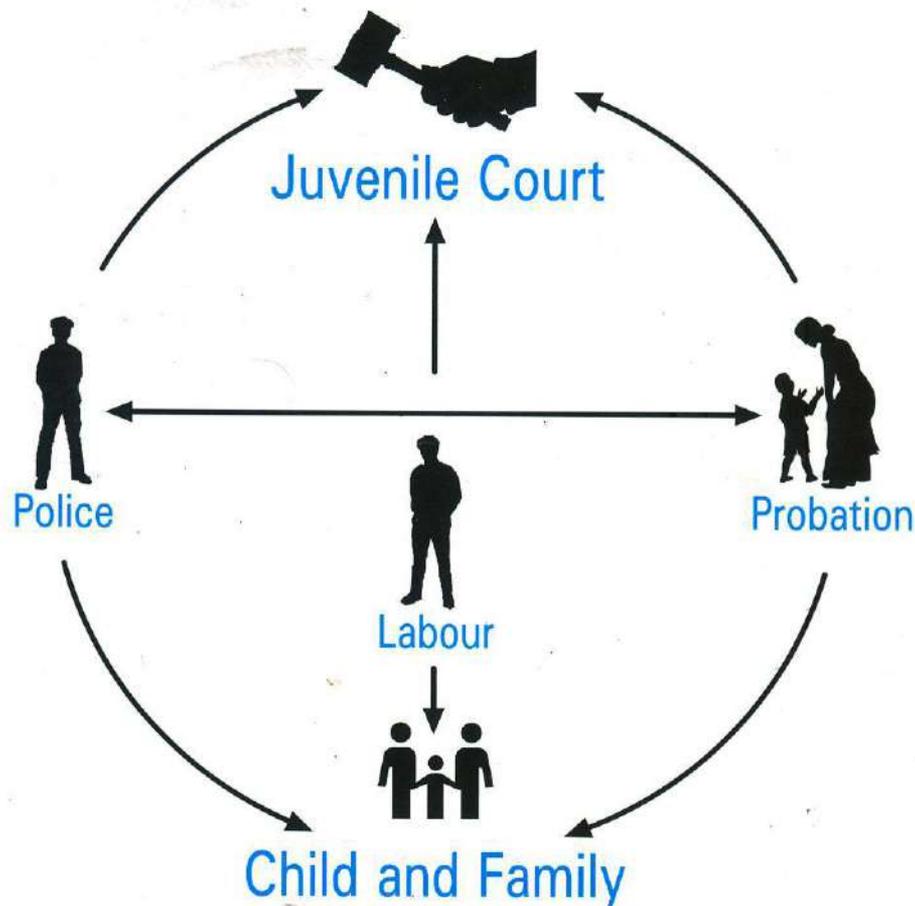




FOR EVERY CHILD

LEGAL PROTECTION OF CHILDREN IN CONTACT WITH THE CRIMINAL JUSTICE PROCESS



A Handbook prepared for Probation Officers, Child Rights Promotion Officers, Police Officers, Labour Officers, Prison Officers and other public officers dealing with children in contact with the criminal justice process by the Ministry of Justice and Law Reforms in collaboration with the United Nations Children's Fund (unicef) and Save the Children in Sri Lanka (SCISL)



unicef



FOR EVERY CHILD

In this booklet you will find ...

- A user friendly guide to the Children and Young Persons Ordinance 1939 (CYPO) - page 3
- Case law under the CYPO - page 10

FOREWORD

The Children and Young Persons Ordinance (CYPO), although enacted in 1939 only came into force in the early 1950's. It is the CYPO that lays down legal procedures for dealing with both "deprived" and "delinquent" children and young persons. The policy and practice of this law has defined the way the State has treated these two categories of children over the years. The CYPO is implemented chiefly by Police Officers, Probation and Child Care Officers and Magistrate's Courts.

Within this trinity of services it is the Probation and Child Care Officer who can be rightly identified as the specialist custodian of the child's welfare. This welfare principle embodied in section 21 of the Ordinance must now be amplified by the best interests of the child principle set out in section 5(2) of the ICCPR Act No. 56 of 2007.

The Department of Probation and Child Care Services was established in 1956 and recently celebrated half a century of operation. During this period its Officers, entrusted with far reaching powers, functions and duties in respect of our most vulnerable children did not have the benefit of a translation of the law - either in Sinhala or Tamil.

The need to familiarize both Probation and Child Care Officers and other Public Officers with the provisions of this important law has been approached in a novel way in this slim publication. It has identified and distilled the most essential and fundamental principles and provisions of this law and also included the decided cases to bring the law within the reach of as many officials and laypeople as possible. The language has been used to communicate directly what the law seeks to convey to service providers.

This handbook should be used as an introduction to the actual law and I hope that many officers will now be encouraged to understand, use and improve this law and its practice to make it a living law. Only such an engagement with the law will ensure the success of reforms to the CYPO which are now contemplated to bring certain aspects into conformity with the UN Convention on the Rights of the Child.

I thank our collaborating organizations unicef and Save the Children in Sri Lanka for their generous support in making this publication a reality.

Suhada Gamlath
Secretary to the Ministry of Justice and Law Reforms
September 1, 2008



WHAT YOU SHOULD KNOW ABOUT ...

THE CHILDREN AND YOUNG PERSONS ORDINANCE 1939

The Juvenile Court

General Principles

Juvenile Justice

Care and Protection



The Juvenile Court

■ What is a Juvenile Court?

Any Magistrate's Court sitting to hear a charge or inquire into a case of care and protection under the CYPO is a **Juvenile Court**. Proceedings before a Juvenile Court are not open to the public.
Sections 2 and 7(3)

■ What are the main procedures of a Juvenile Court?

There are **two** procedures a child or young person may take in a Juvenile Court. They are,

1. *The Juvenile Justice procedure*

To try any crime committed by a child or young person except the crimes of Murder, Culpable Homicide or an attempt to commit Murder or Culpable Homicide or Armed Robbery under section 383 Penal Code; and

2. *The Care and Protection procedure*

To inquire into any case of a child or young person in need of care or protection and make a suitable order for care within the family or alternative care outside the family of origin

■ Who is a child?

Any person under the age of 14 years is a child.
Section 88

■ Who is a young person

Any person under the age of 16 years is a young person
Section 88

■ Confidentiality

No report of proceedings before a Juvenile Court can be published. No material leading to identification of a child or young person can be published.
Sections 11 and 20

No child or young person should be exposed to criminal proceedings. The Court can be cleared when a child or young person is giving evidence relating to any offence against decency or morality.
Sections 18 and 19

■ Application of CYPO

Part II - sections 13-47 apply to all criminal proceedings involving children and young persons. The Penal Code and Criminal Procedure Code will apply to supplement the CYPO where they are not inconsistent with the CYPO.
Section 47



General Principles

- **Welfare principle**

The court must have regard to the welfare of the child or young person in every case.
Section 21

- **Separation from adult offenders**

At all stages - children must be kept separate from adult offenders and girls must be accompanied by a matron.
Section 13

- **Parent or guardian must be summoned to attend court**

In all proceedings affecting the child or young person the court must call the parent or guardian to attend.
Section 16(1)

- **Police notification to Probation and Social Report**

Before a child is to be produced in court for any reason the OIC must immediately notify the Probation Officer.

The Probation Officer must conduct the social inquiry and report to court
Sections 17 (1) and (2)

- **Supervisory duties of Probation Officers and Fit Persons**

If the Court places the child under supervision by
A Probation Officer or by
a Fit Person

they have a duty to,

- Meet the child or get reports from him or her at regular intervals
- Check whether the conditions of the Court order are being observed
- Report to Court on the child's behaviour
- Advise and help the child and when necessary find him or her a suitable job
Section 38(1)

Juvenile Justice

■ Police bail

After arrest the parent or guardian must be called and the child or young person should be released on police bail.

Section 14(1)

■ Discretion of OIC

If the crime is either Murder, Culpable Homicide or an attempt to commit Murder or Culpable Homicide or Armed Robbery under section 383 Penal Code and where police bail is not a suitable option the OIC can detain the child or young person in a Remand Home or a Voluntary Remand Home designated under sec 14(3) before production in Court

Section 14(3)

■ Bail as of right

Where the offence is bailable¹ - the child or young person must be given bail as of right. In other cases they can be placed in a Remand Home or with a Fit Person.

Section 15(1)

■ No child can be sent to an adult remand prison

Only a young person and that too in the exceptional circumstances mentioned in sec. 15(2) can be sent to prison pending trial.

Sections 15(1) and (2)

■ Explanation of charge

Where a child or young person is produced the court must explain the charge in simple language and without delay.

Section 9(1)

■ Hearing

The court must decide the case after hearing both sides.

Section 9(5)

¹This is mentioned in a Table - Schedule 1 of the Criminal Procedure Code which sets out the classification of crimes under the Penal Code. If the crime is against any other law - that law will normally provide the classification.

■ Pre-sentence hearing

Before making an order after a finding of guilty the court can take into consideration the past record and situation of the child by making necessary inquiries

Section 10(1)

■ Orders after a finding of guilty

The Juvenile Court can

- After due admonition - discharge the child or young person
- Order the child or young person to be given to the **parent, guardian or nearest adult relative** on that adult undertaking responsibility for the good behaviour of the child or young person for a maximum period of one year.
- Order the child or young person to be placed with a **fit person**, whether relative or not and who is willing to take care of him or her.
- Make an order of conditional discharge under section 306 of the Criminal Procedure Code.
- Make a probation order
- Where the crime is punishable with imprisonment in the case of an adult - order the child or young person to be held in custody in a Remand Home for a maximum period of one month; or order him to be sent to an approved or certified school if he or she is above 12 years of age.

Sections 25(1), 26(1), 27(1) and 30

■ No child can be imprisoned

A child cannot be imprisoned for a crime or for not paying a fine. A young person also cannot be imprisoned for a crime or for not paying a fine unless court certified that he or she is an extremely unruly character.

Sections 23 (1) and (2)

■ Conviction not a disqualification

A conviction or finding of guilty before a Juvenile Court will not be regarded as a disqualification against the child or young person.

Section 22

Care and Protection

■ Who is a child or young person in need of care or protection?

This is a person having no parent or guardian; or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, and is either falling into bad associations or exposed to moral danger or beyond control.

This also includes a child or young person against whom - broadly any crime involving bodily injury has been committed; or

a child or young person living in the same household as the offender or victim of such a crime if and only if that child or young person **requires care or protection**.

Section 34(1)

■ Places of safety²

There are three places of safety under the CYPO. They are

- Any Remand Home
- Any Hospital
- The residence of a Responsible Person nominated by the Minister under section 14(3)

Any Police Officer of or above the rank of Sub Inspector of Police can take a child direct to a place of safety to be kept there till the child can be taken to Court.

A child can also take refuge by himself or herself in such a place of safety.

The Court can also make interim orders lasting not longer than 28 days at a time ordering the child to be kept at a place of safety or with a Fit Person (who can be a relative) till it makes a final order about the child.

Sections 88 and 37(1)

²Section 451A of the Criminal Procedure Code amended by Act No. 28 of 1998 authorizes a High Court or Magistrates Court after filing of indictment or charge to place a child under 18 years of age in a place of safety pending trial where it appears that the alleged victim of child abuse requires care or protection. Please note that such an order can only be based upon a finding that the child requires care or protection.



■ Powers of Court in a case of care and protection

The Court must be satisfied that the child or young person is in need of care or protection. According to case law the parent or guardian must be heard and Court should not simply follow the recommendation of the Probation Officer. On being satisfied one of the following orders can be made.

- (a) To send a child over 12 years of age to an approved or certified school; or,
- (b) To place the child in the care of a person fit and willing to take him or her whether relative or not; or,
- (c) To release the child to his or her parent or guardian on condition to exercise proper care; or,
- (d) To Place the child under the supervision of a probation officer for a period not exceeding three years.

An order under (b) or (c) can be coupled with an order of supervision under (d).

Section 35(1)

■ Conditions regarding a certified or approved school order

The court must take care to select a certified or approved school belonging to the same religion of the child.

Section 39

Every approved or certified school order gives power to the School to keep the child for 3 years. If the child is under 14 years at the end of that period he or she can be kept up to 14 years of age.

Section 42(1) Also see sections 43 - 45.

■ The record of child or young person

When the Court sends a child to a Certified or Approved School it must send a record with information about the child to the Manager of the School

Section 43(2)

■ Conditions regarding a Fit Person Order

An order made placing a child under the care of a fit person remains in force until the child becomes 16 years of age.

The fit person in whose care a child is placed should also be of the same religion as the child. If not the Fit Person must undertake to bring up the child according to the child's religion.

A fit person has the same rights, powers and liabilities as a parent or guardian in respect of the maintenance of the child.

Section 46

An order placing a person under the care of a fit person may be varied or revoked on the application of any person.

The Court can revise an order placing a child in the care of a fit person at the request of the person or the child.

Section 57(4)

■ Deciding the age of a child or young person

Where the birth certificate of the child or young person is not available the Court can take evidence including a medical report to decide the age. The age so decided is presumed to be the true age of the child or young person and proceedings will not become invalidated if it is later found that the age is different.

Section 80

■ Evidence of husband or wife of accused

Where the accused of a crime against the child or young person is a parent the other parent can be called to give evidence by the prosecution.

Section 81

■ Appeals and Revision

An appeal can be made to the Provincial High Court by the child or young person or by the parent or guardian against the following orders

- A Fit Person order
- A Remand Home order
- An Approved or Certified school order
- An order of supervision by a Probation Officer or Fit Person

An application in revision can be made against other orders to the Provincial High Court.

Section 84



CASE LAW RELEVANT TO THE CHILDREN AND YOUNG PERSONS ORDINANCE

Navaratnam v Karunaratne 62 NLR 82

When an application is made before a Juvenile Court in terms of section 35(1) of the CYPO it is the duty of the Magistrate to hear evidence and be personally satisfied that the young person in question is in need of care or protection. **The Magistrate cannot act merely on the report of a probation officer.**

Perimbarajah v OIC MO Branch Wattala 1994(2) SLR 361

The child in this case was a 13 year old domestic servant. After considering the probation report but without making any inquiries the Magistrate ordered the child to be sent for a period of three years to the Certified School in Maggona.

Held:

1. In terms of s.43 of the Education Ordinance it is the duty of the parent to see that the child attends school till he reaches the age of 14 years.
2. Action was not taken to prosecute the parent although the child had not been sent to school for the last 7 years.
3. There was a duty cast on the Magistrate to make inquiries and find out from the parent whether he was in a position to maintain the child. The child had not committed any offence; there was no evidence to indicate he had fallen into bad association or was exposed to moral danger or that he was beyond control. It was the duty of the Magistrate to find out whether the parent was fit to exercise care or was not exercising proper care over the child. This was a breach of the principles of natural justice (which requires a party to be given a hearing.)
4. The Magistrate was directed to act under section 35(1)(C) and order the parent to enter into a bond to exercise proper care and guardianship.

NOTES

To summarize these cases the Magistrate must conduct a full inquiry and take oral evidence of the parties concerned if necessary. It is now widely accepted that the child's wishes should be ascertained and taken into account. The second case is a specific application of this wider principle and held that the parents have a right to be heard.

Due process is therefore critical before a decision is taken concerning the child. The social inquiry report submitted in terms of section 17 is the principal document upon which the decision must be taken although it is not conclusive.

REX vs. W.A. JAYASENA alias JAYASINGHE 43 CLW 71

Gratiaen J.

A boy of ten years and six months was charged with murder. There is no evidence to establish the charge but he pleaded guilty to the offence of wrongful confinement under section 333 of the Penal Code. The boy was found on medical and other evidence to be intelligent, co-operative and amenable to discipline and capable of being educated to be a good citizen.

The Court in the circumstances was of opinion that in the best interests of the accused and society, which is the underlying principle of section 21 of the un-proclaimed Children and Young Persons' Ordinance, and because of the absence of adequate machinery to carry out the objects of the Ordinance, the accused should be discharged subject to conditions under section 325(2) and 325(2) (2c) of the Criminal Procedure Code.

In re JOHN MATHEW 1986 (1) SLR 243

A young person should not be ordered to be imprisoned for any offence or committed to prison in default of payment of fine unless the Court certifies that he is so unruly a character that he cannot be detained in a remand home or certified school or that he is so depraved a character that he is not a fit person to be so detained.

In re ATHURUPANE 51 NLR 21

Gratiaen J.

Where an accused person is remanded for a term not exceeding the period prescribed in Section 289(2) of the Criminal Procedure Code, it is essential that he should be produced in Court at the expiry of that term so that the Magistrate might bring his mind to bear once more on what would be the appropriate order to make, should the inquiry or trial be postponed. The fixing of bail calls for the exercise of judicial discretion and for the most anxious care in each case.



I hold that, the more helpless a creature, the more entitled it is to protection by man from the cruelty of man. But he who has not qualified himself for such service is unable to afford it any protection

- Mahatma Gandhi

