

## The Pre-Trial Detention of Child Offenders: Some Evidence from Malaysia

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**Abstract:** Many child offenders are deprived of their liberty at the pre-trial process for a long period of time. Lengthy detention at this stage is detrimental to the well-being of child offenders because of the trauma they experience while being detained. However, the effectiveness of the current system in preventing child offenders from being detained at the pre-trial process in Malaysia remains an open question because of the high numbers of child offenders being detained at the pre-trial process. The objectives of this study are to examine such issues by highlighting the inadequacies of the laws governing the pre-trial detention and to analyse whether the current laws are meeting the requirements of international standards. A mixed quantitative and qualitative approach has been adopted to identify the views of 432 child offenders who participated in the study and the opinions from the stakeholders respectively. The findings revealed that there is a compelling need to reform the current laws governing the pre-trial detention in order to reduce the number of child offenders being deprived of their liberty at the pre-trial process.

**Key words:** Pre-trial detention, Juvenile justice system, child offenders, CRC 1989, Malaysia

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### INTRODUCTION

In Malaysia, the laws governing the Juvenile justice system are enshrined in part X of the child Act 2001 (hereinafter, known as the 2001 Act). However, the 2001 Act only governs the trial process of the child offenders and there are no specific provisions that uphold the legal rights of the child offenders at the pre-trial process. In the absence of these fundamental provisions, the criminal procedure code (hereinafter, referred to as the CPC) can be relied upon when dealing with child offenders at the pre-trial process.

Section 83 (1) of the 2001 Act only provides that a child offender can only be arrested, detained or tried in the juvenile justice system in accordance with the 2001 Act. However, this provision does not specify the detailed procedures governing the arrest, detention and trial of the child offenders (Ahmad, 2010). One of the issues surrounding the pre-trial process is when child offenders are detained for a lengthy period of time, pending trial.

Hence, it is crucial to examine the adequacies of the current laws in governing the detention of child offenders at the pre-trial process. At present there is scarce literature in this area that highlights the inadequacies of the current laws in protecting the child offenders through

findings obtained from empirical studies. The objectives of this paper are as follows to examine the adequacies of the 2001 Act in governing the pre-trial detention of child offenders to analyse the international legal framework in protecting child offenders from being subjected to pre-trial detention and to propose viable alternatives and reforms in the law that can effectively reduce the numbers of child offenders being deprived of their liberty at the pre-trial process.

### MATERIALS AND METHODS

The findings discussed in the article are derived from the mixed methodology approach that has been adopted in order to meet the research objectives highlighted above. Such approach is specifically chosen to ensure that the representative's opinions from the child offenders as well as the stakeholders are obtained and they both can add an overall strength to the study.

For quantitative study, cluster and stratified sampling were chosen in order to ensure that the findings obtained are representative of the population of child offenders in Malaysia. About 432 child offenders who were serving sentence across Malaysia participated in the cross-sectional survey and they were all below 18 year of age. In relation to qualitative study, 25 officers from

9 different sectors had been identified as most suitable to take part in the semi-structured interviews due to their expertise in the field of juvenile justice system.

The advantages of using mixed methods are that it provides a holistic view of the juvenile justice system in Malaysia by taking into account the views of both the child offenders and the stakeholders. Hence, the adoption of mixed methods adds an overall strength to the study conducted.

The findings of this research are based upon both the primary and secondary data. In obtaining the primary data for qualitative study, the research instrument used is the interview schedules and the interviews were digitally recorded and were analysed in detail according to various coding and themes. On the other hand, survey was adopted when quantitative study fieldwork was undertaken with child offenders who were serving sentence in institutions located in Peninsular Malaysia including Sabah and Sarawak.

The secondary data in this research involved both primary and secondary sources obtained via library-based research. The primary sources include the 2001 Act and the criminal procedure code while articles from academic and referred journals, books, policies, online databases and documents collected from the stakeholders made up the secondary sources for this research.

**The key provisions governing the pre-trial detention of child offenders:** Section 84 (1) of the 2001 Act specifies that if a child offender is arrested with or without warrant, the child must be brought to the Court For Children (hereinafter, referred to as the CFC) within 24 h following the arrest. Even though this provision seems to be in line with Section 28 (3) of the CPC that requires a police officer to bring an offender to the Court within 24 h it is weakened by Section 84 (2) of the 2001 Act. This provision provides that in the event the child offenders are not brought to the CFC within the above stipulated time period, the child offenders will be brought to a Magistrate who has the discretionary power to make an order for them to be detained in a place of detention until they can be brought to the CFC. A closer examination on the wordings of Section 84 (2) of the 2001 Act revealed that it does not specify the period of detention of child offenders before they are finally brought to the CFC. Even though this provision seems vague, the Court of Appeal in the case of *PP v N (A Child)* highlighted that it is not necessary to stipulate the time period for the detention of the child offenders because “it must be understood that the child must be brought before a Court for children without unnecessary delay.” In supporting this judgment, the appellate court further pointed out that Section 84 (2)

of the 2001 Act is hardly applicable because it will only be operative when it is not possible to bring the child offenders to the CFC within 24 h from the time of arrest. Despite the judgment rendered by the appellate court, it is submitted that in the absence of any time limit specified in Section 84 (2) of the 2001 Act, there may be possibilities that child offenders can be detained longer than necessary.

In relation to detention of child offenders, Section 84 (3) of the 2001 Act further specifies that child offenders may be detained at the pre-trial process in one of the following situations when they are not given bail by the CFC when the child offenders are charged with murder or other grave crime it is necessary in the best interest of the child offenders, to remove them from associating with any undesirable person or the CFC has reasons to believe that the release of the child offenders would defeat the ends of justice. It is submitted that when Sections 84 (1-3) of the 2001 Act are collectively read together, child offenders who are arrested must be brought to the CFC within 24 h (unless the qualification in Section 84 (2) of the 2001 Act highlighted above applies) and the child offenders must be released on bond pending the “hearing of a charge” except if the CFC refused to release the child offenders under one of the grounds outlined in Section 84 (3) highlighted above.

Subsequently, after the child offenders are detained, Section 86 of the 2001 Act vested the powers in the CFC to detain the child offenders in a designated place of detention provided in the 2001 Act until they are brought to the Court having jurisdiction to deal with the case. A closer analysis of this provision revealed that the specific period of detention is again not provided in this provision and there are no specific places of detention designated for child offenders (UNICEF, 2013). It subsequently follows that the 2001 Act only specify that child offenders be detained at the police station, police cells or police lock-ups, separated from the adult offenders or they may be also placed in the mental hospital when necessary. It is to be noted that the 2001 Act does not specifically specify the rights of the child offenders during the pre-trial detention. However, the rights of an arrested person is enumerated in Section 28A of the CPC.

**International legislative framework governing the pre-trial detention of child offenders:** The Convention on the Rights of the Child 1989 (hereinafter referred to as the CRC) is the most ratified human rights treaties and it seeks to uphold and protect the legal rights of children, including those who come into contact with the criminal justice system. Malaysia acceded to the CRC on the 17th February 1995 in order to uphold the legal rights of

the children in Malaysia. The CRC promotes that all forms of legal protection afforded on child offenders should take into account these four main general principles enshrined in the CRC the principle of non-discrimination the best interest of the child shall be a primary consideration the inherent right to life and right to participation.

In addition to the general principles highlighted above, the CRC also outlines specific legal protection afforded to children who come into contact with the laws, as provided in Article 37 of the CRC. Article 37 of the CRC enumerates the leading principles, relevant to child offender's deprivation of liberty, the procedural rights, treatment and conditions when they come into contact with the criminal justice system.

In particular, Article 37 (b) of the CRC advocates for states parties to ensure that the arrest, detention or imprisonment of child offenders shall be in conformity with the laws and shall be used only as a measure of last resort and for the shortest time. In addition, this study also provides that no child offenders shall be deprived of their liberty unlawfully or arbitrarily. These leading principles enshrined in the CRC are affirmed by the Committee on the Convention on the Rights of the Child 1989 (hereinafter referred to as the Committee on the CRC) in General Comment No. 10 entitled "Children's Rights in Juvenile Justice" (hereinafter referred to as General Comment 10). The Committee on the CRC, in General Comment 10 reminds States Parties to provide clearly in the laws, factors that warrant the detention of child offenders at the pre-trial process such as to secure his attendance at the trial and if they posed dangers to themselves or to others.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (hereinafter referred to as the Beijing Rules) upheld the principles highlighted above in the CRC (10). The Beijing Rules stressed upon the need to separate child offenders who are deprived of their liberty from the adult offenders. Further, calls are made for Member States to provide the child offenders with care, protection and all aspects of individual assistance they may require such as social, educational, vocational, psychological, physical support and medical treatment when they are detained, by taking into account their age, sex and personality. Additionally, the Beijing rules strongly advocates for member States to uphold the rights and guarantees afforded to child offenders who are deprived of their liberty in accordance with the Standard Minimum Rules for the Treatment of Prisoners 1955 (hereinafter, referred to as the Standard Minimum Rules in 1955) (UN, 1955). The Standard Minimum Rules 1955 provides that the pre-trial detention

of child offenders must be avoided as much as possible and child offenders shall be detained only in exceptional circumstances. Additionally, member states are reminded that child offenders who are serving pre-trial detention must be separated from convicted juveniles. Moreover, the Standard Minimum Rules 1955 urged Member States to ensure that the following legal safeguards are afforded to child offenders when they are detained at the pre-trial process the rights of child offenders to have access to legal representatives as well as ensuring the confidentiality of this communication and their entitlement to legal aid the rights of child offenders to pursue employment, education and training and the rights of child offenders to receive and retain materials for their leisure and recreation. In protecting the rights of child offenders who are detained at the pre-trial process, the Committee on the CRC recommends States Parties to incorporate the rules enshrined in both Beijing and Standard Minimum Rules 1955 in their domestic laws.

## **RESULTS AND DISCUSSION**

Some pertinent findings are highlighted below in relation to the length of detention of child offenders at the pre-trial process. Table 1 depicts the length of detention imposed on child offenders before they were charged. The said table demonstrates that only 11.1% of child offenders were detained for a period of 24 h or less. The highest percentage of child offenders were subjected to detention for 7 day followed by 19.2% of them who were detained for 2 week 14 or less and 17% of them were deprived of their liberty for a longer time, between 1 and 2 month.

Similarly, high numbers of child offenders were also deprived of their liberty, pending trial as stated in Table 2. For instance, the highest number of child offenders were deprived of their liberty for a period between 3-5 week (27.3%) before trial commences. In addition, 22.7% of the child offenders were detained for >12 week followed by those who were subjected to detention between 1-2 weeks pending trial.

In light of the findings depicted in Table 1 and 2, it can be inferred that child offenders who came into contact with the justice system at the pre-trial process were detained for a long time even before they were charged. This prolonged period of detention is congruent with studies undertaken earlier that demonstrate similar findings (Ahmad and Kiprawi, 2012). These findings demonstrate that the current laws and it's implementation may not be meeting the requirements of Article 37 (b) of the CRC as well as both the Beijing and Standard Minimum Rules 1955

Table 1: Duration of detention before charge

Length of detention of child offenders before charge	Frequency	Yes (%)
≤1 day	48	11.1
≤1 week	162	37.4
≤2 weeks	83	19.2
≤3 weeks	5	1.1
≤4 weeks	8	1.9
1-2 month	78	17.8
3-4 month	23	5.2
5-6 month	6	1.4
>6 month	10	2.3
Did not answer	9	2.1
Total	432	100.0

Table 2: Detention of child offenders pending trial

Length of detention of child offenders pending trial	Frequency	Yes (%)
≤1 day	64	14.8
1-2 week	64	14.8
3-5 week	118	27.3
6-8 week	38	8.8
9-12 week	34	7.9
>12 week	98	22.7
Did not answer	16	3.7
Total	432	100.0

Nadzriah Ahmad December-March 2014-Statistics of child offenders who were subjected to pre-trial detention before they were charged

that provide, the detention of child offenders must be used only as a measure of last resort and for the shortest appropriate period of time.

The quantitative findings also demonstrate that the highest number of child offenders were placed in police lock-ups when they were detained at the pre-trial process (38.4%) followed by those who were detained in the prisons (28.9%) and those who were serving sentence in the probations schools (17.1%). Concerns may be raised in relation to placing child offenders in the prison because this is not in line with the Standard Minimum Rules 1955 highlighted above that provides child offenders who are serving pre-trial detention must be separated from convicted juveniles.

In addition to the issues of prolonged detention highlighted in the preceding paragraphs, concerns have also been raised in relation to the condition of detention when child offenders were deprived of their liberty. For instance, past findings found that not only were the lock-ups overcrowded, the sanitary conditions of these places were also poor. Further, there was also lack of privacy in washrooms and showers and poor quality of food was served to child offenders. The condition of child offenders worsened when they were not provided with sufficient facilities for sleeping arrangements and they were also deprived from clothing and other necessities. These findings do not seem to be in line with the provisions outlined in the Beijing rules highlighted in the preceding paragraphs.

The adverse effects of being deprived of liberty are highlighted by the Committee on the CRC that emphasized

child offenders are susceptible to be victims of violence at every stage of criminal proceedings, from their first contact with the enforcement officers including the period of pre-trial detention. The opinion of the Committee is affirmed by the Beijing Rules that recognized child offenders who are subjected to detention pending trial may be at risk of “criminal contamination” through their association with other child offenders.

**Findings for qualitative study:** In recognizing the adverse effects of pre-trial detention on child offenders as highlighted above, the officers who participated in the semi-structured interviews highlighted the following important points child offenders often felt distressed and uncomfortable due to the long period of detention child offenders felt traumatized when they were detained because they were afraid and they were not represented by their parents child offenders felt distressed during detention because they were unable to express their feelings to anyone, in the absence of their parents or family members child offenders felt frightened in the lock-ups because they were not separated from the adult offenders and child offenders felt intimidated by the presence of police officers who mistreated them when they were detained in lock-ups. These findings provide compelling evidence that the implementation of the laws are not in line with the 2001 Act because some of the child offenders were not separated from the adult offenders when they were detained. Additionally, child offenders were susceptible to traumatic experience during the pre-trial detention because their individual needs were not attended to, in accordance with the requirements enshrined in the Beijing Rules. Moreover, their legal rights were not protected as highlighted in the Standard Minimum Rules 1955 explained in the preceding paragraphs.

**Viable alternatives to pre-trial detention:** The Committee on the CRC reminds States Parties that subjecting child offenders to long period of pre-trial detention constitutes a grave violation of Article 37 (b) of the CRC. Further, the Committee strongly opined that the use of pre-trial detention as a form of punishment on child offenders contravened the cardinal principle in criminal law that everyone is presumed innocent until proven guilty, in line with Article 40 (2) (b) (i) of the CRC. Instead of subjecting child offenders to the pre-trial detention, the Beijing rules advocates for member states to implement alternative measures such as close supervision and placing child offenders under an intensive care or placing them with a family or in an educational setting or home.

The need to provide child offenders with alternative measures is also given emphasis in the Standard Minimum Rules 1955 that provides the pre-trial detention of child offenders must be avoided as much as possible and they shall be detained in exceptional circumstances only.

In order to overcome the detrimental effects of the pre-trial detention, the Committee on the CRC recommended the following measures, meant to reduce the use of detention at the pre-trial process in the event alternative measures are not implemented, child offenders should be brought before a court or judicial body not later than 30 day after his or her pre-trial detention takes effect and final decisions on the charges pressed against child offenders must be made not later than 6 month after they have been presented to the court or other judicial bodies. Drawing lessons from other jurisdictions, in particular New Zealand, the police officers are given specific statutory powers to release child offenders following an arrest because detention must be used only as a measure of last resort. Additionally, the following two specific programs have been developed to reduce the numbers of child offenders subjected to pre-trial detention child offenders are required to wear electronic monitoring devise to facilitate the police in the monitoring process; and child offenders can also be part of the 6 week Supported Bail Program (SBP) to assist them in fulfilling the terms of bail set by the Youth Court. This programme helps to reduce the number of child offenders serving remand and detained in police custody by subjecting them to community based alternative programmes. Additionally, SBP engages the involvement of family members in helping to supervise and monitor their own children. It is submitted that the above recommendations can help to reduce the numbers of child offenders who are serving long period of detention. However, for SBP to be implemented in Malaysia, the government needs to first pay heed to the calls made by the international community to recommend for the withdrawal of reservation expressed to Article 37 of the CRC as well as making concerted effort to reform the provisions in the 2001 Act in order to reflect the provisions in the CRC and the international rules highlighted above (Ohchr, 2011).

### **CONCLUSION**

The findings highlighted in the preceding paragraphs provide compelling evidence that alternative measures need to be undertaken in order reduce the number of child offenders who are subjected to pre-trial detention. In line with the provisions enshrined in the CRC and other

international instruments, detention of child offenders should only be used as a measure of last resort and in exceptional circumstances only. Drawing from the best practice in other countries, particularly New Zealand, the implementation of specific programmes can help to reduce the numbers of child offenders being detained at the pre-trial process. As well as preventing them from the trauma of being detained when they come into contact with the formal justice system.

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