence and capacity and the ability of a parent and child to make decisions regarding representation. The Code should also deal with situations where the child's views and wishes are, in the view of the legal officer or paralegal, contrary to their best interests.

As noted above, there is at present no national body responsible for the delivery of legal aid although there are currently discussions on the setting up of a Legal Aid Secretariat or Board. The lack of such a body is hindering the effective delivery of legal aid and is an obstacle to children accessing justice. We would hope the current inability of the legal aid providers to agree on the nature and form of such a body can be resolved in the very near future. The Draft UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems Guidelines suggest that:

*To ensure the effective implementation of their nation-wide legal aid schemes, States may consider the establishment of a legal aid body or authority [legal aid board] to provide, administer, coordinate and monitor legal aid services. Such a body shall:*

- (i) be independent of the Government and shall not be subject to the direction or control of any person or authority in the performance of its functions;*
- (ii) have the necessary powers to provide legal aid, including but not limited to the appointment of personnel, the designation of legal aid services to individuals, the setting of criteria and accreditation of legal aid providers including training requirements, the oversight of legal aid providers and the establishment of independent bodies to handle complaint against them.*
- (iii) develop, in consultation with key justice sector stakeholders and civil society organisations, of a long term strategy guiding the evolution and sustainability of legal aid;*
- (iv) report annually to the responsible minister and to Parliament.*

Such a body should also deal with complaints against legal aid providers.<sup>143</sup>

#### **g) Training**

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<sup>143</sup> Principle 28 of Basic Principles on the Role of Lawyers.

All legal aid providers should be required to undergo initial and continuing professional training. The Department of Public Legal Services should establish a training framework and minimum training standards for all legal aid providers. A national scheme of paralegal services with standardised training curricula and an accreditation scheme should be developed,<sup>144</sup> whether by a new regulatory body for paralegals or by the national legal aid delivery body, or in the absence of either by the Department of Public Legal Services. Without training both on law and on working with children, paralegals must be regarded as of limited value to children. A training programme for paralegals should include children's rights, criminal law, child protection, domestic violence, property, gender rights and child development. Paralegals should also be trained in key skills, including interviewing child clients, counselling and negotiation and effective advocacy.

#### *h) Financing legal aid*

Financing of legal aid in Tanzania is fragmentary at present, with many different funders. The short-term nature of donor funding and the current lack of state funding and uncertainty as to funding in the future, makes it difficult to plan and establish a coherent national programme of legal aid for children. Finding a mechanism for sustained funding to ensure that children can access legal advice and representation is a fundamental challenge.

States use a range of methods to fund legal aid, in addition to the setting aside of funds from the State budget and external donor funding. The Draft UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems suggest that moneys recovered from forfeiture orders or fines imposed by judges on offenders could be used to cover legal aid. Advocates can be required to take a minimum number of legal aid cases each year as part of the criteria of registration, although given the small number of advocates in the country this would only go some way to addressing the funding issues. Alternatively a mandatory charge could be added to private legal bills of perhaps 2 or 3%, which would go to finance legal aid or other similar ventures.

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<sup>144</sup> See Draft UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems Guideline

**It is recognised that setting aside funding for legal aid is difficult in times of economic stringency. So too, is determining what forms of action and which groups of people should have priority in accessing legal aid. Children are, however, a particularly vulnerable group, a fact recognised by the UN Draft Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which recommend that Children should have access to free legal aid.<sup>145</sup>**

## **9. CRIMINAL JUSTICE**

This section considers children's access to justice within the criminal system. Data for this section was collected through a series of semi-standardised interviews and focus group discussions with juvenile justice professionals. These professionals included police officers (of all ranks); prosecutors (state attorneys and police prosecutors), resident and primary court magistrates, judges of the High Court; defence lawyers, retention home staff, approved school staff, staff in adult prisons, social welfare officers, ward tribunal members and staff at relevant CSOs and NGOs. In total, 96 professionals and 192 children were interviewed across 10 research regions. All professionals were interviewed individually as were 170 of the children. The rest of the children were interviewed in three focus group discussions. Interviews were conducted at national-level with relevant ministries and other juvenile justice stakeholders.

This section considers access to justice for children in conflict with the law, as well as for children who are victims and witnesses of crimes. The partner assessment to this report, *An Analysis of the System for Children in Conflict with the Law in Tanzania* goes into great depth regarding the juvenile justice system.<sup>146</sup> This report does not seek to repeat the findings of that report but focuses instead on children's access to justice and, in particular, access to legal representation and support, the court system and juvenile justice procedures. The report also examines access to justice for children who are victims and witnesses, focusing again on access to legal advice,

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<sup>145</sup> Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) Guidelines and Explanatory memorandum - version edited 31 May 2011.

<sup>146</sup> *An Analysis of the System for Children in Conflict with the Law in Tanzania*, UNICEF 2011.

support and representation, procedures and the extent to which these systems are able to hear the voice of the child. This section is divided accordingly; beginning with the situation for children in conflict with the law and moving on to the situation for children who are victims and witnesses.

### **9.1. *Children in conflict with the law: International juvenile justice standards***

The international framework governing children's rights within juvenile justice systems are extensive and detailed. The UN Convention on the Rights of the Child (CRC) contains several key Articles relating to children in conflict with the law, including Articles 37 and 40. Article 37 of the CRC protects the rights of children who are arrested and detained, including the right to legal and other appropriate assistance. Article 40 of the CRC sets out the essential elements of a juvenile justice system and the rights of children in conflict with the law. As with all matters relating to children, the general underpinning principles of the CRC Articles 2 (discrimination), 3 (best interests of the child), 6 (right to life) and 12 (right to be heard) also apply.

The CRC is accompanied by guidance in the form of the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) 1990,<sup>147</sup> the UN Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) 1985,<sup>148</sup> the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) 1990,<sup>149</sup> and the Vienna Guidelines for Action on Children in the Criminal Justice System 1997,<sup>150</sup> as well as the Committee on the Right of the Child's General Comment No. 10,<sup>151</sup> which covers the administration of juvenile justice. These instruments provide for access to justice for children in conflict with the law in several key provisions:

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<sup>147</sup> Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990

<sup>148</sup> Adopted by General Assembly resolution 40/33 of 29 November 1985

<sup>149</sup> Adopted by General Assembly resolution 45/113 of 14 December 1990

<sup>150</sup> In resolution 1997/30, paragraph 1, the Economic and Social Council welcomed the Guidelines for Action on Children in the Criminal Justice System annexed to the resolution and invited all parties concerned to make use of the Guidelines in the implementation of the Convention on the Rights of the Child with regard to juvenile justice.

<sup>151</sup> CRC/C/GC/1025 April 2007

The African Charter on the Rights and Welfare of the Child also enshrines rights for children in conflict with the law. Article 17 specifically contains due process guarantees and rights that must be available to all children who are in conflict with the law, including the right to legal representation and assistance.

### **9.2. Domestic laws**

Although Tanzania does not have a separate set of legal provisions and procedures applying to children in conflict with the law, relevant provisions are to be found in the Law of the Child Act (LCA), 2009, the Penal Code 1945 and the Criminal Procedure Act 1985.<sup>152</sup> These Acts set out the criminal offences and the applicable procedure for dealing with those who are suspected, charged with or convicted of committing a criminal offence, including children.<sup>153</sup> The LCA contains provisions relating to the juvenile court and sentencing.

### **9.3. Access to justice at the police station**

Rule 10.1 of the Beijing Rules provides that ‘upon apprehension of a juvenile his parents or guardian shall be immediately notified and, where such notification is not possible, the parents or guardians shall be notified within the shortest possible time thereafter’. In addition, Rule 15.1 provides that the parents or the guardian shall be entitled to participate in the proceedings. The CRC Committee in General Comment 10,<sup>154</sup> echoing Rule 10.1 of the Beijing Rules,<sup>155</sup> recommends that States explicitly provide in law for the maximum possible involvement of parents or legal guardians in the proceedings against a child.

### **9.4. Parents informed of child’s apprehension**

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<sup>152</sup> As amended in 1998.

<sup>153</sup> For a full discussion of the Law of the Child Act and the impact of its amendments to the Criminal Procedure Act and Penal Codes, please see the full assessment within the Analysis of the Juvenile Justice System in Tanzania.

<sup>154</sup> Para 54.

<sup>155</sup> The Rule provides that “upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter”.



In order to fulfil international obligations, parents should be notified immediately of their child's apprehension and a child should have a parent, guardian or other appropriate adult present when they are questioned. Section 56(1) of the Criminal Procedure Act goes only some way towards implementing this provision. It provides that :

*'a police officer in charge of investigating an offence in respect of which a child is under restraint shall, forthwith after the child is placed under restraint, cause a parent or guardian of the child to be informed that he is under restraint and of the offence for which he is under restraint.'*

However, a 'child' in this section only means a person under the age of 16 years, and does not cover 16 or 17 year olds.

Of the 154 children who were interviewed in relation to their experience at the police station, only 13 (8%) reported that an adult was present at the station immediately following their arrest. It was reported both by children and by the police officers who were interviewed that, in some cases, parents were not contacted, as children did not have their contact details. For example, a Police Constable in Mbeya stated that: *'Police officers do contact parents, if a child has their phone number or knows the physical address of his parents or relatives. If a child does not have a phone number and a physical address of his parents or relatives, it becomes difficult [to contact them.]'* An Officer in Charge in Arusha stated that: *'all our suspects ... are taken to the police station where they will be required to make a statement. In the case of children, some attempts are made to ensure that they get assistance from their parents or guardians. Admittedly, this is a very difficult venture especially when we do not have the contacts of their parents.'*

The CHRAGG study also made some findings on the obstacles to children's parents being contacted on arrest. Some children interviewed for the CHRAGG study reported that they had hidden their identities from the police or that they lacked proper addresses of their parents so could not pass these details onto police. It was also found that some children, on arrest, were asked to provide the police with their

parent's contact details, but that very few were actually contacted, though parents were contacted and spoken to if they were 'prominent people.' There were also some allegations that police demanded bribes to facilitate communication with parents.<sup>156</sup> Street children present a particular problem, as a Police Prosecutor noted: *'where a child under arrest has a parent, we often wait for him or her to come. The big problem is street children. They do not have parents or relatives here.'*

### **9.5. Parents present during questioning**

The presence of parents or an appropriate adult during police questioning of a child is seen as an essential element of good practice and ensuring access to justice for children. Without parent present it is difficult to ensure that the child understands what is being said, both in terms of content and language. An adult can also assist the child to express him or herself clearly.

Section 56(1) of the Criminal Procedure Act does not place a duty on a Police Officer to ensure that a parent or guardian is present during questioning of a child, nor does it place an obligation on Police Officers to contact an alternative adult (for instance, a teacher or a social welfare officer) in the event that the child's parents or guardian cannot be contacted or cannot attend.

Of the 154 children who were interviewed only 9 out of the 154 (6%) reported that an adult was present during questioning.<sup>157</sup> However, most of these adults were family members who had made a complaint against the child and cannot therefore be considered as being present to support the child.

A further reason for the presence of parents is to prevent oppressive questioning and false or forced confessions. Although children are capable of providing reliable evidence, they are, because of their age, more susceptible to pressure from authority, and thus to providing information that may be unreliable, misleading or self-incriminating.

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<sup>156</sup> The CHRAGG Report, p. 16

<sup>157</sup> This conforms to the finding of the CHRAGG study: p. 37 – 8.

49 of the 104 children in conflict with the law who were interviewed (47%) for this study reported that the police had forced or attempted to force them to sign a confession. Typically this involved physical violence or threats of physical violence.<sup>158</sup>

*'The police were beating me, and forcing me to agree with them and the offence. They forced me to put my signature on a statement. I had to agree because I was scared.'*

16 year old boy, Mwanza adult prison

*'The police questioned me twice on the eleventh day after the arrest. My parents were absent both times. At first I was questioned by two police officers who hit me with a soda bottle on my knees and ankles and forced me to sign a fabricated confession. They said they would let me go if I admitted I was guilty.'*

14 year old boy, Arusha Retention Home

*'At the Police Station, I was questioned and as I was denying it, the Police beat me up such that I could not resist any longer and conceded.'*

17 year old boy, Tanga adult prison

*'At the police station, I was made to sit down, and was then taken to a female cell, with adult female detainees. I stayed from 3<sup>rd</sup> to the 12<sup>th</sup> of January, and was then taken to court. The police did not tell me the charge. Instead, they threatened to beat me up so that I would confess. I admitted the charge, but repudiated my statement in court.'*

15 year old boy, Moshi Retention Home

Several children reported being made to sign a statement that they could not read.

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<sup>158</sup> The CHRAGG study confirms this finding, noting at page 15 that '56 children (31%) reported being badly treated or subjected to violence by the police, with some children alleging that violence and torture was used to extract confessions. This information was corroborated by the focus group discussions...'

*'The police did not tell me why I was being arrested. I was taken to Unga Limited Police Post, where I was beaten up and spent five days before being transferred to the Central Station for four days. I was forced to sign a long statement that I couldn't read. No one came to visit me at the police station.'*

15 year old boy, Arusha adult prison

*'I was arrested in 2010 by Police Officers at 5am while I was coming home from clubbing. The Police asked where I was coming from and I told them 'from the club'. I was then taken to the Police Station and I stayed there for thirteen days. I was questioned a day before going to court. I was being beaten and told to say the truth. I eventually signed the statement, but I did not read it.'*

16 year old boy, Arusha adult prison

*'I was arrested sometime in September 2010 while at home doing house chores. The local militia came to our home and told me that my friend had been killed and that I know the culprit. I was taken to Mbauda Police Station, where I was beaten up so that I would admit the offence, but I didn't. At the Central Police Station, I was also beaten up and forced to sign a statement I didn't make. I eventually signed the statement; though I was not given time to read it.'*

16 year old boy, Arusha adult prison

*'At Duga [Police Post] I was asked my name, age, religion and place of abode, then the Police wrote other things and I was told to sign the document, which I did. I did not read what was written in the statement. At Duga, they even forced me to say that my age was 18 years. I protested, but I was not listened to, even in court.'*

16 year old body, Tanga prison

If parents are not available it is common practice in many countries to use a substitute adult, such as a relative or close family friend, a social welfare officer or a teacher. This person is often referred to as an 'appropriate adult'. None of the children reported that a social welfare officer was present during questioning. The

study showed that police do not routinely contact social welfare officers, even in those areas where there are Gender and Children's Desks at the police station. This may be due, in some areas, to a lack of available social welfare officers, but more probably it is due to the fact that it has simply not been a practice of the police.

The Assistant Commissioner for Social Welfare expressed that as a matter of practice, the police should contact social welfare officers whenever a child is arrested.<sup>159</sup> However, this practice has not yet been fully implemented. Better cooperation, communication and understanding of the separate roles and responsibilities of the police and social welfare officers is needed before there can be meaningful joint working. Many police officers cannot see the need for the involvement of social welfare officers at the questioning stage and undertake interviews with children without another adult being present. A Police Investigator in Arusha reported that *'social welfare officers are not always called. We think it's not necessary to call them. Only parents are necessary.'*

The exception to this appears to be Hai, where the police routinely contact social welfare officers when a child is arrested. This was attributed to the establishment of a multi-disciplinary district child protection team,<sup>160</sup> which appears to have improved coordination and cooperation between police and social welfare officers. A social welfare officer in Hai reported that: *'After establishing the child protection team most cases are being reported...police do contact social welfare officers whenever they arrest children. Even at village level, there are established contacts to report to the child protection team and the message is relayed to a social welfare officer. We are contacted when a child is already at the Police Post. This is done most often, especially after establishing the child protection team in 2010. In every case involving a child we are normally contacted at anytime whenever there is a child in the station.'* However, it was noted that social welfare officers are still not routinely present during questioning: *'Police normally question children on their own and later we take our part.'*

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<sup>159</sup> Interview with Mr Moshi, Assistant Commissioner for Social Welfare

<sup>160</sup> With funding from UNICEF, district child protection teams have been piloted in Hai, Temeke and Magu.

## **We would recommend**

**1. That guidelines, a protocol or regulations should be developed that place a duty on the police to contact parents. This should contain details of:**

- a. When a parent must be phoned;**
- b. How many times the police must phone a parent;**
- c. What to do when a parent cannot be contacted**

**2. That children should not be interviewed without an adult present. In the absence of the parents this should at the present time, be a social welfare officer.**

**3. NGOs should be encouraged to develop an ‘appropriate adult service’, training people who are willing to attend at police stations and support the child during questioning. Community justice facilitators, MVCC members or village workers would be ideal candidates for training as appropriate adults.**

**4. Joint working protocols be established between the social welfare department and the police setting out when social welfare should be called and their role.**

**5. The High Court has directed that a confession should not be admitted unless it is made in the presence of an advocate, the child’s parents or an appropriate adult.<sup>161</sup> The Guidance from the High Court should be more widely publicised amongst resident court magistrates.**

### **9.6. *Right to legal assistance***

The presence of parents alone may not be sufficient to ensure that children’s access to justice is protected at the police station. Article 37 of the CRC provides that children shall have prompt access to legal and other appropriate assistance upon arrest. While the CRC does not address the issue of ‘free’ legal aid, the ICCPR enshrines the right to free legal assistance for the child if he or she, or the parents, cannot pay for a lawyer. Section 53(c)(ii) of the Criminal Procedure Act 1985 places

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<sup>161</sup> NEED TO ADD REF

an obligation on police officers, prior to commencing questioning or any other investigative actions, to inform suspects that they may communicate with particular persons, including a lawyer. However, this does not amount to a right for every child to have a lawyer present during questioning or to consult with a lawyer prior to being questioned.

None of the children who were interviewed reported having access to a lawyer at the police station and none had a lawyer present during questioning. It is always in children's best interests to ensure that a lawyer, either in the form of an advocate or a paralegal, is present when a child is questioned about an alleged offence, and this right should be clearly contained within the legislation.

Children should be granted time alone with their legal representative before questioning commences to allow them to consult with their lawyer, to ask them questions and generally understand the situation they are in.<sup>162</sup> The purpose of legal assistance when the child is first questioned by either the police or prosecutors is once again to ensure independent scrutiny of the methods of interrogation used and to ensure that the evidence is voluntary and not coerced.<sup>163</sup> A legal representative can ensure that inappropriate questions are not asked and that the child is treated in a manner suitable and appropriate to the child's age and maturity.

We recognise that at the present time, given the low number of advocates and paralegals that it may be unrealistic to seek to implement this right immediately. However, this should remain an aim and a plan for progressive implementation of the right to have a paralegal or an advocate present during questioning should be developed.

Neither section 53 of the Criminal Procedure Act nor the Legal Aid (Criminal Proceedings) Act gives a child the right to free representation. Only children facing a capital charge receive free legal aid, and then only once a charge has been laid. It does not provide a right to free representation at the police station. The UN CRC

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<sup>162</sup> See Article 40(2)(b)(vii) of the CRC.

<sup>163</sup> See Committee on the Rights of the Child, General Comment No. 10 (2007), para. 58. See also Vienna Guidelines, para. 16.

Committee, during its most recent periodic review of the Tanzanian government, recommended that the Tanzanian Government “ensure that persons under 18 years of age in conflict with the law have access to legal aid.”<sup>164</sup>

The extent to which States provide free legal aid varies significantly, but without some form of free legal aid, it is difficult to ensure that effective legal representation is available to the child throughout the legal process. In some States, local NGOs and organisations specialising in juvenile justice provide duty lawyers (either advocates or paralegals) who will attend to represent the child when he or she is being questioned after being apprehended by the police. Children need to be supported by a lawyer who understands the juvenile justice system and the unique problems faced by children in conflict with the law.

**We would recommend that, in order to implement the right to legal or other appropriate assistance regulations should be issued under the the Law of the Child Act, or an amendment should be made to either the Legal Aid (Criminal Proceedings) Act or the Law of the Child Act, to include provisions providing that a child has:**

- **A right to legal advice at any time that he or she is detained by the police;**
- **A right to legal representation when the child is alleged to or is being accused or recognised as having committing a criminal offence.**
- **A right to consult with his or her lawyer before being questioned and at any other time when proceedings are on-going;**
- **A right not to be questioned until a lawyer (whether an advocate or paralegal) is present;**
- **A right to free representation where the child cannot pay for representation.**

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<sup>164</sup> UN Committee on the Rights of the Child, Concluding Observations: United Republic of Tanzania, UNCRC/C/TZA/CO/2, 21 June 2006, para. 70.



The body responsible for ensuring that the child obtains legal representation should be clearly specified.

We would also recommend that the TLS, TANLAP and other legal aid providers consider setting up duty lawyer schemes, so that a lawyer is available to attend questioning of a child.

A police protocol or regulations should impose a duty on the police to inform the duty lawyer scheme of the child's apprehension when the child or parents have been unable to find a lawyer or do not have the ability to pay for one. The protocol or regulations should set out the circumstances and the time limit within which the police should undertake this task (for example, the child and parents should be asked on arrival at the police station whether they wish to be represented by a lawyer of their own choice. Where the child and/or parent do not wish to do so, the duty lawyer scheme (or a lawyer or paralegal where a duty lawyer scheme does not exist) should be contacted to represent the child immediately. The TLS should be encouraged to set minimum quality standards for lawyers representing children so that an effective service is provided.

### ***9.7. Jurisdiction over juvenile cases: the juvenile courts***

The formal judicial system relating to children in conflict with the law begins when charges are laid against the child. Section 97(1) of the Law of the Child Act provides that *'there shall be established a court to be known as the Juvenile Court for purposes of hearing and determining child matters relating to children.'*<sup>165</sup>

Under the LCA, the Chief Justice of Tanzania may designate any premises used by a Primary Court as a Juvenile Court in addition to the District Courts.<sup>166</sup> However, only a Resident Magistrate can preside over the Juvenile Court.<sup>167</sup> It would seem therefore, on the face of it, that jurisdiction over juvenile crime cases has been

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<sup>165</sup> s. 97(1), LCA

<sup>166</sup> s. 97(2), LCA

<sup>167</sup> s. 97(3), LCA

removed from the primary magistrates and the Primary Courts.<sup>168</sup> However, as discussed earlier, under the previous legislation, the now repealed Children and Young Persons Act 1937, the Chief Justice exercised his powers<sup>169</sup> and extended the jurisdiction over juvenile cases to the primary court.<sup>170</sup> The position on jurisdiction since the coming into force of the Law of the Child Act 2009 is somewhat unclear.

Clearly the juvenile court, presided over by a resident magistrate, has jurisdiction over children accused of criminal offences up to the age of 18 (and not 16 as under the Children and Young Persons Act). However, even though it was the undoubted intention of the drafters of the Law of the Child Act that all criminal cases involving children should be taken before a juvenile court,<sup>171</sup> it would appear that for the moment, until new Regulations are issued by the Chief Justice, that the district courts and the primary courts retain jurisdiction as well.<sup>172</sup>

The court hearing criminal cases against children varies from district to district. In some districts most juvenile cases are now heard in the district courts before resident magistrates who sit in effect as a juvenile court, but are not designated as such, with cases being heard in chambers. However, in other areas, primary courts presided over by primary magistrates continue to hear most juvenile cases. Primary magistrates interviewed in Babeti Primary Court, Masana Primary Court in Hai District, Malomboso Primary Court in Arusha, Moshi Urban Primary Court in Tarime District, the Myamagana Urban Primary Court in Mwanza and the Kigoma Primary Court all responded that they continued to try juvenile cases. In Nyamagana Urban Primary Court 46 juvenile cases were instituted and tried between March 2010 and July 2011. In Tarime Urban Primary Court, magistrates reported that they tried around 3 juvenile crime cases per week.

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<sup>168</sup> There is currently only one Juvenile Court in operation in Tanzania, and the Chief Justice has yet to designate any primary courts as juvenile courts.

<sup>169</sup> Under s.43 of the Children and Young Persons Act

<sup>170</sup> See the Children and Young Persons (Extension of Ordinance to Primary Courts) Order, Government Notice 640 of 1964.

<sup>171</sup> See for instance s.101 of the Law of the Child Act.

<sup>172</sup> See s.160 Law of the Child Act which provides that all rules, orders, notices, etc made under repealed laws shall be deemed to have been made under the new Act and will remain in force and have effect until amended or withdrawn under this Act. See also s.160(2)(a) which enables the District Court to retain jurisdiction in the absence of an established juvenile court to take over the functions.

The primary courts visited all had a room which could be used to try children ‘in camera’, but the need to try children in camera was not always well understood. A primary court magistrate in Igarukilo Court noted that *‘I would only conduct sessions in camera if the case involves children litigants. If a case is between a child and an adult, I conduct the session in open court’*. One of the major issues with the use of primary courts is the provision that prevents children being legally represented,<sup>173</sup> which conflicts with the provision in s.99 of the Law of the Child Act giving the child the right to legal representation. Young children can be tried without any form of assistance to enable them to defend the allegations made against them, reducing access to justice.

The Law of the Child Act provides that the Chief Justice shall publish rules to govern the procedure and the conduct of proceedings in the Juvenile Court. At the time of writing, the Chief Justice had not published such rules. However, the LCA provides the following conditions that must be observed in proceedings before the Juvenile Court:

- (a) The Juvenile Court shall sit as often as necessary;
- (b) Proceedings shall be held in camera;
- (c) Proceedings shall be informal as possible, and made by enquiry without exposing the child to adversarial procedures;
- (d) A social welfare officer shall be present;
- (e) A right of a parent, guardians or a next of kin to be present;
- (f) The child shall have a right to next of kin and representation by an advocate;
- (g) The right to appeal shall be explained to the child; and
- (h) The child shall have a right to give an account and express an opinion.<sup>174</sup>

The Juvenile Court, when hearing a charge against a child shall, if practicable, unless the child is charged jointly with any other person not being a child, sit in a different building or room from that which the ordinary proceedings of the court are held.<sup>175</sup>

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<sup>173</sup> Magistrates Courts Act 1984 s.33

<sup>174</sup> s. 99(1), LCA

<sup>175</sup> s. 98(3), LCA

Only one juvenile court has been established so far, in Kisutu, Dar es Salaam. It is presided over by one resident magistrate, who sits part-time. At present, the court appears to hear few juvenile cases despite the fact that it is the main juvenile court for Dar es Salaam, and the police having issued an instruction that all cases involving under 18 offenders in Dar es Salaam must be referred to the juvenile court. The Court only sits from 7am – 9am, two days a week.<sup>176</sup> If the Magistrate is not there (e.g. if she is sick or on leave), the court ceases to sit.<sup>177</sup> In the first five months of 2011, the Court completed eight full trials. The Magistrate at the Juvenile Court reported that she deals with only four or five cases per week, though some weeks, this could be as low as two. This is difficult to understand given that remanded juveniles must appear before the court every 14 days for a review.

According to the Juvenile Court Magistrate, she often dismisses cases before they reach full trial, or the case will be withdrawn by the prosecution. Cases may be dismissed by the Magistrate under s.225 of the Criminal Procedure Act 1985, if the prosecution has not sufficiently advanced the case. The Magistrate reported that she uses this power in around 80% of cases. Normally, a case will be dropped after the third or fourth appearance by the accused (after the child has spent about two months on remand). The numbers of cases waiting to be tried in the juvenile court and the period of delay between charge and trial is unknown.

It is difficult to distinguish the facilities, the practice or the procedure of the Juvenile Court in Kisutu from any other district court surveyed for this study, though clearly there are greater differences in the primary court.<sup>178</sup> All district courts including the juvenile court hear cases against child defendants in camera. ‘In camera’ is defined as requiring the case to take place in chambers. This term is often taken in other countries to mean in a closed rather than an open courtroom, rather than

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<sup>176</sup> Interview with Juvenile Court Prosecutor and SW Officers; interview with Juvenile Court Magistrate.

<sup>177</sup> Interview with CHRAGG

<sup>178</sup> The primary court magistrate does not need to be legally qualified though magistrates are now required to hold at least a certificate in law. Neither prosecutors nor defence lawyers are permitted to be present in the primary court, and the proceedings are conducted in a more informal, inquisitorial manner. The facilities in those primary courts visited for the purposes of this study were poor, with the judges chambers lacking virtually all facilities.

specifically in chambers. In all the courts visited for the purposes of this study, magistrates' chambers were small rooms, effectively limiting the number of persons who can be present in the room. The Juvenile Court in Kisumu has space for a maximum of 6 people. There is very little space within chambers and it is difficult to envisage the child, his parents, lawyer, prosecutor, social worker and witnesses fitting into the room.

**We would recommend that any new court building, including the 20 new primary courts to be built under the Legal Sector Reform Programme should contain a designated juvenile court room for the hearing of criminal charges against children that would provide adequate space for the child, his parents and his lawyer.**

#### **9.8. Training of juvenile judges**

Of the resident magistrates interviewed none had received juvenile justice training and only 2<sup>179</sup> had received any training on the Law of the Child Act, which was provided by the local child protection team. The Ministry of Constitutional Affairs and Justice has not as yet organised training for judges on this Act, which has now been in force for over a year.

**We would recommend that:**

- 1. A programme of training for magistrates hearing juvenile cases should be developed and delivered as a matter of urgency.**
- 2. Once this programme of training has been developed and delivered, the Chief Justice should issue an Order providing that only magistrates who have received training on juvenile justice and on the Law of the Child Act should be able to hear juvenile cases.**
- 3. Magistrates who have received the training should be able to request the Chief Justice that they be designated as juvenile judges**

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<sup>179</sup> In Babeti and Hai. The other 5 resident magistrates had not received any training on juvenile justice or the Law of the Child Act, including the Juvenile Court judge.

**4. The Institute of Judicial Administration, which provides continuing education for magistrates (Certificate of Law and Diploma in Law), should develop specialised courses for designated specialist magistrates in juvenile justice.**

**9.9. Parental participation at the first hearing and trial**

S. 108(1) of the Law of the Child Act provides that in all proceedings against a child, where the parents, guardian, relatives or social welfare officers attend, any one of them may, with the prior consent of the court, assist the accused child in the conduct of his case, and in particular with the examination and cross-examination of witnesses. This provision implements Rule 15.1 of the Beijing Rules and promotes parental participation. However, in many cases the children do not have parents, are street children or the parents have not been contacted before the child appears before the court for the first time. In the juvenile court, the magistrate estimated that about 50% of children appearing before her did not have a parent.

The availability of social welfare officers to accompany children at court varies across the country. We were told by a resident magistrate in Kigoma that there are no social welfare officers attached to the court, whereas in Hai, a social welfare officer is based at the court and can attend at hearings to support the child in the absence or a parent.<sup>180</sup> In Nyamagana in Mwanza District social welfare officers reported that they had attended 9 juvenile cases in the previous 16 months. However, only 5 children out of 130 reported that they had a social welfare officer present during their initial hearing. Children who did have a social welfare officer present at the hearing stated that they were able to speak to the officer, but did not know why the officer was present in court. For instance, a 13 year old boy interviewed at Dar es Salam Retention Home stated that: *'The Social Welfare Officer didn't tell me anything...he was just asked by the Magistrate where to take me and he said I should be taken to the Retention Home...I haven't seen him since then.'*

When a social welfare officer is present, the assistance that can be given to the child is limited. The social welfare officers do not have access to transport and are very

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<sup>180</sup> This is likely to be the result of having an inter-disciplinary District Child Protection Team which is funded by UNICEF.

unlikely to have met the child before he or she is brought to the court. They do not read the case papers before a trial and therefore their ability to assist a child with examination and cross-examination, or assist the court, is extremely limited.

#### **9.10. Legal representation at the first hearing and trial**

Section 99(1)(f) provides that children shall have a right to representation by an advocate. However, none of the resident magistrates in either the juvenile court or the district court surveyed for this study could recollect a case in which a child had such representation either at the first hearing or at the trial itself. While all resident magistrates recognised that it was a right, all referred to the practical difficulties of implementation. The lack of legal representation reduces children's access to justice significantly. Children are unfamiliar with courts and with the legal process. They have very limited understanding of what is entailed in determining whether charges have been properly set, when bail should be granted or of preparing a defence. They are unlikely to have any understanding at all of the rules of evidence that apply or the need to cross-examine witnesses for the prosecution. Some children interviewed stated that they could understand what was going on in Court, and that they felt magistrates made allowances for them and assisted them. However, interviews with other children demonstrated that, in the absence of legal and other assistance, they found the environment of court intimidating and did not know what to do or what was expected of them, especially when asked to make a statement, as required by the Law of the Child Act '*on whether he has a case to show why he should not be convicted*'.<sup>181</sup> One resident magistrate noted on interview that one child, when asked to present his defence, merely said: 'I didn't do it'.<sup>182</sup> Examples from children interviewed for the survey indicates the difficulties children face without legal representation. Yet, 93% of children interviewed for the study reported that they had not received any legal assistance, including at the first initial hearing where charges were laid. Only children who are accused of homicide are entitled to free access to legal representation and only during the actual trial. However, some of the

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<sup>181</sup> S.196 Law of the Child Act 2009

<sup>182</sup> Resident magistrate, Babeti

children interviewed for the study had been charged with murder but even they had not had any access to legal assistance before trial.

*'I don't know anything on my charge sheet. I used to go to court every 14 days. Every time, the Magistrate adjourned the case. I pled not guilty to the charge sheet because I did not commit the offences...No one assisted me in the conduct of my case. Even the magistrate was not in my favour. No one was there for me during the hearing.'*

16 year old boy, Lindi adult prison (convicted to three years imprisonment for rape and theft)

*'I was taken to court a week after questioning (by the police). At court, the charge was read over to me. I pled not guilty...I felt incapable of speech while I was on the stand. I felt disorientated. The magistrate did not speak to me. I did feel that I would have had the opportunity to get my views across had I been in the right mindset to do so. I was informed of my right to bail, but my parents were not aware that I was being taken to court.'*

14 year old boy, Arusha Retention Home

*'When I went to court, the charge was read out. I was asked whether I had stolen the cart. I pled not guilty and was then brought to the Retention Home. I got an idea about how the proceedings would work as I watched what happened at the mentions prior to mine. At the other hearings (I have had three mentions) I don't feel like justice was done. The complainant has only shown up at the first hearing. I try to complain to the Magistrate, but the Magistrate doesn't listen to me properly and doesn't give me the chance to speak and get my views across. I go back to court every 14 days and the mention lasts not more than two minutes. The Magistrate always just reschedules another date. I try to argue with the magistrate, but he says he doesn't want to hear complaints from me. I haven't had anyone there to help me.'*

16 year old boy, Arusha Retention Home



*'At court I was charged with murder, but the court told me it would be manslaughter. Bail was not explained to me. I did not get any assistance from a lawyer or social welfare officer. I think I understood my case, though I'm not sure whether the charge is murder or manslaughter' [researchers discovered it was murder].'*

15 year old boy, Arusha adult prison

*'I did not understand the procedures. Although the language used was Kiswahili, which I understand, the magistrate did not fully explain the proceedings to me.'*

16 year old, Arusha adult prison

*'In court I do not get any assistance either by a lawyer or a social welfare officer. I am informed that I will get such assistance when my case goes to the High Court for a hearing, but not at this committal stage...sometimes I do not understand the proceedings due to the use of legal jargon by both the court and the prosecutors.'*

17 year old boy, Arusha Retention Home (on murder charge)

*'I pleaded guilty to the charge of being in possession of marijuana...Despite the fact that I have pleaded guilty, I do not understand the proceedings in court.'*

15 year old boy, Arusha Retention Home

*'The magistrate does listen when I speak, but I don't get the chance to speak. The others in court [co-accused] will argue with the magistrate for a closer court date, and there won't be time for me to speak, because the police will usher everyone out of court before I get the chance...I haven't complained about being taken to the Remand Home. I don't get the time in court to make this complaint, as there are so many others that speak on the court days. I don't get the chance to speak as I'm only a child.'*

16 year old boy, Arusha adult prison

*'My case was conducted in chambers. An old man had been the one who asked whether or not I had wounded the child who took the watch. I said I did but as I tried*

*to explain why I did, I was told to wait. I felt like I could not get my views across. I did not have my right to bail explained to me.'*

13 year old boy, Tanga Retention Home

*'At the Primary Court, the charge was read over to me and I pled not guilty. I was confused with the surroundings. The case was conducted in chambers and the magistrate dressed in plain clothes, [but] I felt I wasn't accorded the opportunity to get my views across.'*

16 year old, Tanga adult prison

*'At court I felt bad, as I had never been on the stand. I did not get the chance to defend myself.'*

17 year old boy, Tanga adult prison

Lack of legal or other appropriate assistance and representation will seriously impair a child's ability to access justice, as it creates an inequality of arms between the state and the accused. Even where court procedures are modified to ensure that the process is 'child-friendly', without access to quality legal assistance and representation, it is difficult to argue that children receive a fair trial and, therefore, do not receive full access to justice.

Access to justice is also impeded if children are not informed of their right to appeal and granted free legal aid to make an appeal. The children interviewed for the study did not appreciate that they could appeal and had not been informed of their right to do so. As a result, children appeal against conviction or sentence only very rarely.

Access to justice for children in conflict with the law is hampered at all stages of the proceedings by poorly functioning and uncoordinated systems, a lack of specialised institutions, specially trained practitioners and a lack of free legal aid.

**We would recommend that:**

a. Legal aid providers consider setting up a duty lawyer scheme, staffed by advocates and paralegals at every district and juvenile court that hears criminal cases against children, to ensure that children can access the legal representation to which they are entitled both at first hearing and at trial. A duty lawyer scheme should also operate at the retention homes. Legal aid providers should agree between themselves which of them should take responsibility for ensuring that an advocate or paralegal attends at the retention home at least once a week and sees all children who have entered the retention home. The legal aid provider should ensure that all children in the retention home are given legal assistance in the preparation of their defence and are represented at review and the final trial.

b. Where an advocate is not available, a trained paralegal should be able to represent a child in the juvenile court.

c. Training course for paralegals should be established and approved by the Ministry of Constitutional and Legal Affairs.

d. That the Ministry of Constitutional and Legal Affairs set up a ring-fenced fund to pay for representation of juveniles to ensure that the right contained in section 99(1)(f) of the Law of the Child Act is implemented fully.

e. Incentives should be offered to advocates to work with NGOs in rural areas.

f. Funders and the government should set aside a fund for the recruitment and training of paralegals in the rural areas to represent children in retention homes under the supervision of an advocate.

#### **9.11. Delay**

The ICCPR, the CRC, the Banjul Charter and the African Charter on the Rights and Welfare of the Child all require that an individual charged with a criminal offence shall be brought to trial within a “reasonable” period of time and that delay should

be avoided.<sup>183</sup> The various international instruments all use slightly different terms, but the essence of the provisions is that there should be no delay.

There is no standard definition of what constitutes delay, or what length of wait between charge and final trial is acceptable. However, it is generally accepted that “reasonable” delay when applied to a child is a shorter time than that which is reasonable for an adult. The Committee on the Rights of the Child, in General Comment No 10, recommends that the States should set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time limits should be much shorter than those set for adults.

For children who are placed in pre-trial detention it is all the more important that there should be no unwarranted delay in bringing them to trial, especially in light of the requirement under Article 37(b) CRC that pre-trial detention should only be used as a last resort and only for *‘the shortest appropriate period’ of time’*.

The Criminal Procedure Act provides that it shall not be lawful to adjourn a case for a period of more than 60 days,<sup>184</sup> but this can, in exceptional circumstances, be extended to two years.<sup>185</sup> In other words, a child must be tried, other than in exceptional cases, within 60 days, and s.103(2) of the Law of the Child Act provides that in any offence other than homicide, the case shall be disposed of by the court on that day.

The CHRAGG report also found that: *‘Children who are charged with major offences like murder and armed robbery are often spending more than 2 years in detention facilities pending the hearing of their cases. Children charged with minor offences*

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<sup>183</sup> See Article 40(2)(b)(iii) of the CRC; Article 14(3)(c) of the ICCPR; Article 6(1) of the ECHR; Article 7.1(d) of the Banjul Charter; Article 17(2)(c)(iv) of the African Charter on the Rights and Welfare of the Child; Article 8 of the American Convention; Rule 20:1 of the Beijing Rules; and the Vienna Guidelines, para. 23.

<sup>184</sup> section 225(4)(a) s.45 – 46 of the Judicial Service Act require a Magistrate or Judge to pronounce a judgment within 60 days.

<sup>185</sup> Section 255(4)(c) Criminal Procedure Act

*spend shorter times in pre-trial detention, but often longer than 60 days permitted.*<sup>186</sup> It was clear from the interviews carried out for this study with children and professionals that the 60 day limit is being exceeded for some children in pre-trial detention. A magistrate interviewed in Dodoma reported that *'normally, cases take from 9 months to 2 years.'*

Magistrates can dismiss cases if the time period is exceeded and the case has not progressed, but some professionals and children reported that children may simply be re-arrested.

*'On 26 March 2011, I appeared in court and a charge of armed robbery was read to me, together with one adult. I denied the charge...I have been to court five times. The last time I went the charge was withdrawn, however, I was immediately arrested and charged before another magistrate for house breaking. I complained to the magistrate and was told to write a complaint letter to that effect. I want to write that letter but I don't know how to go about it.'*

17 year old boy, Arusha Retention Home

In addition to the requirement that the trial should take place within 60 days, section 15 of the Primary Courts Criminal Procedure Code, provides that no persons shall be remanded:

*( a) in prison custody for more than fifteen days at any one time;*

*( b) in custody in a lock-up for more than seven days at one time; or*

*( c) in the custody of any other person or place for longer than is necessary to hold him and convey him to a prison or lock-up and, in any event, for longer than seven days at any one time.*

Children must therefore, be brought back before the court for a review and to determine whether it is necessary for the child to remain in pre-trial detention every 15 days. Our survey made it clear that this does not always occur in practice. This

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<sup>186</sup> CHRAHH Report, p. 40

was primarily attributed to a lack of transport to ensure that children get to court, and a lack of available magistrates.<sup>187</sup> It is clear at all the courts surveyed that transporting children from the retention home to the court presents a major problem. One resident magistrate informed us that there was only transport once a week, and that did not always happen.<sup>188</sup> We were informed that a child's trial often goes part-heard because the child must be taken back on available transport. Trying to liaise with the prosecutor and the witnesses to re-list the case is difficult. The trial cannot continue the next day as transport is rarely available.

A shortage of resident magistrates presents a further problem. The Chief Justice reported *'there are still 350 Magistrates needed in Tanzania. Currently, some Magistrates have to cover 2 courts that are 100kms apart.'* Lack of available Magistrates is a particular problem in rural areas, as reported by the Director of Human Rights at CHRAGG. However, even in District Courts in urban areas, there appear to be a lack of Magistrates. The State Attorney in Lindi reported that: *'in the District Court, we only have three Magistrates. Sometimes you find one will be on leave, and cases are adjourned.'*

The Juvenile Court in Kisumu sits with only one Magistrate from 7am – 9am, Monday to Friday. According to the Juvenile Court Prosecutor: *'there is a problem with delays. For example, one boy has been on remand for 3 years (on bail), on a sexual offence charge. He was charged when he was 14 and is now 16 and the case still hasn't been heard.'* However, it is also the case that due to poor co-ordination, some magistrates sit in their courts with few cases to occupy them.<sup>189</sup>

**We would recommend that :**

**a. Serious consideration be given to establishing a juvenile courtroom at each retention home so that reviews can be undertaken by a resident magistrate at the retention home, removing the need for children to be transported to the court. We**

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<sup>187</sup> For more detailed information, please see section X (delays).

<sup>188</sup> Responsibility for transport of remandees from the retention home to the court falls to the police departments in most areas of the country.

<sup>189</sup> There are of course a number of reasons for delays including a slow investigation process in some cases and the fact that there is only one forensic laboratory in the country.

would encourage the Chief Justice to address this under the powers granted to him under the Law of the Child Act 2009. We believe that this would enable the current laws to be more effectively implemented and, if the duty lawyer scheme is introduced at the retention homes, would ensure that children are legally represented. We appreciate that it might be more difficult for parents to attend but, taking the rate of parental attendance into account, we consider on balance that reviews at the retention home would be in the best interests of children.

b. Consideration should also be given to holding some juvenile trials at the retention home, especially when, despite the provisions of the Law of the Child Act, it is clear that the trial will not be finished within one day.

c. The Ministry of Constitutional and Legal Affairs should undertake an administrative review to determine how children's cases can be more effectively managed and timetabled.

d. The Ministry of Constitutional and Legal Affairs should consider establishing Juvenile Justice Management Committees in each district. The Committees should have representatives from all the juvenile justice stakeholders (police, magistrates, prosecutors, social welfare departments, retention home head, transport providers (if transport is not provided by the police) and legal aid providers. The Committee should be responsible for co-ordination of the justice system for children and for ensuring that targets set for the completion of trials involving children are met. In areas where there are already multi-disciplinary child protection teams, consideration should be given to establishing the Juvenile Justice Management Committee as a sub-committee.

#### ***9.12. Access to justice for children in conflict with the law in the quasi-judicial system***

The Ward Tribunals Act 1985 gives the ward tribunals jurisdiction to hear minor criminal offences. The primary function of the ward tribunal is to secure peace and harmony in the area in which it is established, by mediating and endeavouring to

obtain a just an amicable settlement of disputes.<sup>190</sup> It can order the party who committed the offence to apologise to the other, censure or admonish the child, order a fine or that the child pay back the other through monetary payment, community work or some other agreement acceptable to the village or ward. It is not clear to what extent the ward tribunal retains its jurisdiction over minor criminal cases following the passing of the Law of the Child Act. There is nothing in the Law of the Child Act that prevents ward tribunals from continuing their present jurisdiction. In practice, however, not one of the ward tribunals that were surveyed for the purposes of this study dealt with allegations of criminal behaviour or anti-social behaviour by a child. Anti-social behaviour was seen by those surveyed as a matter for the family and village workers.

**We would recommend that the ward tribunal should not retain any criminal jurisdiction. However, where a diversion programme has been established in the area and a child has been referred to that programme, Ward Tribunals might consider offering offender/ victim mediation services to those running the programme, as a part of that programme. If it were to do so, the members of the Ward Tribunal would need to undergo training on child development, juvenile justice and mediation.**

### ***9.13. Access to justice for children in conflict with the law in the informal/ traditional system***

Traditional leaders who were interviewed for this study stated that they themselves would not deal with cases relating to children in conflict with the law. Instead, they told researchers that they would refer such cases to the police. It is not possible to know whether this is always true but it would appear that traditional systems, such as Elder Councils and Clan Councils would not normally convene to hear cases involving children in conflict with the law.

In many instances however, criminal offending between children is dealt with informally between families. Where a child has committed a crime, the parents or

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<sup>190</sup> Ward Tribunals Act 1985, section 8(1).



guardian may approach the victim or his or her family with a traditional reconciliation offering. The compensation or other form of restorative action is then agreed between the families. Magistrates and police informed us that many cases that are initially reported to them are settled between families rather than through judicial proceedings. Complaints are withdrawn and witnesses become unwilling to give evidence.

Traditional mechanisms for settling cases should be supported, where this is in the best interests of the child and is a positive alternative to judicial proceedings. The CRC and other international instruments all encourage alternatives to judicial proceedings, but there are risks with such an approach. Traditional justice can itself violate rights and lack fairness, thus limiting the child's access to justice. While village workers, Ward Councils, Elder Councils and Clan Councils may in particular areas have a role to play in mediating and settling disputes, they need to be assisted to ensure that they operate in a manner that treats children's best interests as a primary consideration, and that any settlements reached are non-discriminatory.

**It is recommended that government and NGOS develop training materials and where feasible, provide training, to ensure that traditional bodies are updated on children's rights, the Law of the Child Act and current good practice.**

#### ***9.14. Access to justice for children in conflict with the law in the administrative system***

Local Government officials, social welfare officers and the police are the major actors in the administrative system in relation to children in conflict with the law

The juvenile justice study identified several key problems relating to the actions of the police in the context of children who are in conflict with the law. These included:

- The fabrication of allegations against vulnerable children, including those without parental care and those who are working
- Children being arrested for one offences and then being accused of much bigger and unrelated offences

- Arrest, detention and imprisonment of children not being used as a last resort
- Children being held in police detention for long periods of time
- Children being held with adults in police detention
- Children not being permitted to see visiting family members while in police detention
- Conditions in police detention failing to meet international standards
- A high incidence of police ill-treatment of child suspects
- A high rate of forced or attempted forced confessions
- Failure of the police to inform children of the reasons for their arrest
- Lack of awareness among children of their rights to a legal representative, or to contact their relatives
- Failure to contact an appropriate adult at the time of arrest, or during questioning
- No access to a lawyer at the police station and during questioning
- No access to a SW Officer following their arrest and during questioning.

The Juvenile Justice Study has addressed these issues, all of which impede children's access to justice, and has made recommendations to resolve them, which this study supports. As a result we have not covered them once again in this report.

### ***Conclusion***

The introduction of the Law of the Child Act 2009 has taken very positive steps towards the introduction of a juvenile justice system. However, the Act is not being implemented fully as yet and, as a result, the rights of children to access justice as set out both in the Tanzanian legislation and in international instruments are not being assured to them. The many issues that impede children's access to justice have been set out in this section of the report. The challenges include lack of clarity with regard to jurisdiction, infrastructure, including inadequate court buildings, case management systems, human resources, lack of community-based services and a lack of access for children to legal advice and representation.

Tanzania lacks specialised institutions and specialised juvenile justice practitioners. A welcome initiative is the police Gender and Children Desk, established in some police stations. The desk is staffed by a small number of trained staff. Sadly, staff do not appear to stay long-term on the Desk, thus reducing expertise. The law does not provide for specialist prosecutors for children in conflict with the law, although there is a specialised prosecutor attached to the Juvenile Court in Dar es Salaam and in several other districts. Magistrates taking juvenile cases do not receive training on juvenile justice or on communicating with children, or indeed on the Law of the Child Act. In addition there is a shortage of social welfare officers for magistrates to draw upon in order to assist in Court.

Professionals in most of the study regions had a low awareness both of domestic laws relating to children and of standards relating to child rights. Many had not heard of the Law of the Child Act, and the vast majority did not have a copy of the Law. Further, the Act has not, at the time of writing, been translated into Kiswahili meaning that the Law of the Child Act is inaccessible to large numbers of front line practitioners and professionals working with children, as well as to most children and their parents. We must conclude that the lack of a translated Law of the Child Act when taken together with the lack of awareness and the lack of training has resulted in a low level of implementation of the Act.

Finally, the lack of legal advice, support and representation in all systems causes a significant obstacle to children accessing justice.

### ***Recommendations***

We have made a series of recommendations in this section but would recommend in addition:

- **The development of career specialisms: police and prosecutors should be able to specialise in working with children and vulnerable adults and should be able to access training on a national basis to enable them to do this. Once police and prosecutors become specialised in working with children,**

they should not be moved away from this area of work without good reason;

- A national training programme on the juvenile justice aspects of the Law of the Child Act should be developed for magistrates, police, prosecutors and social welfare officers. This should be funded primarily by Government, building upon existing training materials developed by NGOs. The Government should work with UNICEF, other UN agencies and funders as well as NGOs to agree the delivery of a nation wide training programme over the next 18 months.
- The Government, funders and NGOs should develop a plan for providing greater access to legal advice and representation to children alleged to or accused of criminal offences. A number of pilot 'duty lawyer schemes' should be established at police stations, retention homes and courts hearing criminal cases against children over the next 12 months to ascertain the best model for ensuring such access nation-wide.

#### **9.15. *Child who are victims of or witnesses to criminal offences***

#### **9.16. *International standards***

The international standards protecting children who are the victims of criminal acts, or who are witnesses to such acts, are to be found in the CRC, but more detailed guidance on the treatment of child victims and witnesses and on their access to justice is to be found in the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.<sup>191</sup> International standards require that children must receive access to *'the mechanisms of justice and to prompt redress, as provided for*

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<sup>191</sup> ECOSOC Resolution 2005/20 of 22 July 2005. See also and the Guidelines for Action on Children in the Criminal Justice System. ECOSOC Resolution 1997/30 of 21 July 1997. UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. General Assembly Resolution 40/34 of 29 November 1985. Other guidance, including, for example, the International Association of Prosecutors (IAP) Model Guidelines for the Effective Prosecution of Crimes against Children also instructs those within the justice system on how to work in a child-friendly manner with children who are in contact with the criminal law system as victims and/or witnesses. Available at [http://www.icclr.law.ubc.ca/Site%20Map/Programs/Model\\_Guidelines.htm](http://www.icclr.law.ubc.ca/Site%20Map/Programs/Model_Guidelines.htm)

by national legislation, for the harm they have suffered,<sup>192</sup> as well as access to fair and adequate compensation.<sup>193</sup>

The African Commission on Human and Peoples' Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>194</sup> also contains a provision specifying that the right to an effective remedy, which includes:

- (i) access to justice;
- (ii) reparation for the harm suffered;
- (iii) access to the factual information concerning the violations.

The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime set out specific rights for children involved in the criminal system who have been the victims of or witnesses to crimes:

- The right to be treated with dignity and compassion<sup>195</sup>
- The right to be protected from discrimination<sup>196</sup> (including discrimination that might prevent a child from participating in proceedings due to age)<sup>197</sup>

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<sup>192</sup> Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20 of 22 July 2005, Para 47 and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985. Article 1.

<sup>193</sup> Para 48.

<sup>194</sup> Adopted by the African Commission on Human and Peoples' Rights, 2001.

<sup>195</sup> Guideline 14 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

<sup>196</sup> Article 2 of the UNCRC States: "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

<sup>197</sup> Guideline 18 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

- The right to be informed<sup>198</sup>
- The right to be heard and to express views and concerns<sup>199</sup>
- The right to effective assistance<sup>200</sup>
- The right to privacy<sup>201</sup>
- The right to be protected from hardship during the justice process<sup>202</sup>
- The right to safety<sup>203</sup>
- The right to special measures to prevent re-victimisation<sup>204</sup>
- The right to reparation<sup>205</sup>

### **9.17. Reporting crime**

The Government of Tanzania has not up until now commissioned any crime surveys, making it difficult to determine how many children are the victims of crime. As part of the research for this study, we provided questionnaires to 70 children and asked them whether they had been the victims of a crime. Of these children 49 (70%) said that they had been the victim of a crime, but only 12 had actually reported the crime to the police.

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<sup>198</sup> Guidelines 19-20 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

<sup>199</sup> Article 12, CRC and Guideline 21 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

<sup>200</sup> Guideline 22-24 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

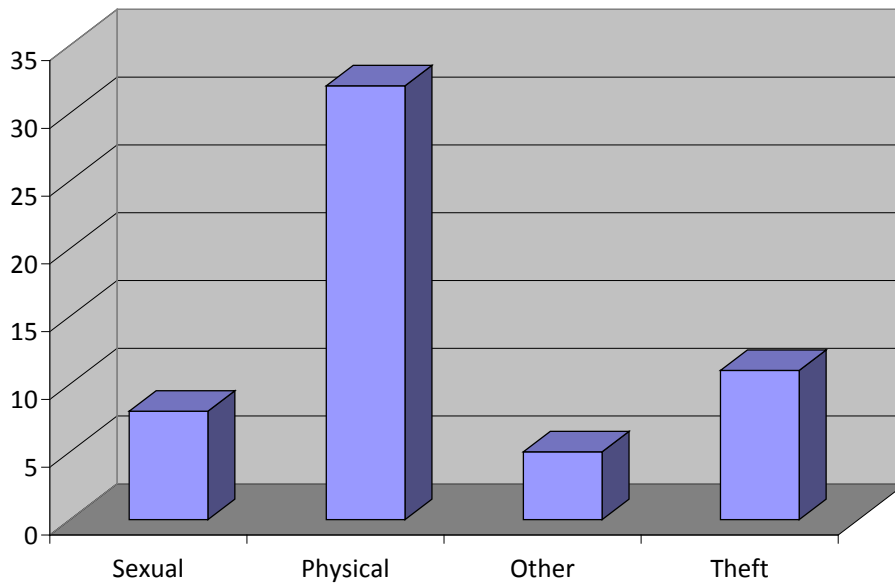
<sup>201</sup> Article 16 CRC and Guidelines 26-28 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

<sup>202</sup> Guideline 29 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

<sup>203</sup> Guidelines 32-34 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

<sup>204</sup> Guidelines 38-39 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

<sup>205</sup> Guidelines 35-37 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.



In interviews, children gave several reasons why do not report offences:

*'I was raped by my cousin whom we were living with and he was threatening to kill me if I dare to report to anyone. I didn't go to anyone because I was scared. It was my teachers who discovered as they saw I wasn't acting normal.'*

F, 14, Tameke.

*'I was afraid to go to them [the police] because if I report they would pin me down with a loitering case as they normally do to children living on the streets.'*

M, 16, Moshi (victim of exploitative labour)

*'I didn't go to the police] because I was scared my aunt would beat me up more.'*

F, 12, Bwitenge, Serengeti (child who was abused by her Aunt)

*'I didn't go to the police because I was scared. I have seen other girls going to the police but in a few days their parents or relatives are released from the police detention and at the end of the day they end up being circumcised. Also my parents used to tell that they are not scared of going to the police.'*

F, 18, Dar es Salaam recounting an experience when she was trying to avoid FGM at the hands of her parents.

Some children did report that they went to neighbours or to relatives who took them to the police. One child from Tameke who went to the police after an uncle failed to send him to school stated

*'I heard from people that police have established a gender desk where they help women and children so I was free to explain'* <sup>206</sup>

A further reason for low reporting rates may be that children do not always understand which acts are criminal. For example, even high levels of violence within the family may be treated as culturally acceptable or as a social or civil issue, to be dealt with by the family, the community, or by a social welfare officer or other administrative official.

Police also need persuading on occasions to take action. NGOs reported that in such cases they direct the child to the police. The response of the police in such cases is to provide the child with a form PF3, which enables the child to obtain free medical treatment. The child must then take the form to the hospital and obtain a report on injuries sustained. Once this report has been obtained, the child is expected to return with the completed form to the police. Without a completed PF3, the police are reluctant to take action in physical or sexual abuse cases. For many children the bureaucracy involved, and the total of visits involved with making a complaint is too great and without support, they simply give up.

#### **9.18. Competence to give evidence**

The right of children to give evidence is covered both by s.127 of the Evidence Act 1967 and s. 115 of the Law of the Child Act 2009. The Law of the Child Act does not repeal s.127 of the Evidence Act and thus it is presumed that the two provisions are both to be regarded as being in force. For the purposes of this report, reference is made to the Law of the Child Act.

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<sup>206</sup> Similar results were noted on the Violence Against Children in Tanzania: Findings from a National Survey UNICEF 2009. Only half of the girls in the study who were victims of sexual violence and only one-third of boys told anybody about their abuse. The study does not record the proportion of victims of violence who informed the police.



S.115 of the Act provides that where a child called as a witness does not, in the opinion of the court understand the nature of the oath, the evidence may be received if in the opinion of the court, the child is possessed of sufficient intelligence and understands the duty of speaking the truth. There is no requirement that unsworn evidence should be corroborated and the magistrate may, after warning himself, act on the evidence to convict a defendant if satisfied that the child is telling the truth

The Act does not, unlike the Evidence Act, set an age limit at which children must give unsworn evidence and neither does it set a minimum age for children to give evidence. In our survey, magistrates allowed children as young as 6 to give unsworn evidence after a voir dire, and informed us that few children 'failed' the voir dire.

#### **9.19. Giving evidence in court**

If a child is to give evidence against an accused, that evidence must be given in camera. Thus if the accused in the case is an adult and the trial has, up until that point been in open court, the session must be interrupted and moved into the chambers. The small size of the chambers room poses challenges for child witnesses. The accused must be present at all times during the trial unless he or she chooses to withdraw. The child victim/ witness will therefore be in close proximity to the accused throughout the time he or she gives evidence, although the accused will be standing towards the back of the room rather than sitting at the magistrate's table. It is not possible for the accused to be removed out of sight of the victim or witness and the use of screens is unknown. In an increasing number of States, child witnesses in cases involving violence or sexual offences are placed in a separate room and give evidence through video link, so that the accused can see the witness, but the witness cannot see the accused. This practice has not been introduced into Tanzania and at present the technological facilities are not available in the district courts.

A further issue for child witnesses is that, In addition, due to the lack of legal representation, the accused will cross-examine the witness himself, even in serious

cases, such as rape cases. The magistrate cannot prevent such cross examination though he or she can and we were told, does intervene to control and prevent oppressive questioning. Virtually all the magistrates interviewed agreed that child witnesses find the process of giving evidence intimidating. Some children are so scared by the proximity of the accused that they are unable to proceed. In these situations, the practice appears to be for the magistrate to adjourn for a short period of time to counsel the child, in the absence of the accused.

There is no practice of familiarising a child witness with the court and the procedure that will be followed when he or she gives evidence. Thus most children will enter the court with little or no idea of what is to happen, the procedures to be followed or what is expected of them. It is considered good practice for the child to see the courtroom before the trial, and in some cases, to meet the magistrate so that there is one familiar face when the child enters the courtroom. In addition, the child should ideally, have somebody to support them when they arrive at court and when they are giving evidence. Although none of the magistrates had any objection to a relative or social welfare officer attending to support the child while he or she gives evidence, most magistrates interviewed reported that this did not happen.

### **9.20. Informing children**

It was clear from the survey that child victims and witnesses did not always know the outcome of proceedings against the defendant and in the case of the victim are not invited to give their views on sentencing or to give a statement about the impact of the offence on them. A failure to inform child victims and witnesses of the outcome of the trial can severely hamper a sense of justice. As one child reported: *'I don't know how the case was finalised because I just hear that he has been released. All I know is that I went to give my evidence in court.'*<sup>207</sup>

### **9.21. Access to justice for victims/ witnesses in the quasi-judicial system**

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<sup>207</sup> A 16 year old boy from Dar es Salaam who was the victim of a physical crime.

Under the Ward Tribunals Act, the quasi-judicial system can deal with criminal cases but Ward Tribunals and other quasi-judicial bodies interviewed for this study stated that they do not hear any criminal cases involving child victims.

### ***9.22. Access to justice for victims/ witnesses in the administrative system***

Social welfare officers should all be specifically trained to work with children who are the victims of or witnesses to criminal offences and should be prepared to refer these cases to the police where appropriate. Similarly, police officers should be trained to work with children who are victims or witnesses, with Gender and Child Desks working directly with these children and cooperating with social welfare officers in order to ensure the welfare of the child. However, in practice, these bodies are not adequately trained and with the exception of Hai District do not engage in joint working.

**We would recommend that both the police and social welfare officers should develop joint working protocols.**

### ***9.23. Access to justice for victims/ witnesses in the informal/ traditional system***

When children are the victims of or witnesses to crimes, their cases may never be reported to the police and may instead, be dealt with informally, through the traditional justice system. Although traditional elders interviewed for this study stated that they would be unlikely to deal with cases involving criminal offences, in some cases, practitioners suggested they would encourage settlement of minor incidents in the community. The concerns regarding this would be that children may find it hard to be heard or participate within a system that is run by their 'elders' and within which they do not have formal rights.

In addition, there is a serious concern that some victims (or their families on their behalf) are encouraged to engage in out-of-court informal settlements even when the offence is as serious as rape, rather than involving the police and the formal judicial system. It is not unheard of for families to agree upon a financial settlement rather than waiting for the often very slow judicial system to complete a case. This

has significant implications for children who are victims. Traditional systems do not necessarily treat the best interests of the child as a primary consideration, are not obliged to ensure that the child is given a right to be heard or that the right to privacy, assured in the formal judicial system, is upheld. Furthermore, it is reported that in many cases involving child victims, the financial reparation will go to the child's family, rather than the child: leaving the child with no redress, no compensation and little access to justice.

### ***Conclusion***

The existing systems for processing cases of children who are victims and witnesses currently fail to meet international standards and current understanding of good practice, denying children effective access to justice. Children who are victims and witnesses are not truly heard in the justice systems and the systems themselves are not arranged so as to be child friendly. Even where practitioners attempt to act in the interests of the child, for example by holding cases 'in camera', lack of training on working with child victims and witnesses can mean that these proceedings are not child friendly and that they therefore do not contribute to access to justice for children.

The authors take the view that Guidelines could be fully implemented, and children's access to justice greatly improved without great difficulty, and without great cost.

### ***Recommendations:***

- 1. We would recommend that the Government work with local universities to undertake a small-scale crime survey to determine how many children are the victims of crime;**
- 2. We would recommend that the police should have a Gender and Children's Desk in every police station and at every police post to deal with children who are victims of crime.**
- 3. Police operating procedures should set out the procedures to be followed when a child makes a complaint/ alleges he or she has been the victim of a crime. These should include a requirement for police, and where possible a member of the**

**Gender and Child Desk, to speak to all children who make a complaint and determine the nature of the complaint.**

**4. Every police station and police post should have access to a specialist officer who is trained in working with children available/ on call at all times.**

**5. All members of the Gender and Children Desk should receive initial and regular training on working with child victims. The Ministry of Home Affairs should set the frequency and delivery of such training.**

**6. Rather than retire to chambers to hear a child witnesses evidence, the child should be heard in closed court, with all members of the public and the media removed.**

**7. The use of screens should be introduced, so that the child cannot see the accused while giving evidence.**

**8. That a child giving evidence for the prosecution in a criminal trial either as a victim or witness should not be cross-examined by the accused. Where there is no legal representative for the accused, the magistrate should undertake the cross-examination to establish the credibility of the evidence. We recognise that this might require an amendment to the Evidence Act 1967 or the Law of the Child Act 2009.**

**9. All magistrates should receive training on ensuring a child friendly environment for child witnesses.**

**10. In all cases where a child witness is giving evidence, the child shall be shown the courtroom before the trial and shall be provided with an information pack about the court, informed who will be present in the courtroom and the procedures that will be applied. Such information packs should take account of the fact that some children may not be able to read or will have a low reading age.**

**11. A child witness should be accompanied by his parents or guardians (unless his parents are the accused or are otherwise unsuitable). In the absence of the parents, the magistrate should ensure that a social worker accompanies the child.**

**12. Court administrators should ensure that the accused and the witness are not required to wait in the same area at the court.**

**13. Prosecutors should be placed under a duty to support child witnesses during the trial and to inform them of the outcome of the trial.**

**14. Consideration should be given to allowing a child victim to make a statement to the court in writing or orally of the impact that the offence has had upon him or her.**

**15. NGOs should be encouraged to support child victims and witnesses through the process of making a complaint and through the judicial proceedings, including informing the child about the process**

## **10. CIVIL CASES**

We have addressed the situation for children who are alleged to or accused of committing criminal offences and children who are victims or witnesses to crimes. This section addresses access to justice for children whose civil rights have been violated.

The Universal Declaration of Human Rights provides that *‘Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’*<sup>208</sup> This applies just as much to children as it does to adult. The Universal Declaration does not specify what form of national tribunals children shall have access to. However, whatever system

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<sup>208</sup> Article 8, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). This is echoed by the International Covenant on Civil and Political Rights, which states in Article 3 that States Parties must ensure that “any person whose rights or freedoms as herein recognised are violated shall have an effective remedy” and that the right to the remedy must be determined by a “competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.”

the State chooses to put in place, children must be able to access it, and the system must provide an adequate remedy and redress for the violation of their rights.

The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>209</sup> echoes the provision of a right to redress by setting out the right to an effective remedy in Section C, while the Tanzanian Constitution states in Article 30(3):

*“Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.”*

Although this Article of the Constitution provides to all persons, including children, the right to a remedy in the event that their rights are violated, the Civil Procedure Code requires that children seeking to institute proceedings for redress must do so through a 'next friend,'<sup>210</sup> who will, in most cases also be appointed as the guardian of the child for the purposes of the action. Anyone of sound mind, who has attained majority can act as the next friend or guardian, provided that the interest of such person is not adverse to that of the child. A next friend, once accepted by the Court, must remain in place unless he or she can find another fit person to take on the role.<sup>211</sup> Where there is nobody to act as guardian to the child, the court can appoint one of its officers. A requirement that a child bring an action through a next friend is frequently found in common law jurisdictions. Unusually though, Tanzanian law does not contain a 'competency' exception. This generally allows the child to bring his or her own action in those instances where the child can demonstrate that he or she is sufficiently mature to understand the application being made and the consequences of making the application. The survey indicated that some NGOs believed that it was difficult for children to find a 'next friend' and that next friends did not always act in the best interests of the child, or in some cases had a conflict of interest with the

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<sup>209</sup> Adopted by the African Commission on Human and Peoples' Rights, 2001.

<sup>210</sup> Article 4 Order XXXI, Section 1 of the Civil Procedure Code, No. 49 of 1966.

<sup>211</sup> Under Rule 8 of Order XXXI.

child. The rules on 'next friends' would benefit from review and some revision to allow competent children to make their own application. Information on the role of the next friend and who can act as a next friend would also be helpful. NGOs can act as next friends as could community members or school teachers who have an interest in the child.

Under the Court Fees Rules,<sup>212</sup> a court may choose to remit fees in a case, if it is felt that the complainant is too poor to afford the fees or for other reasons.<sup>213</sup> If a child (or other complainant) has been granted legal aid, fees will also generally be waived.<sup>214</sup> The ability to make an application to the court without paying court fees is a big advantage to children who would not, otherwise, be able to afford to do so, unless a member of the family, a relative or friend agrees to pay. It is not clear, however, to what extent this is known, with many children and families believing that they could not meet the cost of a court application.

As discussed at length within this report, access to justice does not just mean access to the courts, it means the adequate support before, during and after proceedings to ensure that the child's interests are supported and that children have meaningful opportunities to realise their rights. For this study, the research team conducted field research and asked providers, community members and children about the civil issues that affected children most often. Through discussions, three civil issues emerged as being of real concern to children and the community: inheritance rights; land rights and maintenance rights.

### **10.1. Inheritance rights**

A child's right to inherit from his or her parents or family is a matter of considerable contention in Tanzania. This is partially due to the fact that many people do not leave

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<sup>212</sup> Made under the Judicature and Application of Laws Act.

<sup>213</sup> Rule 8 of the Court Fees Rules made under Judicature and Application of Laws Act.

<sup>214</sup> Legal aid providers must apply for exemption and be named by the Chief Justice. Though some organisations are specifically named in the Rules, others have been added since that date. If a child is successful in the proceedings, the Court has the power to direct him or her to pay the necessary court fees if, for example, these are covered by monetary damages



valid wills,<sup>215</sup> partially due to customary laws that discriminate against children in general and particularly against girl children and those born out of wedlock,<sup>216</sup> and partially because, in the absence of an effective enforcement system, a deceased's estate can be misappropriated by others without such misappropriation being challenged either by a child or by the community as a whole. This may be because of a lack of awareness as to their rights, and partly because of family pressure.

*'Those who are affected by ownership conflicts are children who are left with no parents. What we mean here is that when all parents die, other relatives normally inherit each and everything. As a result we witness a number of street children.'*<sup>217</sup>

In Tanzania, inheritance is governed by three sets of applicable law: 1) Customary Law, 2) Islamic Law and 3) the Indian Succession Act. Customary Law in Tanzania is codified through Government Notices, while Islamic Law is codified through statutes. The Indian Succession Act based on English Law of 1865.<sup>218</sup> The choice of laws is governed by the Judicature and Application of Law Act, 2002, which provides that:

*11.(1) Customary law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in, matters of a civil nature—*

*(a) between members of a community in which rules of customary law relevant to the matter are established and accepted, or between a member of one community and a member of another community if the rules of customary law of both communities make similar provision for the matter;*

*(b) relating to any matter of status of, or succession to, a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted; or*

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<sup>215</sup> According to one worker in Mugumu, Serengeti, a big problem is that people do not prepare wills "this means that the property is not left to the children and by the time the child grows up, the property has been taken and they can't complain because they will be suppressed by their relatives." Imara Interview, Mugumu, Serengeti.

<sup>216</sup> This section discusses inheritance rights, which may include the distribution of land in the context of administering an estate. Land and property ownership issues are discussed at greater length in the next section, which deals specifically with land rights.

<sup>217</sup> Msinjahill Ward Tribunal (Lindi)

<sup>218</sup> Inheritance Law in Tanzania: the Impoverishment of Widows and Daughters, pp 606-607.

*(c) in any other case in which, by reason of the connection of any relevant issue with any customary right or obligation, it is appropriate that the defendant be treated as a member of the community in which such right or obligation obtains and it is fitting and just that the matter be dealt with in accordance with customary law instead of the law that would otherwise be applicable, except in any case where it is apparent, from the nature of any relevant act or transaction, manner of life or business, that the matter is or was to be regulated otherwise than by customary law.*

The applicable law in cases of inheritance is dependent upon the 'lifestyle' of the deceased: if it is shown that an individual lived according to the laws of Islam, that person's estate would be divided according to Islamic law.<sup>219</sup> Similarly, if an individual lived according to traditional or customary lifestyle, that person's estate would be divided according to customary law of that person's tribe or clan.

Both traditional and Islamic laws can result in discriminatory practices. For example, in some tribes, the property will go to the first son, then to all boys and then to girls.<sup>220</sup> In other cases, children born out of wedlock are unable to inherit any land. NGOs report a significant number of their cases, brought to them by children, or more commonly by their parents or relatives are concerned with loss of inheritance and 'grabbing' of assets by the deceased father's family.

The Judicature and Application of Laws Act accepts that local customary law shall be applied by the court in relevant cases '*provided that the court shall not apply any rule or practice of customary law which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly disapplied or superseded by any written law.*'<sup>221</sup> The question arising from this sub-section of the Act is whether the customary law inheritance provisions which treat women less fairly than men, are discriminatory on the basis of gender and are, as a result, unconstitutional because they discriminate on the basis of gender contrary to Articles 12, 13 and 29 of the Constitution of the United Republic of Tanzania.

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<sup>219</sup> See Judicature and Application of Laws Act 2002, section 11(ii).

<sup>220</sup> Interview with WLAC

<sup>221</sup> Judicature and Application of Law Act 2002 section 11(3).

In the case of Elizabeth Stephen v the Attorney General<sup>222</sup> where two widows challenged the distribution of their dead husband's estate under customary laws, the High Court found that the customary law inheritance practices were indeed discriminatory. The Court were not, however, willing to give orders declaring the customary law unlawful, contrary to section 11(3) of the Judicature and Application of Law Act or unconstitutional. The Court held that it was impossible to effect customary law change by judicial pronouncements and that it would create chaos if the courts were to make judicial pronouncements on the constitutionality of customary laws. An appeal has been made to the Court of Appeal, but a date for hearing had not been set by the time of writing of this report. According to the High Court the appropriate remedy for discriminatory customary laws was set out in section 12 of the Judicature and Applications Act 2002. This section provides that:

*1) A district council may, and where the Minister so requires shall, record in writing a declaration of what in the opinion of the Council is the local customary law relating to any subject either as applying throughout the areas of the council or in any specific part thereof, and submit such declaration to the Minister.*

*2) A district council may, if in the opinion of the council it is expedient for the good government and welfare of the area, submit for the consideration of the Minister a recommendation for the modification of any customary law, whether or not a declaration has been recorded..*

The court saw the advantage of this approach as ensuring change would start from the grass roots, where any custom is felt, and that any resulting changes would be acceptable and implementable by the majority.

It was not possible to determine in this study whether any district councils have sought to amend customary laws or whether the Minister has required them to do so. It is, however, believed that neither the District Councils or the Minister have taken any action under section 12. As part of this study, we asked primary court

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<sup>222</sup> Civil Cause No 82 of 2005, 8 September 2006

magistrates and Ward Tribunals how they handled inheritance cases where it was clear that the husband's relatives were seeking to take the deceased's property and not to give equal shares to the children or to give equal shares to girl children. In both Hai and Babeti Districts, the primary court magistrates all stated that they took the provisions of the Constitution that forbid discrimination, and especially discrimination on the basis of gender, very seriously and would not make an order that discriminated against children or one class of children, other than children born out of wedlock, which most appeared to consider a very different issue. Magistrates indicated that when faced with such cases, they would call the family before them and seek to mediate a resolution that gave the wife and children fair and non-discriminatory shares.

### ***Recommendations***

Section 10 of the Law of the Child Act 2009 states that "*A person shall not deprive a child of reasonable enjoyment out of the estate of a person*". At present, the study indicates that this provision is not being fully implemented. We recognise that ensuring that children, and especially girl children are treated equally as heirs to a parent's estate presents the State with a challenge and that this issue is unlikely to change in the short term. That does not mean, however, that attempts should not be made to address children's lack of access to redress and a remedy in inheritance cases. **We would recommend that in order to enable children to access justice that:**

**a) The Government issue regulations under the Law of the Child Act specifying how this provision is to be implemented.**

**b) NGOs consider how they might work with District Councils and the Minister to address and amend discriminatory customary inheritance laws under section 12 of the Judicature and Application of Laws Act 2002.**

### ***10.2. Land rights***

Disputes about land often arise at the same time as disputes over inheritance and can be inextricably linked. Although this section focuses on dispute relating to

ownership of land rather than inheritance, similar issues arise with children being deprived of ownership of land or from reaping the benefit of the land.

*“my parents passed away but I have an uncle. My father had left two plots of land for farming – my uncle farms these plots without consulting us. I have heard rumours that my uncle has sold the plots and the buyer has cut the trees down. I went to visit the plots and they have been cut down.” (M, 16, Serengeti)*

*“When my mother passed away, she left a parcel of land to my oldest brother – but my uncle chased him away and took the land” (M, 16, Serengeti)*

The ownership of land is governed by the Land Act 1999. In practice, however, although bound by the Land Act, the survey conducted for this report showed that some Ward Tribunals continue to rely upon customary law, with tribunals tracing ownership of land through customary law or local knowledge.<sup>223</sup> Land cases are normally heard at Village Land Council Level or Ward Tribunal Level, depending on the value of the land. Indeed, many Ward Tribunals stated that their main role is to deal with land cases.<sup>224</sup> The Land Tribunal in Babeti did not have any cases brought by children or on behalf of children.

Administrative officials play a key role in assisting children access justice in relation to land disputes. In many land dispute cases, the first port of call for a child or his or her relatives is the Ward Executive Officer.<sup>225</sup> When a case is complete the local administrative authorities can also support enforcement. According to one Ward Tribunal, enforcement of its cases is done through referral to a Ward Executive Officer.<sup>226</sup> Where possible, cases are settled at the local level without reaching a Tribunal or Court. As Shigala Ward Tribunal said: *‘community mechanisms are effective in ensuring children get to exercise their rights.’*<sup>227</sup>

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<sup>223</sup> Babeti District Ward Tribunal

<sup>224</sup> Mwanza District City Solicitor.

<sup>225</sup> Nkulungu Ward – our role is limited to dealing with land issues.

<sup>226</sup> Shigala WT

<sup>227</sup> Shigala WT

Further evidence of seeking to reach community based solutions are evident in cases reaching the District Land and Housing Tribunal. The Tribunal will engage, first, in a form of mediation, including, for example, writing letters to both parties and conducting mediation, before moving on to a full hearing where necessary. Crucially, Land Councils don't deal with issues of inheritance. So, if a child brings a case to the Land Council (through a next friend as above) and the issue relates to inheritance, the Land Council would ascertain ownership of the land if possible, but would return the issue to the Primary Court if there is a dispute as to the administration of the estate.<sup>228</sup>

While land ownership clearly has huge implications for children's livelihood and welfare, social welfare officers demonstrated mixed views on whether their role included land issues. While some said it did not others said it was part of their role, *'if it was relating to children.'*<sup>229</sup> There is a need for social welfare officers to assist children engaged in land disputes because, as one participant in this research said, *'Most children do not enjoy rights of property. If the parents die, the uncle or grandparent comes and takes land. Most are after the property... there is an increase in street children.'*

Land issues are reportedly more complicated and more common in rural areas.<sup>230</sup> This possibly reflects the fact that ownership is more difficult to ascertain or that it is not recorded in writing. Children also face difficulties in land cases because they are often required to raise issues against those who are their relatives: *'it is very difficult for children to complain about land issues considering the fact that children are cared for by parents or guardians who may be the oppressors and it is rather challenging for a child to complain of land issue against the said care givers. It is not easy for a child to report mistreatment.'*<sup>231</sup> The main difficulty for children is accessing legal assistance to help them claim land to which they have a legal title. Access to legal aid providers is limited, especially in the rural areas. This situation is unlikely to change without a considerable increase in the number of paralegals and further training for

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<sup>228</sup> CJF hai Ward... CH interview

<sup>229</sup> Principal Social Welfare Officer at Regional Administrative Secretary's office – Dodoma

<sup>230</sup> AFNET Dodoma, 25<sup>th</sup> July 2011.

<sup>231</sup> Mkula Ward Triubunal

existing community based volunteers, such as the community justice facilitators, MVCC members and village workers.

### **10.3. Maintenance rights**

Maintenance, or the lack of maintenance, for children is a major issue in Tanzania, despite the provisions in the Law of the Child Act that impose a duty on parents to provide maintenance for the child and to supply the necessities for survival and development of the child.<sup>232</sup> A parent, guardian, child (through a next friend), social welfare officer or relative of the child can apply to a Court for a maintenance order where a parent fails to provide for the child. An application can be made against the biological father or an alleged biological father of the child, the Act making it irrelevant whether the mother and father were married. Any maintenance order made by the court lasts until the child is 18 and can continue after that time if the child remains in education.

Many of the administrative bodies that were surveyed for the purposes of this report dealt with cases where an allegation of failure to maintain was made. Social welfare officers, village executive officers, ward tribunals, community development officers and the police all dealt with parents claiming that they had not received maintenance. The approach of all of these bodies initially was to seek to call both parents before them and to undertake mediation. In many cases mediation appeared to be successful, although we were told that the relief was often only temporary.

Perhaps, rather surprisingly, we found that a considerable proportion of complaints about failure to pay maintenance were made first to the police. Failure to pay maintenance is also a criminal offence, but using the criminal law was often the first port of call for many parents rather than the last. It was also an approach considered by some administrative authorities. The Municipal Council in Arusha stated that *'the only useful intervention is for the Ward Executive Officer to arrest and detain such parents in order to make them care more their children. This has worked in these*

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<sup>232</sup> See Law of the Child Act 2009, section 9(3)(b) and sections 41-43.

*areas as there has been a decrease on such cases.*<sup>233</sup> It is certainly the case that many respondees to the survey thought that being approached by the police, or even being detained by them for a period of time, was likely to focus the mind of the errant father and far more likely to result in payment of the necessary maintenance than any other method.

While mothers seek maintenance to help them feed and clothe their children and to assist with accommodation, children were more likely to approach administrative authorities and NGOs to complain about lack of payment of school fees and the non-provision of school uniform, which meant that the child was unable to attend school. If a child can access an administrative authority or NGO to make a complaint of this nature, it is likely to have a successful outcome. In all the cases that were related to us during the course of the survey, a resolution, even if only a relatively short-term resolution, appeared to have been reached. Either parents were persuaded by the administrative body to pay the fees and costs or, where the parents were really unable to pay, support was obtained from the community or from a NGO.

We would recommend that where possible a failure to maintain should continue to be dealt with through mediation in the community wherever possible with criminal proceedings or proceedings under the Law of the Child Act being a last option. Ward Executive Officers and social welfare officers should consider how children can be made more aware of the duty of parents to maintain them and how access to administrative authorities who can help them can be increased.

## **Conclusion**

The life chances of children in Tanzania are often significantly reduced as a result of violation of legal rights. Children may lose land, their inheritance and their right to be maintained due to a lack of access to dispute resolution mechanisms. Although NGOs in their role as legal aid providers are available in some areas to give legal advice and support, few children are accessing them and taking action to address the violation of their civil and constitutional rights. Children may not be seeking legal

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<sup>233</sup> Arusha Municipal Council.



advice and support for a variety of reasons: because they are unaware that they have legal rights; do not know where to go to seek help for violations of those rights, or because of cultural and family pressure not to contest or challenge the decisions of their family or community.

In order to increase access to justice for children we would recommend that there be a much greater programme of public education on rights. The best way to impart such education to children is likely to be through the school curriculum and through NGOs working with children. Many of the obstacles for children seeking to access justice in relation to land and inheritance are raised by the current practices in customary law and by the overall status of children in society. We recognise that tackling these are likely to be long term objectives. The survey did note however, the commitment of many working in the administrative system and the NGOs to increasing access to children, and to persuading families and communities to reach non-discriminatory settlements which considered the best interests of children and would benefit children.

### ***Recommendations***

**In light of the analysis of law, policy and practice in Tanzania in relation to international standards, a number of provisions are recommended to ensure that children have full access to justice in the area of civil rights and entitlements, including:**

- 1) The Government and NGOs should include education on children's civil rights within the school curriculum**
- 2) Procedures and coordination between administrative, quasi-judicial and judicial systems should be clarified so that it is clear who should have what involvement in cases involving civil rights;**
- 3) Capacity building should be provided to legal aid practitioners in ensuring that when adults come to claim maintenance, inheritance rights or land rights, actions are taken in the best interests of the child;**

- 4) Clarification should be given regarding the application of discriminatory inheritance laws through customary or Islamic law;
- 5) All practitioners should be trained in the Law of the Child Act and in relevant laws in order that they are able to better implement their roles in line with domestic and international standards relating to child rights.

## 11. CHILD PROTECTION

### 11.1. *Levels of violence*

The Violence against Children Study published in 2011<sup>234</sup> reports high levels of abuse suffered by children. Almost three-quarters of both females and males interviewed for the study reported experiencing physical violence by a relative, authority figure (such as teachers) or intimate partner, before the age of 18. The majority of this violence was in the form of being punched, whipped or kicked. Approximately 3% were threatened with a weapon during childhood. More than 50% of the interviewed children aged 13-17 also reported that they had experienced physical violence in the last year.

Sexual violence figures are also high. 30% of females and 13% of males aged 13-24 interviewed reported experiencing at least one episode of sexual violence before the age of 18, with 5.5% of females and 2.2% of males experiencing physically forced sex. Over a quarter of females who participated in the study reported that their first sexual intercourse was unwilling, and that they were either tricked, pressured, threatened, physically forced or coerced in another way to have sexual intercourse. 60% of children who reported sexual violence said that the perpetrator was at least 10 years older than them, while in 30% of cases the perpetrator was under the age of 18.

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<sup>234</sup> Violence against Children in Tanzania: Findings from a National Survey, 2009. Summary Report on the Prevalence of Sexual, Physical and Emotional Violence, Context of Sexual Violence, and Health and Behavioural Consequences of Violence Experienced in Childhood. Dar es Salaam, Tanzania: UNICEF Tanzania, Division of Violence Prevention, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, and Muhimbili University of Health and Allied Sciences, 2011.

In addition, approximately a quarter of females and nearly 3 out of every 10 males in the study reported experiences of emotional violence by an adult prior to turning 18. Between 4% and 5% of the respondents reported that they were threatened with abandonment by an adult while under the age of 18. The main perpetrators of emotional violence were relatives of the child and neighbours.

The impact of such abuse is known to have a serious long-term effect on children's lives. The Violence Against Children report notes that:

*Violence against children can have a profound impact on core aspects of emotional, behavioural, and physical health as well as social development throughout life. These consequences may vary depending on a child's age when abused, the duration and severity of the abuse or neglect, the child's innate resiliency, and co-occurrence with other maltreatment or adverse exposures such as the mental health of the parents, substance abuse by the parents, or violence between parents. Short-term impacts include physical injury and emotional trauma (e.g., post traumatic stress syndrome, depression). Sexual violence, in particular, is associated with an increased risk of a range of sexual and reproductive health problems, including unwanted pregnancy, pelvic inflammatory disease, infertility, gynaecological disorders, and the transmission of HIV/AIDS and other sexually transmitted infections.<sup>235</sup>*

Article 19 of the CRC requires that States take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Protective measures should include prevention and identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment and, as appropriate, judicial involvement.

The Concluding Observations of the Committee on the Rights of the Child to the periodic report of the Government of Tanzania in 2006, recommended that the

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<sup>235</sup> Ibid. section 1.1 pp9-10.

Government strengthen its measures to prevent child abuse and neglect, and take all possible action to ensure the protection of children from violence and abuse, including concrete, appropriate and time-bound responses.<sup>236</sup>

### **11.2. Recent legislative changes**

In response to this recommendation, the recent Law of the Child Act 2009 has introduced some significant changes to the child protection system. The Act places parents under a duty to protect their child from abuse, violence and neglect,<sup>237</sup> but also gives local Social Welfare Department strong powers to intervene to protect children. It sets out the grounds for considering a child as being in need of care and protection,<sup>238</sup> and provides that where a child is suffering or is likely to suffer significant harm, a social welfare officer may apply for a care order or a supervision order. The Law of the Child Act also provides that social welfare officers and police officer shall investigate all cases of breach and violation of the rights of the child<sup>239</sup> and that where the social welfare officer has reasonable grounds to suspect that a child is being abused, or is in need of care and protection, he or she together with a police officer, can enter and search the premises where the child is kept in order to investigate.<sup>240</sup>

In addition, the Law of the Child Act imposes a duty on any member of the community who has evidence or information that a child's rights are being infringed, or that a parent, guardian or relative having custody of a child who is able to, but refuses or neglects to provide the child with food, shelter, right to play or leisure, clothing, medical care and education to report the matter to the local government authority of the area. Interestingly, there is no corresponding duty on front line practitioners or professionals working with children to report abuse, though it may be argued that the term 'community' is broad enough to apply not just to members of the public but also to the practitioners and professionals.

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<sup>236</sup> CRC/C/TZA/CO/2 21 June 2006

<sup>237</sup> Law of the Child Act section 9(3)

<sup>238</sup> Law of the Child Act 2009, Section 16

<sup>239</sup> Law of the Child Act 2009, s.94(7).

<sup>240</sup> Law of the Child Act 2009 s.96(1).

Due to the fact that the Minister of Social Welfare has not, as yet, issued regulations under the Act, it is unclear to whom abuse should be reported, or the procedures to be followed, once an allegation is reported. This makes it difficult for a child or somebody acting on behalf of the child to ensure the child's protection, safety and well-being. We concluded from our survey that it is not common for members of the community to report possible child abuse, though it clearly does occur, particularly in serious cases. Children who took part in the survey did not appear to know where to report abuse, either against themselves or against other children, or how to seek redress. It is not possible for a child to apply to be taken into care, nor to initiate protection proceedings in court, as only a social welfare officer may make such an application.

We were unable to find any evidence of central government transitional planning or training for social welfare departments, professionals working with children, managers of child protection and magistrates on how to implement the Law of the Child Act. We believe that this has delayed implementation. Some of the new powers, such as the power to apply for care orders, is not well understood by those working in the child protection system and at the time of writing of this report we believe that not one application has been made for a care order or a supervision order by a social welfare officer. These orders, granted by the juvenile court, allow children to be removed from their parents, placed away from home and give custody of the child to the social welfare department. The lack of any such applications raises serious questions as to how protection duties imposed by the Act are being exercised.

Children who have been abused face considerable difficulty in accessing protection: there are virtually no community services that would provide much needed intervention to protect the child. If the child stays at home he or she may be placed at further risk, but if the child leaves, there is little support or help available, and the child is likely to end up living on the street exposed to a different set of risks. At present, district authorities have not set up the fostering services specified in the Act and no regulations have been issued on foster care. Further, there is only one state children's home, leaving a lack of emergency beds for children who need care

outside the family. The only facilities on offer are NGO and private children's homes. These are of extremely variable quality, and are largely unregulated and unsupervised. This is being addressed under the new provisions contained in the Law of the Child Act, which require all children's homes to be approved by the Commissioner of Social Welfare.<sup>241</sup> Children's homes already in existence in April 2010, were given 6 months to apply for approval. Regulations have, however, still to be issued under the Act and evidence from the survey would indicate that not all children's homes in existence in April 2010 have applied for approval under the Act, or indeed under previous provisions. Children living in unapproved children's homes are in legal limbo, as it is unclear who has legal and day-to-day responsibility for them.<sup>242</sup>

Although the Law of the Child Act gives responsibility for child protection to the social welfare departments, districts do not appear to have undergone the restructuring that is arguable necessary if the duties imposed upon them by the Law of the Child Act are to be met. This study saw only one site, Hai, where an integrated multi-disciplinary child protection team is in place, well staffed by social welfare officers. In other areas visited, there were an inadequate number of social welfare officers to fulfil the duties imposed by the Act and responsibility for child protection was, in practice, spread across a range of stakeholders, including village workers, village executive officers, ward executive officers, the police, community justice facilitators with no one body holding ultimate responsibility for protecting the child.

### **11.3. *What sort of abuse do children suffer?***

The abuse disclosed by the children in our study included serious physical abuse and sexual abuse. Children related incidents of burning and stabbing and severe beatings resulting in bruising. Social welfare officers related details of even more serious physical abuse resulting in broken bones, and sometimes even death. Sexual abuse

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<sup>241</sup> The Law of the Child Act 2009, section 134 also puts in place new monitoring provisions requiring residential homes and institutions to establish a committee of no less than 4 fit persons to oversee the running and general administration of the children's welfare and development.

<sup>242</sup> The patron of an approved residential home or the manager of an institution or the foster parents with whom the child is placed shall have parental responsibility for the child while the child is with him or with the institution: Law of the Child Act 2009 s.27(1).

appears to be a common occurrence, especially where children are placed in extended families and are not cared for by their parents, or are placed with a family for the purpose of employment, with both girls and boys at risk.

#### **11.4. Why don't children report abuse?**

Some of the children in the survey said that they had been reluctant to report abuse to the police themselves. They were scared of the consequences both for and from their family if they did so, and some were scared of the reaction of the police, especially in the case of street children. In some cases, children did not know who to report to, or know that they could report the matter to the police, or the police station was too far away.

*'One day I had not washed the pots as I was supposed to do. When my mother came home from the club and saw that I had not washed the pots, she took a knife and stabbed me with it on my ribs. I didn't tell the police. The police station is very far away.'*

Boy, aged 15.

*'I was being severely beaten when I was at my grandmother's house, it was torture. I didn't go to anyone because I was not aware I could'.*

Boy, aged 15

*My mother did not have the money to care and provide for me so she decided to leave me in the streets. I didn't tell anyone. I was young and not brave enough. I was very disappointed, as I was mistreated in a way I never expected by my mother.*

Girl, aged 13

*Why didn't you go to the police? 'Because I did not have the experience to know that I had a right to be heard'*

Boy aged 14, abused and abandoned

*I didn't know if the police would help, and I was scared and didn't know my rights*

Girl, aged 17, victim of an attempted rape

### **11.5. Who is abuse reported to?**

Neither children, nor teachers or members of the general public appear to know to whom they should refer cases of child abuse. Children commonly tell relatives or somebody they feel close to, who may be a neighbour, teacher or minister of religion. Teachers do not operate under a school child protection policy (though there the Ministry of Education and Vocational Training has committed to introducing such policies under the National Response Plan). If there has been clear physical or sexual abuse, cases are most likely to be reported to the police. If there is no clear evidence at the time of making the complaint, the teacher or neighbour may discuss the matter with the parents, but such discussion can often back-fire on the child, with further abuse being meted out or the child being 'chased away' from the family. Interestingly not one child, nor any other respondent, stated that they had reported the abuse first to a social welfare officer.

*My Uncle's son raped me. I told the headteacher at school. I thought she would help me as I tried to tell his parents, but they didn't want to take any action, but the school told me I can't sit for my exams since I was pregnant. I was taken to the social welfare officer who took me to the orphanage centre, but I delivered and was brought to the House of Peace (a mother and children centre).*

Girl, aged 17

### **11.6. Referral to the social welfare department**



Our survey showed that referrals to the social welfare department by the police tended to occur where a criminal offence had been committed against the child and the child had been removed from the home. The major role of the social welfare officer in these instances appears to be either to mediate the child's return to the home or to find a children's home that will accept the child. It did not appear from our survey that social welfare officers saw their role as including a duty to investigate what had happened to the child, or to review family functioning and the protection of other children in the family, despite the provisions in the Law of the Child Act. In some cases, however, the child was taken straight to a children's home by the police, with no input from social welfare. Some teachers did refer children to the social welfare department, but only where the allegations raised serious child protection concerns.

In other cases, where the police decide not to pursue criminal investigation or to prosecute, they do not report child abuse or protection concerns to the social welfare department, leaving children unprotected and with no access to assistance to ensure that they are safe and cared for.

*'My father chased us away from home claiming none of us were his children. We were three, I and my two older brothers, together with our mother. Our father came home and broke some house utensils and set others on fire. Three years after that, he came home after having lost a game of chance and since he had lost all his money he decided to sell us. I told the police. No action was taken against my father. He continued to treat us however he felt like. He did whatever bad thing he felt like doing to us, which affected us very much. We each decided to go our own way, as a family without peace of mind is not a family.'*

Boy, aged 14

*My father and mother had separated. My father had another woman. Later on we were left with our mother. Our mother left and our family started dispersing. I was left alone. I decided to tell my neighbour because I was not*

*getting any food and I was not studying. I told my neighbour expecting to get help. The neighbour laughed at me and beat me up. I later became a street child. I went to my father. He renounced me. I was very hurt. I went to the police so I could be assisted with transport to go and find my mother. The police chased me away saying those are the street loiterers.*

15 year old boy

In neither of these cases did the police make a referral to the social welfare department, even though these children fall clearly into the definition of a child in need of care and protection as defined by s.16 of the Law of the Child Act.

### **11.7. Outcomes for children**

Children were asked in the survey how they felt about the outcome for them following disclosure of abuse. Children were offered a range of alternatives in the questionnaire, from very satisfied to very disappointed. The responses to this question appeared not to be related to the extent to which they were provided with protection, but depended on whether, in their eyes, 'justice' had been done.

*They said they will arrest the woman that I was living with and also they found me a place to live here at the centre. I am very satisfied.*

Girl, aged 13 subjected to physical abuse

But the majority of children were either disappointed or very disappointed. This was largely because either no action was taken, the child found the action insufficient or they had not been kept informed of the outcome of their case.

*'They [police] arrested the person who was abusing me, and then they took me to the hospital then to the social welfare officer who brought me here. I am deeply disappointed with the outcome because I don't know what step has been taken against those who beat me up, but the one who raped me is dead'.*

Girl, aged 14.

*They arrested him and I was taken to the social welfare officer. I was disappointed with the outcome because I don't know how the case was finalised. I just hear that he has been released. All I know is that I went to give evidence in court.*

Boy, aged 16

### **11.8. Applying for a care order or a supervision order**

Not one of the magistrates, or any of the social welfare officers interviewed for this study had any experience of applying for a care order or a supervision order. Neither had any of the magistrates interviewed suggested to the social welfare department that they should apply for such an order to protect the child. Virtually nobody knew that the Law of the Child Act permitted such an application and none knew how to apply for it or what it would achieve. To the best of our knowledge, despite the fact that the Law of the Child Act has been in force since April 2010, there has not been a single application for a care order or a supervision order. The lack of knowledge on the subject of care and supervision orders, the lack of regulations on their use and the lack of understanding as to the purpose of such an order is a significant obstacle to ensuring continued protection of the child.

### **11.9. Assessment of risk**

Social welfare officers do not routinely carry out assessments on children and families, before making a decision on the future of the child. This appears to be partially due to a lack of understanding of family dynamics and abusive behaviour, which may result in children being placed at risk of further abuse and partially due to the lack of alternatives to placement with the abusive parents or family., Even in cases of very serious abuse, care givers were rarely assessed with a view to the future safety of the child, and we did not hear of one case where the family had been assessed to determine the safety of other children living in the family. Rather

than assess risk, the response of social welfare officers and the police is to mediate and try and place the child back in the family.

A very good example of a lack of awareness of risk, and a consequent reduction in children's access to justice, was related to us by a police officer from the Gender and Children Desk, a social welfare officer and a resident magistrate in one of the areas surveyed. It concerned a 4 year old girl who was raped by her 17 year old uncle. Both lived with the 4 year olds' Grandmother. The assault was reported to the police by a neighbour. The child was taken to hospital and the 17 year old was arrested and remanded. The police reported the case to the social welfare officer. It was agreed that the social welfare officer would go and see the family when the child came out of hospital and was sent back home. No assessment was undertaken of the Grandmother and her ability to care for the child or to keep her safe from further harm before the child was returned home. The reason given for the lack of assessment was that the family lived 9kms away and that the child was safe because the Uncle was on remand. The Uncle was convicted and sentenced to corporal punishment. After receiving his punishment he was free to return home. The magistrate was of the view that having been punished he was unlikely to repeat his behaviour. At no point did the magistrate, the police or the social welfare officer raise concerns about the future risk to the child from the Uncle or the Grandmother. No visit was made to the child's home and once again, no assessment undertaken prior to the Uncle's return to the house. The failure to assess and understand risk is a significant barrier to children being protected against abuse. Little is gained for children if access to justice is concerned only with prosecuting after the event rather than preventing foreseeable harm.

This was a case where the child had suffered harm and given the return of the perpetrator to the home and the Grandmother's failure to take steps to protect the child both before and after the rape, one in which the child was likely to suffer harm in the future. The child fell very squarely within the criteria for a care or supervision order. Neither the social welfare officers nor the court appeared to have given any consideration as to whether such an application should be made to protect the child

### **11.10. Children's homes**

As stated above, there is only one State children's home in Tanzania and, as yet, no district fostering services. Social welfare departments are therefore dependent upon NGO, FBO and even privately run services to care for and protect children. There is also no state funding available for children who are placed in such homes. If the children's homes fail to secure adequate funding from donors, children may be asked to leave the facility in which case many will find themselves living on the street. Once a child is placed at a children's home, it would appear that in practice all contact with the social welfare department ceases. There is little planning for the future of the child, who may spend most of his or her childhood residing at the home. Children's homes all reported that moving children on once they reach 18 presented a great challenge, as children have generally lost all contact with the family and their community by this time. Where a child leaves a children's home and returns to the family, there is a duty on the social welfare officer to keep in regular contact. The same duty does not exist where a child does not return to the family. In the latter case, the extent of the duty is merely to encourage the child to become independent and self-reliant.<sup>243</sup>

The lack of state controlled of funded alternative care provisions for children who cannot live with their parents, means that it is not possible to implement Article 19 of the CRC fully. The State is highly reliant on the NGO, FBO and private sector to fulfil its international obligations to provide protection to children. Up until the passing of the Law of the Child Act, the State has had little control over children's homes which of highly variable quality. The Law of the Child Act requires homes to be 'approved' by the Commissioner for Social Welfare. The Minister for Social Welfare has responsibility for setting rules for the inspection of homes, while the Commissioner retains responsibility for monitoring and supervising residential homes. The Commissioner is also given the power to give such orders and directions to an approved children's home as may be necessary for the promotion of the

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<sup>243</sup> The Law of the Child Act 2009 s137(4) and (5).

development of a child. Regulations have been drafted for children's homes at the time of writing, but have still to be approved.<sup>244</sup>

### ***Recommendations***

At present, children cannot be regarded as having full access to justice in cases of abuse. Their access to redress is severely limited and we did not hear of any cases where the child was granted 'compensation' for injuries sustained. While it is perhaps to be expected that children will not have ready access to compensation, they should be assured of protection. Redress requires that social welfare officers, the police and the magistrates take a more proactive role in protecting children. In order to achieve this we recommend that:

- 1) Regulations should be issued under the Law of the Child Act as soon as possible. Such regulations should specify that all allegations of child abuse should be reported to the Social Welfare Department and should detail the procedures to be followed when such an allegation is made;**
- 2) Each district should have a well-trained team that investigates allegations of abuse and conducts assessments of children and their families. This should be part of the functions of the social welfare department;**
- 3) Working protocols should be developed between the police and social welfare so each is clear as to their role when an allegation of child abuse is made. The Protocol should also provide for joint investigations and set out the procedures to be followed;**
- 4) An advertising campaign on child protection should familiarise the public with the role of the social welfare officer and how to report allegations of abuse;**
- 5) The helpline currently being considered by the Ministry of Community Development, Gender and Children should provide a child abuse hotline which children and members of the public can call for advice;**

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<sup>244</sup> See Law of the Child Act 2009 Part IX.

**6) Where there is prima facie evidence that the child has suffered abuse, an assessment of the child and family, including other children resident in the family, should be undertaken;**

**7) Where there is prima facie evidence of abuse, no child should be returned home until an assessment has been undertaken and the social welfare officer is satisfied that the child is not at risk of further abuse. Social welfare departments need to ensure that sufficient emergency accommodation is available in their district. This could be provided by a NGO or private provider;**

**8) Family support services and fostering services should be developed as a matter of urgency;**

**9) A system of allowances for extended family members who take on care of a child should be introduced;**

**10) Training should be made available to given to existing and new social welfare officers, staff of the Gender and Children's Desks and magistrates as soon as practically possible, on:**

- Child development;**
- Risk assessment;**
- The typology of abuse;**
- The child protection provisions of the Law of the Child Act;**

**11) The draft Regulations on the standards and conduct of children's homes should be adopted as soon as is practically possible;**

**12) The Minister of Health and Social Welfare should consider the introduction of community based family support services in partnership with NGOs and FBOs;**

**13) While recognising that the costs may in the short term be unmanageable, a progressive system of allowances should be introduced for children who are subject to care orders and payable to foster parents and to residential homes.**

## **12. CHILD LABOUR**

### **12.1. *International standards***

Article 38 CRC requires States to protect children from economic exploitation and from performing work that is hazardous or is likely to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. It further provides that States shall take legislative, administrative, social and educational measures to ensure the implementation of the article, and shall, in particular:

- a) set a minimum age for admission to employment;*
- b) Provide for appropriate regulation of the hours and conditions of employment*
- c) Provide for appropriate penalties or other sanctions to ensure effective enforcement.*

Further restrictions on the employment of children are to be found in ILO Conventions No 138, the Minimum Age Convention<sup>245</sup> and Convention No 182 on the Worst Forms of Child Labour.<sup>246</sup>

### **12.2. *Legislative provisions on child labour***

In Tanzania, Part VII of the Law of the Child Act 2009, which reflects and largely incorporates the provisions of these Conventions, governs the employment of a child. The Law sets the minimum age of employment at 14, at which age children may engage in "light work", where "light work shall constitute work which is not likely to be harmful to the health or development of the child and does not prevent or affect the child's attendance at school, participation in vocational orientation or

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<sup>245</sup> This Convention came into force on 19<sup>th</sup> June 1976 and was ratified by the United Republic of Tanzania on 16<sup>th</sup> December 1998.

<sup>246</sup> This Convention came into force on the 19<sup>th</sup> November 2000 and was ratified by the United Republic of Tanzania on 12<sup>th</sup> September 2001. See also the new ILO Domestic Workers Convention adopted in June 2011. As yet, this Convention is not in force. Together with the Recommendation Concerning Decent Work for Domestic Workers it will form the 189<sup>th</sup> Convention.



training programmes or the capacity of the child to benefit from school work.” Hazardous employment, forced labour, sexual exploitation and exploitative labour are all expressly forbidden under the Law of the Child Act whether such employment is in the formal or informal sector.<sup>247</sup> Employing a child in contravention of the Law of the Child Act is a criminal offence.<sup>248</sup> Children who are employed are given a right to be paid remuneration equal to the value of the work done by the Law of the Child Act, and any employer who fails to pay such remuneration, commits an offence.<sup>249</sup>

In 2001, the International Labour Organisation reported that nearly 5 million children under the age of 18 undertook some form of economic activity in Tanzania.<sup>250</sup> The participation rates differed according to age from 25.5% of children in the 5-9 age bracket to 58.9% of children aged 15-17. Later figures are unavailable but it is believed that the figures remain the same, if not higher. Common child labour activities include domestic work, farming (including both cattle tending and harvesting), working as street vendors, acting as porters and mining.<sup>251</sup>

### **12.3. Exploitative child labour**

Exploitative labour and employment of children under the minimum age of 14 is acknowledged by respondents to the survey as being a widespread problem.

*“We came across an incident where a child aged nine years was exploitatively employed in Dar-es-Salaam. This was made possible by her mother in Lindi. She was not studying there. We managed to find the child and convinced her to come back to Lindi. She is now studying. The mother was also warned.”<sup>252</sup>*

NGO Lindi

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<sup>247</sup> See section 84(1) and also sections 78, 80 and 82 and 83 Law of the Child Act 2009

<sup>248</sup> See sections 78(4), 79(3) 80(3), and 83(3) Law of the Child Act 2009

<sup>249</sup> S.81 Law of the Child Act 2009

<sup>250</sup> Country Report, 2000/2001 Integrated Labour and Child Labour Study, International Programme on the Elimination of Child Labour, Ministry of Labour, Youth Development and Sport, National Bureau of Statistics.

<sup>251</sup> US State Department Report 2010 Human Rights Report: Tanzania.

<sup>252</sup> Patronage in Environmental Management and Health Care Warriors (PEMWA) In Partnership with Save the Children – Lindi, interview 13<sup>th</sup> July 2011.

Reports from NGOs, social welfare officers and NGOs themselves, show a wide range of abuses. These include sexual harassment and sexual and physical abuse:

*'We had a girl domestic worker who came to complain of being abused and mistreated by her employer. She had left the employers residence at the time. The employer retaliated by having the girl kidnapped but we worked with the police and managed to save the girl. The case is pending in court. The child is at Samaria's home. The child is being harassed and being threatened with physical injury for having sought Kivulini's assistance to address the mistreatment she suffered at her employer's hand.'*

*'A woman was provided money for her husband's burial by a man. After the funeral the man wanted to be paid his money. The woman could not afford to pay so she gave her 12 years old daughter to the man as a domestic worker. The daughter became the man's concubine. The case is being dealt with by the Nguvu Kazi NGO.'*<sup>253</sup>

NGO Kivulini, Mwanza

The most common forms of exploitation reported was requiring children to work for long hours in difficult circumstances, for not enough pay or, in some cases, no pay at all. A Social Welfare Officer commented that children in Tarime, a rural area,

*'Are told to tend cattle [and] are also told to do the chores and to keep the home tidy. They are kept at home instead of allowed to go to school. Even if they are formally employed, they earn little.'*<sup>254</sup>

In one other case example from Mwanza,

*'There was a boy in the village who had been employed to keep cattle by a villager upon contract that he would be paid one cow for one year of work. After one year of cattle keeping the villager paid the boy his cow. He then*

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<sup>253</sup> Kivulini, Mwanza, 20<sup>th</sup> July 2011.

<sup>254</sup> SW Officer, Tarime, 8<sup>th</sup> July 2011.

*reported to the Police that the boy had stolen the cow. The boy lost his cow.*<sup>255</sup>

#### **12.4. Rights violations**

The juvenile justice study that was conducted in parallel to this report identified a concern that children who are living with employers are at particular risk of rights violations, including false accusations and arrests. According to that study, many children in conflict with the law who had not been living with their parents had been living with employers who had made complaints to the police, leading to the child's arrest. In the vast majority of cases, children said their employer had falsely accused them of a crime when the child asked for payment for services, or that the employer had wrongly accused the child of stealing from them.

##### **Arrests of child workers**

*"Before my arrest, I was living with my parents. My father died. He had been paying my school fees, so after he died I got a job, tending cattle. At the end of the month's work, I asked my employer to pay my salary. He made up that I raped his two year-old daughter. I don't even know his daughter. He took me to the police station and left me there."*

17 year old boy, Arusha adult prison

*"I was in Standard 6 in Moshi, but here in Tanga I'm working. My boss made up an allegation against me that I had stolen his pistol. He did this because I demanded my wages from him: 300,000 shillings, which was my annual salary due to me."*

16 year old boy, Tanga adult prison

*"I hail from Gairo in Morogoro region. I came to Moshi to work as a house helper. I was hired as a house girl in Soweto suburb, but my employer sacked me after three months work without any pay. I was later taken in by another person, who I stayed with for one month. One day in March 2011, while I was at home cooking, my*

<sup>255</sup> Nkungulu Ward Tribunal, 15<sup>th</sup> July 2011.

*employer started to complain that I had stolen 95,000 shillings from her, and a cell phone. I was taken to the police post.”*

16 year old girl, Moshi Retention Home

*“I was employed as a house helper and worked for three months without pay. When I demanded my salary, I was promised to be given it in three days. On the third day I was told to wait. In the evening after doing the house chores, I was surprised to hear that my employers accused me of rape. They beat me up and took me to the police station that night.”*

16 year old boy, Moshi Retention Home

Although exploitative labour is forbidden, the framework for addressing it is weak. Parents are not always willing or able to prevent their children from being exploited, with poverty being a big factor behind unlawful child employment. A Social Welfare Officer in Mwanza described the way in which children become child domestic workers:

*“Child domestic workers' parents enter in agreements with employers. We do not hear of cases until they differ on payment. Also after we have identified a child domestic worker we face a challenge. The children are desperate – they would rather have work than not considering they come from poor families. [We] have received cases of child labourers younger than 14 yrs. Parents are induced by poverty to allow child labour.”<sup>256</sup>*

An NGO in Lindi noted that:

*“Children in Lindi are not protected at all. There are a number of children who work in boats, salts farms and other dangerous or hazardous areas... however, most incidents are not reported.”<sup>257</sup>*

<sup>256</sup> Regional SW Officer, Mwanza, 21<sup>st</sup> July 2011.

<sup>257</sup> Patronage in Environmental Management and Health Care Warriors (PEMWA) In Partnership with Save the Children – Lindi, interview 13<sup>th</sup> July 2011.

A Dodoma NGO that does not deal with labour exploitation cases also commented on the problems of children being unpaid, being kept out of education, engaging in dangerous work and being abused at work.<sup>258</sup> In addition to being denied their salaries, child domestic workers are “denied the right to development”<sup>259</sup> through lack of education and through the lack of other opportunities essential to childhood development. In some cases, children work and parents, or another adult, receive the salary.<sup>260</sup>

### **12.5. *The administrative framework for protection***

An evaluation by the ILO of the Time-bound programme on the Worst Forms of Child Labour in 2006 recorded that some 16,000 children had been counselled and offered an alternative to exploitative labour, which largely took the form of transitional basic education or vocational training. It further noted, with appreciation, the inclusion of child labour indicators and child elimination targets in the National Poverty Reduction Strategy Paper process (MKUKUTA), and the establishment of child labour committees at district level as well as child labour co-ordinators within the districts. The evaluation also notes, however, that nobody in particular is responsible for monitoring child labour, enlarging the knowledge base and developing elimination strategies. There was no mention by any of our respondents in the 10 districts surveyed of child labour committees or child labour co-ordinators, and it is unclear whether they have survived in the 5 years since the completion of the evaluation. Rather, respondents commented on the difficulty children had in accessing justice and obtaining redress when they have been exploited by an employer, and the lack of clear administrative responsibility for the protection of children from exploitative labour.

Section 86(1) of the Law of the Child Act goes some way to resolving the confusion. It provides that the Labour Officer shall carry out any enquiry he considers to be necessary in order to satisfy himself that the provisions with respect to labour by children are being strictly observed. If the Labour Officer is reasonably satisfied that

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<sup>258</sup> Safina Street Network, Dodoma, interview 15<sup>th</sup> July 2011.

<sup>259</sup> Kivulini, Mwanza, 20<sup>th</sup> July 2011.

<sup>260</sup> Kivulini, Mwanza, 20<sup>th</sup> July 2011.

the provisions are not being complied with he shall serve a non-compliance order on the employer and report the matter to the social welfare officer and the nearest police station and they shall investigate and take any appropriate steps to protect the child. Thus the first step to be taken for a child who has been exploited by an employer is to refer the matter to a labour officer.

The police also have a clear responsibility for the investigation and prosecution of offenders under the Law of the Child Act, as the use of children in exploitative labour, forced labour, night work, failure to pay remuneration or sexually exploitative labour is a criminal offence.<sup>261</sup>

NGOs and social welfare officers appear unaware of the provisions in the Law of the Child Act and do not always have a relationship with their local labour officer. For example, one NGO in Lindi stated that they would refer any child labour exploitation issues to the Labour Office but, later admitted that *'we have no records on incidents where the issue was referred [to the] Labour officer. We don't know if there is any labour officer in Lindi for the purposes of child labour exploitation.'*<sup>262</sup>

The labour officers themselves also appeared unclear about their role and responsibilities in some districts. According to the District Labour Officer in Arusha, *'in practice, if we find a child working in the worst forms of child labour or the child is under 14 its an offence and we should institute criminal proceedings. But it doesn't happen.'*<sup>263</sup> The officer stated that one of the difficulties was in actually prosecuting or taking forward cases related to hazardous work or the worst forms of child labour because there is no list of *'what constitutes hazardous work.'*<sup>264</sup> However, it is not clear why this would prevent prosecution under the terms of the Law of the Child Act.

Despite the fact that the Law of the Child Act criminalises the use of exploitative labour this study found that, as a general practice, child labour issues are dealt with

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<sup>261</sup> See sections 78(4), 79(3), 80(3), 81(2) and 83(3) Law of the Child Act 2009.

<sup>262</sup> Patronage in Environmental Management and Health Care Warriors (PEMWA) In Partnership with Save the Children – Lindi, interview 13<sup>th</sup> July 2011.

<sup>263</sup> District Labour Officer, Arusha, 8<sup>th</sup> July 2011.

<sup>264</sup> A draft list has been prepared as part of the draft Regulations currently with the Attorney General's Chambers awaiting approval and adoption.

as civil issues and, commonly, on an informal basis. In areas where there are Labour Officers, the Department of Public Prosecutions stated that it would expect the Labour Officers to prosecute child labour offences but noted that they have faced problems working with the labour division.<sup>265</sup> The State Attorney in Ilala District of Dar es Salaam stated that they do not deal with child labour issues.<sup>266</sup>

There is a general approach amongst labour officers that exploitative child labour is not an issue for their office, especially in the absence of detailed regulations. The view appears to be that, despite the Law of the Child Act and the Employment and Labour Relations Act, this responsibility sits more appropriately with the social welfare officers. This approach is a significant obstacle to children accessing justice. Labour officers are skilled at dealing with employment issues and could be expected to provide easily accessible assistance to children.

**Regulations have been developed on child employment under the Law of the Child Act. They are with the Attorney General's Chambers. We would recommend that these Regulations be adopted as a matter of urgency. These regulations should specify that labour officers have responsibility for investigation allegations of exploitative labour.**

#### ***12.6. Social welfare officers***

The survey carried out for the purposes of this report show that social welfare officers appear in practice the most likely body to handle cases involving exploitative child labour. The Regional Social Welfare Office Secretariat in Mwanza District stated it worked with 26 cases of child labour a year.<sup>267</sup> The Social Welfare Office from Lindi District stated it had received 20 cases of child labour exploitation and a further 20 of child labour issues, and had taken 18 cases to court.<sup>268</sup> A Social Welfare Officer in Arusha reported that she had been involved in 15 cases of child labour since 2009.

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<sup>265</sup> Department of Public Prosecution, interview 30<sup>th</sup> July 2011.

<sup>266</sup> State Attorney, AG Chambers, Ilala District (Dar es Salaam), July 2011.

<sup>267</sup> Regional Secretariat SW Officer, Mwanza, July 18<sup>th</sup> 2011.

<sup>268</sup> Data table provided by Social Welfare Officer of Lindi District Council, July 6<sup>th</sup> 2011.

In border areas, trafficking of children for the purposes of child labour is a problem. A Social Welfare Officer in Tarime, near the Kenyan border commented on a recent case involving a Kenyan child, aged 8, who had been brought to Tanzania for education but was in fact employed by the secondary school, with his 'wages' paid to the man who took him to the school. In this case, the Social Welfare Officer worked with immigration officials and followed up with the family in Kenya to resolve the problem.<sup>269</sup>

The municipal social welfare officer in Arusha, in similar vein to other interviewees, had some doubts about the efficacy of reporting a child labour case to the local Labour Office. She thought it probably more appropriate to send a case to local administrative officers:

*"It really depends on the nature of the case and who is involved. Most of the cases we receive concern house girls and they are reported by neighbours. In such a case we first go to street government officials for their support and then make a decision on how to address the situation. We normally facilitate amicable resolution. However, if it involves physical or sexual abuse then the police get involved first."*<sup>270</sup>

Seeking to resolve the issues for the child through informal means, such as mediation, outside the administrative or judicial system, was a frequent practice. A Social Welfare Officer in Dodoma suggested that most cases are settled informally.<sup>271</sup> A common form of resolution, particularly in the case of domestic child workers, is for the social welfare officer to organise the payment of a bus fare and to send the child back home to the parents or family.<sup>272</sup> While this may appear to resolve the case, social welfare officers do not undertake an assessment of the child or family and have no knowledge of whether, having provided the fare, the child actually boards the bus or reaches his or her destination. Such a resolution may not always be in the best interests of the child and may, indeed, place the child at

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<sup>269</sup> SW Officer, Tarime, 8<sup>th</sup> July 2011.

<sup>270</sup> Municipal SW Officer, Arusha, 11<sup>th</sup> July 2011.

<sup>271</sup> Social Welfare Officer, Regional Administrative Secretary's Office, Dodoma, July 13<sup>th</sup> 2011.

<sup>272</sup> SW Officer, Tameke, July 2011.



further risk. It is difficult to regard such a resolution as providing the child with access to justice or adequate redress for the violation of the child's rights, or as preventing further violations. Tellingly, even though children can be awarded compensation in labour disputes, according to a social welfare officer from Arusha, *"it is very difficult for our office to enforce compensations unless the labour tribunals or courts are involved."*<sup>273</sup>

In other cases, individual social welfare officers took it upon themselves to come up with a solution that would solve the problem. For example, in one case where an employer had failed to pay the child, she was telephoned by the social welfare officer. As the employer was the wife of an MP, it was possible to persuade her to pay on the basis that she would surely not want the social stigma of having her refusal to pay communicated to a wider audience.<sup>274</sup> In another instance, a social welfare officer from Mwanza City Council threatened to send a child's case to the Commission for Mediation and Arbitration and the employer, recognising the seriousness of the problem, paid the child.

**We recommend that guidelines should be issued to social welfare officers setting out the procedures to be followed in cases of exploitative child labour. Children should not be returned home without an assessment first being undertaken to determine the risk to the child of such an approach.**

### ***12.7. Police officers***

As noted above, an employer who fails to comply with the Law of the Child Act and employs a child in exploitative labour, forced labour, night work or sexually exploitative labour commits an offence. Despite suggestions that the police do not investigate allegations and do not prosecute in such cases, records from Lindi Urban Police Station show that in the past year the police had dealt with four cases of child labour exploitation and three cases of child labour disputes.

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<sup>273</sup> Municipal SW Officer, Arusha, 11<sup>th</sup> July 2011.

<sup>274</sup> SW Officer, Tarime, 8<sup>th</sup> July 2011.

*“We sometimes receive complaints that the child employee has stolen from his employer... in very rare circumstances, we receive allegations from domestic servants. In most cases, the child’s employment is terminated without payment so they come here to seek the help of the police so that they can get their monies and other dues.”<sup>275</sup>*

Despite this example, the number of prosecutions for exploitative labour is low, with many police stations reporting that they had no such cases. In some instances, the police also seek to resolve the issue by sending the child home. An example was given in an interview with police in Tameke of a child from another region who was sent to Tameke for education, but then forced to work. The police were informed by neighbours and then

*“called the family to force them to pay for a bus fair to return the girl home.”<sup>276</sup>*

This approach in the absence of any assessment of the child or family, as noted above, leaves the child at risk of being trafficked once more for child labour purposes. A concern, expressed by an NGO in Mwanza is that police were sometimes paid by employers not to proceed with investigations into unlawful child employment. That particular NGO, who work with child domestic workers, “work closely with State Attorneys to ensure a smooth prosecution of cases.”<sup>277</sup>

### **12.8. The role of NGOs**

There are a number of NGOs working with child domestic workers and other children involved in child labour. The Association for Child Domestic Workers in Mwanza has a membership of approximately 200 children. Both this NGO and others interviewed work largely outside the formal systems to resolve cases involving children. Faraja Vocational Training Centre in Arusha stated that they received 12 cases of child labour in the past year, with the problems they faced being “*long working hours, no pay and most of them abused at work.*” Interestingly, the NGO stated it would

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<sup>275</sup> Lindi Urban Police Station Focus Group Discussion, 5<sup>th</sup> July 2011.

<sup>276</sup> Tameke Police Post, July 2011.

<sup>277</sup> Kivulini, Mwanza, 20<sup>th</sup> July 2011.

choose to work with the police to resolve issues, rather than with the Labour Offices but also stated that *“sometimes matters get resolved in our offices without involving formal justice machineries”*.<sup>278</sup>

Interestingly some NGOs are working at local administrative level to try to reduce and prevent exploitative child labour. Kivulini, another NGO working with child domestic workers in Mwanza, reported that it was working with responsible employers and had overseen 4000 contracts between children and employers under the oversight of the Village Executive Office in recognition that *“the solution is not to prohibit child labour but to assist them to have beneficial contracts.”*<sup>279</sup> The Association for Child Domestic Workers also works directly with Street and Village Chairpersons to access children, but commented that this can be difficult as children are often too frightened to join the organisation, or are living in gated communities and cannot be reached by the NGO.

**We recommend that village and ward executive officers should be encouraged to develop responsible child employment practices in their area and should be placed under a legal duty to report exploitative child labour to local labour officers and local social welfare officers.**

### **12.9. Labour disputes**

Where the issue is a labour dispute rather than a complaint of exploitative child labour, the case can then be mediated through a Commission for Mediation and Arbitration. In order to make an application for the complaint to be considered, the complainant must fill out a complaint form. At present, the Commission are not permitted to assist a child to fill in a form, though a child can go to an advocate or trade union for assistance. Children are unlikely to have access to either of these and the need to fill out a form must be considered a significant obstacle to the child. The first step after a complaint is filed is mediation. There is a right to be represented at the mediation or arbitration but it is not clear what form of representation this

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<sup>278</sup> Faraja Vocational Training Centre, Arusha, interview 12<sup>th</sup> July 2011.

<sup>279</sup> Kivulini, Mwanza, 20<sup>th</sup> July 2011.

takes, or how children can find someone to help them. There is no fee for filing a case with the Commission for Mediation and Arbitration.<sup>280</sup>

Despite this option for resolving labour disputes being available to children, the Commission for Mediation and Arbitration in Lindi, Arusha and Dodoma had, unsurprisingly, never received a case in which a child was involved.<sup>281</sup> The Officer suggested that children do not report because there is a lack of awareness of where to go, because children have to work “*for the family to eat*” and because there is fear on the part of the children.<sup>282</sup> This experience was shared by the Commission for Mediation and Arbitration in Dodoma.<sup>283</sup> Without access to this body, children have no access to justice for labour disputes and it is essential that children learn about the Commission and are able to access it.

**We recommend that in order to make the Commission for Mediation and Arbitration accessible to children, child friendly, age appropriate literature, should be developed, bearing in mind that some children may be illiterate. Each Commission should appoint a Children’s Officer, who may be somebody external to the Commission who is able to assist children to make an application to the Commission.**

### ***Conclusion***

Although there are clear laws forbidding exploitative child labour contained both in the Law of the Child Act 2009 and the Employment and Labour Relations Act 2006, and a clear enforcement mechanism, these laws remain largely unenforced. As a result an estimated 5 million children have no access to justice if they are exploited during their employment or not paid a fair wage for their work, or paid at all. Children are not able to seek redress or compensation for unlawful treatment and children remain unprotected. It is to be hoped that the Regulations currently sitting with the Minister of Social Welfare will be promulgated and enforced in the very near future to implement in full the provisions of the Law of the Child Act 2009. It is

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<sup>280</sup> Labour Mediator, Ministry of Labour and Employment, Babeti, July 2011.

<sup>281</sup> Commission for Mediation and Arbitration, Lindi Urban District, July 2011.

<sup>282</sup> Commission for Mediation and Arbitration, Lindi Urban District, July 2011.

<sup>283</sup> Commission for Mediation and Arbitration, Dodoma, 13<sup>th</sup> July 2011.

vital that a decision is reached on which administrative body has responsibility for the protection of children from exploitative labour.

### **13. CONCLUSION**

As can be seen from this report, ensuring access to justice for children requires a multi-disciplinary approach involving a large number of ministries, administrative, judicial and executive bodies, lawyers and other professionals working with children, civil society organisations, communities, parents and children themselves. The report makes a large number of detailed recommendations for improving access. The authors recognise that improving access to justice for children takes time and requires financial and human resources over and above those currently allocated. However, the costs of failing to provide this basic human right, is even more costly. The failure to put in place systems to protect children from unnecessary deprivation of liberty, loss of education, health, land and inheritance or lack of protection from abuse, neglect or exploitation, is likely to have long-term, negative impact on children's life chances. It is both in the state's interest and in the child's best interests that the justice system develops in a progressive manner to meet the constitutional requirement that *'all persons are equal before the law and are entitled without any discrimination to protection and equality before the law.'*