

¹University of the South Pacific, Suva, Fiji

²Private Practitioner, Solicitor and Barrister, Suva, Fiji

Email: shah_s@vanuatu.usp.ac.fj

Received 5 February 2016; accepted 23 May 2016; published 26 May 2016

Copyright © 2016 by authors and Scientific Research Publishing Inc.

This work is licensed under the Creative Commons Attribution International License (CC BY).

<http://creativecommons.org/licenses/by/4.0/>



Open Access

One of the growing concerns of the world today is children and the protection of their rights. This also extends to the laws in our countries that govern young offenders or juveniles. This paper will focus on Fiji and who is a young offender under the laws of Fiji. It will further consider the process of a young offender coming into contact with the criminal justice system of Fiji. Fiji has a separate Juveniles Act that lays out the procedures, rights and protection that has to be provided for young offenders. These safeguards and procedures will be addressed in this paper and analyzed if they are adequate. This paper will go on to discuss the criminal justice system in brief and progress to consider the rights and protection of young offenders or juveniles when they come into contact with the criminal justice system. Procedures for investigation, arrest, bail, prosecution and sentencing will be addressed. It will try to consider whether Fiji is doing its best to safeguard the rights and interest of

young offenders or juveniles when they come into contact with the criminal justice system and if further safeguards may be required.

Great Britain colonized Fiji from 1874-1970 when it attained its independence. Hence its system of government was modeled on the Westminster system and the criminal justice system paralleled that of the colonising power with adaptations to suit the local setting.

Until 1987 the Privy Council in England was Fiji's final appellate court. This changed after Fiji became a republic and subsequent constitutional changes made the Fiji Supreme Court as the final appellate court. The effect of this is that decisions of the Privy Council are no longer binding on the courts in Fiji but remains highly persuasive. Despite this, however, the general rule of construction of Fiji's statutes is still in accordance with the principles of legal interpretation obtaining in England with meaning attaching to them in English criminal law.

At the lowest rung of the court hierarchy is the Magistrate's Court as a court of first instance, which has a civil jurisdiction to hear cases up to the financial limit of \$50,000¹ and criminal jurisdiction as specified under the Criminal Procedure Code being a sentence not exceeding 10 years for a single sentence and not exceeding 14 years for consecutive sentence.² The High Court tries indictable offences and retains unlimited original jurisdiction to hear and determine criminal proceedings under any law.³ At the next tier is the Fiji Court of Appeal with jurisdiction to hear and determine appeals from all judgments of the High Court and such other jurisdiction as is conferred by law.⁴ Finally, the Supreme Court has an exclusive jurisdiction, subject to such requirement as Parliament prescribes, to hear and determine appeals from all final judgments of the Court of Appeal.⁵

A juvenile court is established under the Juveniles Act.⁶ It comes under the auspices of the Magistrate's Court and is for the purpose of hearing any charge against a juvenile or for the exercise of any jurisdiction conferred on juvenile courts.

The age of criminal responsibility is provided for under the [Crimes Decree 2009](#) as well as under the Juveniles Act. First, the Juveniles Act states:

- It shall be conclusively presumed that no child under the age of ten years can be guilty of any offence;
- A person of and over the age of ten and under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission; and
- A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.

Secondly, the Crimes Decree⁷ provides:

- A person under the age of ten years is not criminally responsible for any offence;
- A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

There is a difference between the provisions relating to age of criminal responsibility under the Juveniles Act and the more recent Crimes Decree. In terms of which one will take precedent, the law that came later would take precedent, thus the age of criminal responsibility should be ascertained by the provision under the [Crimes Decree 2009](#). The provision under the Juveniles Act would need to be amended to be in par with the provision relating to criminal responsibility under the [Crimes Decree 2009](#). Until this provision is amended under the Juveniles Act, the difference in age of criminal responsibility between 12 and 14 may cause confusion example when deciding if a juvenile who is 13 years of age should be given the benefit of doubt under the Crimes Decree or penalized under the Juveniles Act. It is important that the laws relating to juveniles are consistent and complement each other rather than contradict the other. By having consistent laws relating to juveniles, the impor-

¹Section 2, [Magistrates Court Act \(Amendment\) Promulgation 2007](#).

²Section 7, [Criminal Procedure Decree 2009](#).

³Article 100, [Constitution of the Republic of Fiji \(Promulgation\) Decree 2013](#).

⁴Article 99, [Constitution of the Republic of Fiji \(Promulgation\) Decree 2013](#).

⁵Article 98, [Constitution of the Republic of Fiji \(Promulgation\) Decree 2013](#).

⁶[Juveniles Act \[Cap 56\] \(Fiji\)](#).

⁷Section 26, [Crimes Decree 2009](#).



tance given to the rights and interest of juveniles is further emphasized by the nation and avoids grounds for confusion and controversies.

The Juveniles Act distinguishes the following:

- 1) “Child”: a person who has not attained the age of fourteen years;
- 2) “Young Person”: a person who has attained the age of fourteen years, but who has not attained the age of seventeen years; and
- 3) “Juvenile”: a person who has not attained the age of seventeen years, and includes a child and a young person.

These are premised on the role placed on them by the Juveniles Act. For example, a child is associated with the issue of presumption of guilt as dealt with above or the steps to be taken by the court where a child of tender years is called as a witness. The court here means any court where such evidence is required and not necessarily the Juveniles Court. But the Act placed more emphasis on the word “juvenile” and all that relates to it whether it be custody, protection or correction of juvenile delinquents and young offenders.

This is governed by statute namely the Juveniles Act 1978. The purpose of the legislation is to make provision for the custody and protection of juveniles in need of care, protection or control, and for the correction of juvenile delinquents.

The Juveniles Act provides the following measures to protect juveniles in relation to criminal proceedings:

- 1) Prevention of juveniles associating with adults during detention.

Requires the police to make arrangements to prevent a juvenile from associating with an adult who is charged with an offence other than an offence with which the juvenile is jointly charged.⁸ This lessens any possibility of contamination.

A woman ought to have the care of a girl being a juvenile.

- 2) Bail of Juveniles Arrested

Where a juvenile is apprehended and cannot be brought before a court immediately, it is always desirable that he or she be bailed unless:

- the charge is one of murder or other grave crime;
- it is in the interests of justice to remove such person from association with any undesirable person;
- Or the release from custody would defeat the ends of justice.⁹

Where a juvenile is placed in custody the court should ensure that he or she is placed in places of safety. However, where a juvenile is proved to be unruly or of a depraved character, he or she is usually committed to custody in prison.

- 3) Attendance in Court of Parent of Juvenile

A juvenile’s parent or guardian is required to attend at all stages of any proceedings involving the juvenile unless where the juvenile was removed from the custody or charge of the parent or guardian by the court.¹⁰

- 4) Juveniles in Need of Care, Protection or Control

Includes a juvenile:

- Who has no parent or guardian or abandoned by parent or guardian or is destitute;
- Whose parent or guardian is unable or unfit to exercise proper care and guardianship and led to the juvenile falling into bad association, exposure to moral or physical danger or is beyond control;
- The lack of care, protection and guidance affects health and development of juvenile; and
- Where an offence is committed by the juvenile against a member of the same household or by a member of the household against the juvenile.

The correction of juvenile delinquents is a process that began with the investigation of an alleged offending and

⁸Section 3, Juveniles Act [Cap 56] (Fiji).

⁹Section 4, Juveniles Act [Cap 56] (Fiji).

¹⁰Section 7, Juveniles Act [Cap 56] (Fiji).



through the court processes either in a juvenile court or in a summary trial or trial by indictment.

The investigation of an alleged offending by a juvenile is the sole role of the police. There is a clear demarcation between the prosecution and investigation of crimes. Investigation is tasked to the Criminal Investigation Department of the Police Force whilst the Police Prosecution Department prosecutes mostly summary offences. The Office of the Director of Public Prosecutions (DPP) prosecute indictable offences and serious summary offences where the police may not have the capacity to prosecute due to its seriousness and complexity or where difficult issues and questions of law are involved.

However, there is no stopping the police making a referral to the DPP for advice or instructions on the evidence collated even though the investigation is yet to be completed.

At the completion of an investigation a charge is laid. This is usually at the discretion of the police or where an offence is of a complicated or serious nature the advice of the DPP is sought before charges are laid.

The decision to prosecute, whether that of an adult or juvenile is governed by a prosecution policy guideline issued by the Director of Public Prosecutions. The guideline prescribes the test for prosecution, i.e. no person shall be prosecuted unless there is sufficient evidence and it is in the public interest to prosecute. This test is adopted in all Commonwealth countries and is part of the prosecution policies of most common-law jurisdictions.

Public interest factors are either in favor or against prosecution. A prosecution is likely to proceed if:

- A conviction is likely to result in a significant sentence;
- A weapon was used or violence used or threatened;
- The offence was committed against a public officer;
- The accused was in a position of authority or trust;
- The evidence shows that the accused was a principal offender;
- There is evidence that the offence was premeditated;
- There is evidence that the offence was carried out by a group;
- The victim of the offence was vulnerable, has been in fear or suffered personal attack, damage or disturbance;
- The offence was motivated by discrimination against the victim's ethnic or national origin, sex, religious beliefs, or political views;
- There is a marked difference between the actual or mental ages of the accused and the victim, or if there is any element of corruption;
- The defendant's previous convictions are relevant;
- Commission of offence whilst on bail, suspended sentence or other order of the court;
- The offence, though not serious in itself, is widespread in the area where it was committed.

Factors against prosecution include the long delay between the offence with certain exceptions, bad effect a prosecution would have on the victim mentally and in health, defendant is too old or suffering from significant illness, and where reconciliation or restitution is made.

For young offenders factors for consideration include the juvenile's interests. For instance, a conviction can cause serious harm to the prospects of young persons and in appropriate cases a warning is preferred over prosecution.

There is no diversion scheme for young offenders in Fiji and the decision to prosecute using the prosecution policy guideline is an important tool to decide the fate of all alleged offenders including juveniles. The exercise of this discretion to prosecute or not has drastic ramifications for certain offences where the penalty is mandatory imprisonment. For example, Fiji's Dangerous Drugs Decree has a sentencing range from 3 months imprisonment for the slightest residue of marijuana found in the possession of the offender to over 20 years imprisonment for possession or cultivation of large quantities of the drug.

The down effect of such a law is that:

- It is indiscriminate. It matters not whether an alleged offender is a High School student with a promising future or a first offender in good employment.
- It gagged the prosecutorial service of effectively carrying out its task under the prosecution policy guideline.

For juveniles at least, this draconian law was deemed unconstitutional by the High Court and brought relief



for young offenders where the courts now have the discretion over other forms of sentencing in the case of *State v Pickering* [2001] FJHC 341 which stated: “It is not in dispute that the majority of offenders prosecuted under section 8(b) of the Drugs Act, are young first offenders. Some are children, normally entitled to the ‘imprisonment as last resort’ protection under the Juveniles Act. Nor is it in dispute that most offenders prosecuted under section 8(b), are in possession of very small amounts of marijuana. It is not difficult therefore to find the “reasonably hypothetical offender... The Bill of Rights protects the young, the weak, the disempowered and the disadvantaged from unjust and arbitrary behavior. It is this compassion and belief in the nurturing and protecting of our youth, that is the backbone of the Juveniles Act which provides that juveniles must not be imprisoned except for the most grievous of crimes and only if there is no other option. ... A mandatory term of three months imprisonment for this Defendant who is a first offender, and clearly suited for rehabilitation is so grossly disproportionate to his offence that it is a clear breach of section 25(1) of the Constitution”.

The Constitution of Fiji, among other things, guarantees the rights of persons arrested, detained or charged including juveniles. The application of the constitutional guarantees under the Bill of Rights is for all levels of the legislative, executive and judicial branches of government and for all persons performing the functions of any public office.

A juvenile arrested or detained has the right:

- To be informed promptly in a language that he or she understands and the nature of any charge that may be brought;
- To be promptly released if not charged;
- To consult a legal practitioner of his or her own choice in private or to engage a legal practitioner under a scheme for legal aid;
- To be given the opportunity to communicate with family members, etc.;
- To be treated with human dignity and respect.¹¹

Those charged with an offence has similar rights as above including the right to be presumed innocent until proven guilty and not to be tried again for an offence of which he or she has previously been convicted or acquitted.

A juvenile acting in concert with an adult in the commission of an offence is usually jointly charged and tried in the Magistrate’s Court. Except in cases of a trivial nature the charge is severed to allow the court to deal with the juvenile separately in a juvenile court. Usually a decision to sever the charge will be made if there is willingness by the juvenile to admit his wrongdoing and avoid two separate trials with the same witnesses.

1) Procedure in Juvenile Courts

As part of an adversarial system of justice the juvenile court operates by the same rules of procedure and evidence as any criminal court does in common law jurisdictions until a judgment is reached. However, a juvenile not legally represented may ask questions by himself or by his parent or guardian with some leeway given by the presiding magistrate to assist the offender.

Legal representation is available through a scheme of Legal Aid, however, this is usually available and desirable for serious offences only.

2) Methods of dealing with offenders under the Juvenile Act

Where a juvenile court finds a juvenile guilty of an offence, it is open to the following form of sentencing:

- By discharging the offender;
- By ordering the offender to pay a fine, compensation or costs;
- By ordering the parent or guardian of an offender to pay a fine, compensation or costs;
- By ordering the parent or guardian of the offender to give security for the good behavior of the offender;
- By making a Care or Probation Order in respect of the offender;
- Where the offender is a young person, by ordering him to be imprisoned. Imprisonment is normally served at Boys or Girls Correction Centers until he or she attains seventeen years of age.¹²

3) Restrictions on punishment of Juveniles

¹¹Article 14 Constitution of the Republic of Fiji (Promulgation) Decree 2013.

¹²Section 34 Juveniles Act [Cap 56] (Fiji).



The Act restricts the imprisonment of a child for any offence. Except for an unruly character, a court cannot order a young person to imprisonment for default of payment of a fine, damages or costs. However, where imprisonment is meted out, the term should not exceed two years.

4) Punishment of certain grave crimes

A juvenile found guilty of murder, attempted murder, manslaughter, or wounding with intent to do grievous bodily harm, the sentencing court may order detention at a specified place for such period as it deems fit. These correctional centers or approved societies and voluntary institutions are manned or monitored by Social Welfare Department officials tasked to rehabilitate young offenders.

The Act also covered offences against juveniles such as:

- Cruelty and neglect of juveniles: fine of \$400 or to imprisonment for a term not exceeding two years or both;
- Causing or allowing children to be used for begging: fine of \$50 and for a term of imprisonment not exceeding three months;
- Giving intoxicating or spirituous liquor to children: fine not exceeding \$200;
- Sales of intoxicating liquor to persons under 18 years: fine of \$100;
- Taking pawns from juveniles: fine of \$200; and
- Purchasing scrap metals from juveniles: fine of \$200.

Serious offending against juveniles is dealt with under the Penal Code and with the prescribed penalties. Some of these are becoming more prevalent such as pedophilic activities, rape and other sexual offences. Offences in the penal statute that protects juveniles and their prescribed penalties include:

- Abduction of girl under 18 years of age with intent to have carnal knowledge: seven years imprisonment with or without corporal punishment;
- Defilement of girl under thirteen years of age: life imprisonment with or without corporal punishment;
- Defilement of girl between thirteen and sixteen years of age: five years imprisonment;
- Selling and buying minors under the age of sixteen years for immoral purposes: two years imprisonment with or without corporal punishment.
- Unnatural offences, which include sodomy or buggery of young boys, attract imprisonment of fourteen years with or without corporal punishment.

The advent of new technology enhances the ability of criminals such as sex offenders to exploit juveniles transnationally. While sex tourism is not a problem in Fiji, vulnerability of youngsters to these sex deviants is always lingering. The Juvenile Act of Fiji was therefore amended to address this issue. The amendment focused on “Pornographic activity involving Juveniles”. It states that any person whether in public or in private who records from, reproduces, places on to, views or accesses on or from, media or records of pornographic activity directly or indirectly involving juveniles, or persons who look like juveniles whether they are or not.

The Act also prohibits those who make, participates in, uses, observes, publishes, solicits, advertises, distributes, traffics in, lets on hire, buys, sells, offers to sell, media or records of pornographic activity directly or indirectly involving juveniles, or persons who look like juveniles whether they are or not.

The penalty for this offence is a fine not exceeding \$25,000 or a term of imprisonment not exceeding 14 years or both in the case of a first offender. A subsequent offending invokes a \$50,000 fine or life imprisonment.

This paper will not be complete without mention of the important role played by the Department of Social Welfare within Fiji’s Juvenile Justice System. The theoretical underpinning of an adversarial system of justice is intervened by the inquisitorial approach and effort by the Social Welfare Department from roles such as *guardian ad litem* to placement of juveniles into institutions and voluntary societies for their care, protection and control. On many occasions juveniles are not welcome at their own homes or they have offended in their own family units, thus the welfare officer is entrusted with finding a suitable accommodation for the juvenile to safeguard their interests and ensure they are protected. The welfare officers are entrusted by the courts to take into account

¹³Part XI, Juveniles Act [Cap 56] (Fiji).



the best interests and welfare of the juvenile and this may continue until the juvenile has attained the age of seventeen years.¹⁴ The recognition provided under the Juveniles Act requiring the Minister in charge to approve an institution for the care, protection and control of juveniles itself emphasizes the importance given by the law for the protection and care of young offenders.

As would be expected for any developing country with high rates of urbanization and greater pervasion of westernized culture through the popular media and the entertainment industries, the rate of offending by young people is on the increase.

The juvenile system in Fiji is no different from any juvenile justice system in common law countries. The underlying concerns about juveniles and the need for their protection are the same.

While statistics may be interpreted in a number of ways particularly in terms of social ills as causation factors, a fact that cannot be disputed is that young persons are capable of offending and as we progress the level and sophistication of offences become more serious.

Therefore, concerns on juveniles in countries where sex crimes are prevalent and also pedophilia is a matter that needs to be addressed are a worldwide concern because offences against juveniles are becoming transnational. In this way international cooperation is very important. Fiji has incorporated many provisions from the Convention on the Rights of the Child (CRC) in the Fiji legislation by incorporating its provisions in the Family Law Act, [Crimes Decree 2009](#) and also the [Constitution of the Republic of Fiji \(Promulgation\) Decree 2013](#).

The ray of hope lays in the fact that Fiji as a party to the CRC has been making attempts at re-examining our juvenile justice system. The United Nations Children's Emergency Fund (UNICEF) has been very instrumental in Fiji in getting some form of synergy in national efforts towards the treatment of young offenders. With the assistance of UNICEF, workshops have been organized for the police as well as for the stakeholders so that everyone who comes in contact with a juvenile is aware of the juvenile justice system in Fiji.

Constitution of the Republic of Fiji (Promulgation) Decree 2013.

Crimes Decree 2009 (Fiji).

Criminal Procedure Decree 2009 (Fiji).

Juveniles Act [Cap 56] (Fiji).

Magistrates Court Act (Amendment) Promulgation 2007.

State v Pickering [2001] FJHC 341. <http://www.paclii.org>

¹⁴Section 35-38 Juveniles Act [Cap 56] (Fiji).

