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**HORIZON INSTITUTE'S RECOMMENDATIONS  
FOR AMENDMENTS TO SOMALILAND'S JUVENILE  
JUSTICE LAW**

**September 2015**

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## **1. Introduction**

- 1.1 These recommendations are the outcome of a review carried out by Horizon of Somaliland's Juvenile Justice Law No.36/2007 ("JJL"). The objective is to provide comments on the JJL and make recommendations for amendment, with a view to ensuring a comprehensive legal framework for dealing with children in conflict with the law. In particular, the JJL needs to include the practice of diversion, which Somaliland intends to implement with regard to children, in more detail to ensure that the law meets Somaliland's obligations under the Constitution and international human rights laws. These standards encourage diverting children away from the criminal justice system and judicial proceedings as early as possible. Accordingly, one of Horizon's main recommendations is that the JJL should highlight the role of the police, prosecutors, and other agencies dealing with children in conflict with the law in trying to dispose of cases through diversion instead of a criminal hearing, and where possible, without detention.

## **2. Definitions**

- 2.1 While the JJL states that the age of "full criminal responsibility" is 18 years old (Articles 10 and 64.2), Article 1 causes confusion as to the whether the age of majority is either 15 or 18 years old because it refers to a child as being any human being "below the age of 15 years old". Moreover, to further clarify the definition of a "child" under the JJL, the reference to "maturity" should be removed because it is of no substantive relevance to the remainder of the JJL and further convolutes the definition of a "child".
- 2.2 The definition of "diversion" is also problematic because it refers only to the orders of judges and therefore precludes the involvement of police and prosecutors in the diversion process. As discussed in more detail below, diversion, for the most part, should be applied at the pre-trial stage to ensure that the child is not exposed unnecessarily to the formal justice system. As such, diversion proceedings also involve other actors, such as the police and prosecution, and the JJL should be amended to reflect this.
- 2.3 Accordingly, it is advisable that Article 1 be amended with the following new definitions:

"A Child means any human being below the age of 18 years old".

Delete the word "Maturity" and its definition.

"Diversion means the referral of cases involving child offenders away from formal court proceedings".

## **3. Objectives of the JJL**

- 3.1 Article 5 sets out several objectives of the JJL. Article 5.1 states that one of the objectives of the law is to "protect the rights of children in accordance with International Child Right Conventions and International Human Rights Law and in a manner consistent with Somaliland cultural and Islamic values". There is no reference to Somaliland's Constitution, despite it containing several fundamental

rights relevant to the rights of children. Accordingly, reference to the Constitution should be included in Article 5.1.

- 3.2 The reference to “Somaliland cultural and Islamic values” in Article 5.1 could cause confusion and undermine the Constitution. Article 5 (2) of the Constitution already requires all laws to comply with Sharia. Article 36 (2) of the Constitution further requires the Government to legislate for “women to be free of practices which are contrary to Sharia and injurious to their person and dignity”. As such, the current wording of the JIL that requires protection of Somaliland cultural values, some of which may be practices harmful to the girl child, is contrary to the Constitution. Amendment to Article 5.1 of the JIL to remove reference to “Somaliland cultural and Islamic values” and replace it with “the Constitution” would remove the risk of undermining Constitutional provisions. Protection of Islamic values would still be ensured through compliance with the Constitution.
- 3.3 Furthermore, Article 5.1 would benefit from reference to regional, as well as international, human rights conventions to ensure compliance with human rights law.
- 3.4 It is therefore recommended that Article 5.1 be replaced with the following text:

“To protect the rights of children in accordance with the Constitution, international and regional conventions concerning the rights of the child, and other international and regional human rights laws”.

#### **4. Deprivation of Liberty**

- 4.1 The meaning of “a measure of last resort” in Article 8.1.2 is unclear and further confused by Article 8.1.3, which makes the deprivation of liberty conditional on whether the child was caught in the act of committing the offence. It is therefore recommended that both Articles 8.1.2 and 8.1.3 be deleted.
- 4.2 It is recommended that Article 8 instead read as follows:

“8.1. A child may be deprived of liberty only if he is found responsible for a serious act involving violence against another person or is a persistent offender of serious offences, and there is no other appropriate response.

8.2. Children deprived of liberty shall be placed or kept in a safe and secure place permitted by law”.

#### **5. Criminal Capacity**

- 5.1 Article 10 on criminal capacity is unclear as presently drafted. Given the importance of a minimum age of criminal responsibility, Article 10 should be clarified. It is recommended that Article 10 be amended as follows:

“Notwithstanding the provisions of the Penal Code or any other law:

10.1 No child under the age of 15 years of age shall be criminally responsible for any offence. Such children should be diverted from the criminal justice system in line with Part V of this law.

10.2 A child who was between the age of 15 and 18 years at the time of the commission of the offence and is found criminally responsible, must be treated in line with the standards laid out in this law.

10.3 Whoever, at the time he or she committed an act, has attained 18 years of age, shall have complete criminal responsibility and shall not be recognised as a child or youth”.

## **6. Duties of Probation Officers**

- 6.1 Probation officers play a key role in advising the court, the police and prosecutors on the individual circumstances of the child who is in conflict with the law. This is recognised to some extent in the JJJ under Articles 56 and 57, which require probation officers to conduct an assessment of the child and provide information at a preliminary hearing.
- 6.2 Article 22 sets out the duties of the probation officers, but does not specifically include the duty to assess a child and provide an assessment report. It is recommended that the JJJ should expressly include in Article 22 that probation officers must carry out an assessment of the child for the purposes of determining whether he or she should be diverted from the formal justice system, and if not, on the appropriate sentence if found guilty following trial.
- 6.3 It is recommended that the current Article 22 be replaced with a more comprehensive provision, as follows:

“Duties of Social Probation Officers shall be:

- a. To carry out an assessment of the child for the purposes of determining whether he or she should be diverted from the formal justice system.
- b. To provide police officers, prosecutors and the court with information that is relevant to deciding whether the child should be diverted from the criminal justice system. The information on whether or not a child should be diverted from the criminal justice system shall be provided in writing.
- c. To provide any other relevant information to the police, prosecutors and the court, including the circumstances of the offence and the accused.
- d. To provide a written report on an appropriate sentence where a child is convicted of an offence, setting out the reasons for custodial or non-custodial sentence.
- e. To coordinate and cooperate with the police, social workers, parents, victims and others who may have an interest in the case.
- f. To supervise diversion programmes and monitor compliance with diversion orders.
- g. To carry out any other duties as required by this or any other laws”.

## **7. Duties and Responsibilities of Children Police**

- 7.1 Later in this paper, it is recommended that the police also have the authority to divert child cases away from the criminal justice system. Several jurisdictions allow for such diversion, and it is important that the police are vested with this authority because diversion should be considered as early as possible. The police are in a position to divert children's cases even before a formal arrest has taken place. For example, depending on the circumstances and the nature of the act, a police officer could decide not to arrest a child but instead talk to his or her parents or guardian, or simply issue a warning.
- 7.2 Accordingly, it is recommended that Article 24 include the duty to consider whether a child who has come into contact with the police for a potential offence, should be diverted. The current numbering of Article 24 appears to be incorrect but the following duty/responsibility should be added to the list set out in Article 24:

“To consider whether or not a child who has been accused of an offence should be diverted from the formal justice system in accordance with Part V of this law”.

## **8. Pre-Trial Detention**

- 8.1 In accordance with human rights standards, the detention of children should be a last resort and where there are no facilities to separate children from adults, detention is always inappropriate. However, when detention of children is necessary, Article 27 proposes the establishment of Pre-Trial Detention Centres but says nothing about where children should be detained pending trial in the absence of these Centres. Accordingly, it is recommended that Article 27 read as follows:

### **Article 27: Establishment**

“27.1. Children Pre-trial Detention Centres shall be established by a decree of the Minister of Justice after consulting the Minister of Family Affairs and Social Development.

27.2. Children, who are detained or arrested, shall be kept only in Children Pre-trial Detention Centres when they are established.

27.3. Whenever possible, children should not be detained pending trial and alternative measures should be used, such as close supervision, intensive care, or placement with a family or in an educational setting. This must be given particular consideration where there are no Pre-Trial Detention Centres available.

27.4. Under no circumstances shall children be held in the same pre-trial detention facilities as adults”.

- 8.2 In addition, Pre-Trial Detention Centres should differ from prisons because the child has not been found guilty and is being detained for reasons of administrative convenience alone. Pre-Trial Detention Centres must therefore provide care, protection and all necessary services to the child. Accordingly, it is recommended that Articles 28.1 and 28.2 be replaced with the following:

### **Article 28: Responsibilities of Children Pre-Trial Detention Centres**

“28.1. Provide care, supervision, security and any necessary services, such as social, educational, vocational, psychological, medical and physical, that the detained child may require in view of their age, sex, personality and personal circumstances”.

8.3 Article 49 addresses the place of pre-trial detention. Its title, however, refers to “Place of Arrest”. It would be more appropriate to amend the title to refer to “Pre-Trial Detention”.

8.4 Moreover, Article 49 appears to suggest that a child who is arrested must be detained in a Children Pre-Trial Detention Centre. Although the provision may actually mean that where it is determined that a child should be detained, it must be in a Children’s Pre-Trial Detention Centre, it should be worded more clearly to ensure that it is not interpreted as meaning that detention is mandatory. It is therefore recommended that Article 49 be amended as follows:

“Where it is determined that it is appropriate and necessary to detain a child who has been arrested, he or she shall be detained in a Children’s Pre-Trial Detention Centre”.

## **9. Post-Conviction Detention**

9.1 Article 34 addresses the factors a court must consider when determining where a child should be detained following conviction. It should be considered whether or not to include a requirement that the court also consider any information provided by the child’s probation officer. If such a provision is found to be beneficial, Article 34.2.d could be added to Article 34 as follows:

“d. Any information provided by a probation officer”.

## **10. Child Welfare and Protection Committees**

10.1 To avoid undermining existing structures and causing unnecessary duplication of work, the role of Child Protection Committees should be recognised in the JIL. For the sake of clarity, it is also necessary to replace all references in the JIL to the Ministry of Family Affairs and Social Development with the Ministry of Labour and Social Affairs. As such, the following amendment to Article 45 is recommended:

### **“Article 45. Child Protection Committees**

45.1. Where Child Protection Committees do not exist within a community, they shall be established by the Ministry of Justice in consultation with the Minister of Labour and Social Affairs.

45.2. The duties and responsibilities of Child Protection Committees shall be specified in the decree in which they were established”.

## **11. Preliminary Hearing**

11.1 Article 53 requires that an arrested child be brought before a competent Children Court within 48 hours. The JJL should stress that children’s cases be expedited where possible. Accordingly, it is recommended that Article 53.1 be replaced with the following text:

“The arrested child shall be brought to a competent Children Court as soon as possible, and in any case no later than 48 hours. Where there is a backlog of cases causing delay in the courts, cases involving child offenders shall be given priority”.

11.2 Article 59 refers to “the Attorney”. It should be clarified whether the original text of the JJL means to refer to the Prosecutor or to the Attorney General. Article 59.d should ideally state:

“To provide an opportunity to the prosecutor to assess whether there are sufficient grounds to proceed to trial”.

## **12. Detention After First Appearance**

12.1 Article 65 addresses the further detention of a child after their first appearance. This provision should reflect the policy of diverting cases where feasible at the earliest possible stage. Currently, Article 65 allows for further detention of a child where:

- a. The proceedings of a preliminary hearing are adjourned.
- b. The release of a child into the care of a parent, guardian or appropriate adult, or on bail, is for any reason not possible.

12.1 It is unclear, under the current wording of Article 65, whether further detention is justified where either one of these conditions is met, or whether both must be met. There may be a case where the proceedings of a preliminary hearing are adjourned but it may nonetheless be appropriate to release the child into the care of his or her parent or guardian. It is therefore advisable that an “and” be added at the end of Article 65.a. Accordingly, it is recommended that Article 65 read as follows:

“A Children Judge may order further detention of a child for the following reasons:

- a. The proceedings of a preliminary hearing are adjourned; and
- b. The release of a child into the care of a parent, guardian, or appropriate adult or on bail, is for any reason not possible”.

## **13. Diversion**

### ***13.1. Introduction***

- i Part V of the JJL addresses diversion of a child’s case away from the criminal justice system. There are several areas under Part V that require further consideration and amendment in order to ensure a system that respects the rights of the child. An



important approach throughout the process of dealing with children in conflict with the law should be to try, whenever possible, to divert a child from the criminal justice system at the earliest possible stage. This section of the paper recommends amendments with regard to the definition and purpose of diversion, as well as the basis upon which a child is selected for diversion.

### ***13.2. Definitions and Purpose***

- i As recommended above, police and prosecutors should also have the authority to divert a juvenile case away from the criminal justice system. Article 67 should be amended to include the principle that diversion be considered at the earliest stage possible in proceedings in order to promote community reintegration, prevent the stigmatisation of a criminal record, and avoid incarceration.
- ii It is recommended that Article 67.1 be amended as follows:

“Diversion” means the process in which a child who has committed a petty offence and admits responsibility is channelled towards a community-based, non-custodial solution, in line with the Somaliland Constitution and international human rights laws. Diversion orders given by the police officer, prosecutor or judge can include:”

Note that the numbering of the text in Article 67 is also incorrect and Article 67.2 should instead be “g”.

- iii Article 68 provides a list of purposes for diverting juvenile cases. It is recommended that avoiding incarceration of the child be an additional aim of diversion added to Article 68 as Article 68.e.

### ***13.3. Selection of a Child for Diversion***

- i With respect to deciding whether or not a particular child is suitable for diversion, Article 69 sets out when it is mandatory to consider a child for diversion, and Article 70 stipulates the factors to be taken into account when selecting a child for diversion. These articles require particular consideration.
- ii First, the current wording of Article 69 may be interpreted as meaning that diversion should only be applied in the circumstances listed in Article 69.1.a to b. However, Article 69 sets out only those circumstances in which diversion is *mandatory*. This should be clarified in the text.
- iii Second, Article 69 should stress that diversion be considered at the earliest stage possible. (The need to consider diversion at the earliest possible stage also must be reflected in Article 72.3.) It is therefore advisable that Article 69 recognises the potential role of the police and prosecutors in diverting a juvenile case. Moreover, to avoid a conflict of jurisdiction, it is important to clarify in Article 69 that the power of police and prosecutors to divert a case ends with the commencement of trial proceedings.
- iv Third, Article 69.1.c currently requires a child to be considered for diversion where there is insufficient evidence to prosecute. It is recommended that this be removed because in such circumstances the charges against the accused should be dropped.

Moreover, where proceedings have commenced, the prosecution should discontinue the case. It is recommended therefore that Article 69.1.c be removed.

- v Given that the child must accept responsibility for the offence before diversion is applied (in order to preserve the presumption of innocence until proven guilty as guaranteed by the Constitution and international human rights law), it is advisable to add an “and” at the end of 69.2.a, and to emphasise the need for the child’s acceptance of responsibility to be “free and voluntary”.
- vi The JIL should further specify the types of cases that the police, prosecution and judge respectively have jurisdiction over for the purposes of deciding whether or not to apply diversion. The way that Article 69 is currently written suggests that a child could be considered for diversion even where the crime alleged/committed carries a sentence of imprisonment for ten years or more. The JIL does not currently address the fact that certain offences should never be considered for diversion, such as rape or murder. Moreover, the police and prosecution should not have authority to divert the most serious cases, unless it is very clear to the prosecution that there is insufficient evidence to commence proceedings, in which case the charges may be dropped, or the case discontinued. Accordingly, it is advisable that the JIL clearly specify the situations in which the police and prosecutors can also exercise authority to apply diversion.
- vii Accordingly, it is recommended that Article 69 be replaced with the following text:

“69.1. Police, prosecutors and judges should seek to apply diversion whenever possible, and at the earliest possible stage.

69.2. Police and prosecutors may divert the case any time prior to the commencement of court proceedings, at which point this power is transferred to the presiding judge.

69.3. Diversion is mandatory where:

- a. The crime committed is punishable with imprisonment for a period of less than ten years; and
- b. The child freely and voluntarily acknowledges responsibility for the offence.

69.4. A child charged with an offence carrying a sentence of imprisonment for ten years or more shall not be considered for diversion”.

- viii Note: The following proposed provision requires consideration of Somaliland’s penal laws, and how offences and their respective sentences are categorised. However, it is one option that could be considered because the JIL or any potential diversion policy should specifically set out when the police and the prosecution has the authority to divert a case. The following could be added in Article 69 of the JIL:

“69.5. The police and prosecution cannot divert a case which carries a sentence of six months or more imprisonment, without an order from a judge, who shall reach a decision in accordance with this law. An exception to this provision is where the prosecution determines that there is insufficient evidence to prosecute and consequently drops charges or discontinues the case”.

- ix Moreover, to reflect the principle that diversion be considered at the earliest possible stage and that the police and prosecution also have the authority to divert, Article 72 should be amended as follows:

“72.1. The Children Judge or the responsible police officer or prosecutor must ascertain whether the child can be diverted after consideration of:

- a. The proposal of the Attorney General.
- b. The assessment report by the Probation Officer unless assessment has been dispensed with.
- c. The views of all persons present at the preliminary hear who have a relationship with the child, such as his or her parents.

72.2. The Children Judge or the responsible police officer or prosecutor after consultation with the above persons must decide upon the most appropriate diversion option.

72.3. Diversion mechanisms may be used any time in the criminal proceedings, but should be applied at the earliest stage possible, and where feasible, before the trial has begun.”.

#### ***13.4. Factors to Consider***

- i Article 70 addresses the factors to be considered at a preliminary hearing on whether or not to divert a juvenile case from the criminal justice system. One factor that is not included, but should be considered, is whether or not the child has previously been diverted. In cases of recidivism where the child was previously diverted, diversion should still be an option if it is found that the child will benefit from diversion, and the totality of the circumstances suggest that he or she should be afforded another diversion opportunity.<sup>1</sup>
- ii In addition, the need to secure the consent of the child should further be emphasised in the context of selecting the appropriate diversion option. In order for the child’s consent to be “free and voluntary”, the diversion option must be explained to the child in a language he or she understands. In line with the internationally recognised right for the child to be heard, it is also advised that the preferences of the child are taken into consideration.<sup>2</sup>
- iii It is therefore recommended that the following amendments be added to Article 70.1:
  - “e. Whether the child has previously been diverted and if so, consideration must be given to whether the child may still benefit from the proposed diversion, and whether all the circumstances taken into account suggest that the child should be afforded the opportunity of diversion.
  - f. The views and preferences of the child”.
- iv It is further recommended that the following provisions are added to Article 70:

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<sup>1</sup> See for example, Model Law on Juvenile Justice drawn up by the Centre for International Crime Prevention.

<sup>2</sup> See for example, Article 12 of General Comment No. 10 of the Committee on the Rights of the Child.

“70.2 The responsible police officer or judge must explain the diversion order, and the consequences of not complying with that order, to the child in a language they understand.

70.3 The responsible police officer or judge must secure the free and voluntary consent of the child for any diversion option selected. At any stage the child may withdraw their consent and return to formal court proceedings”.

### ***13.5. Procedural Matters***

- i The JJJ is silent on procedural requirements for the use of diversion. Procedural requirements are essential in order to ensure that the child’s right to a fair trial are respected in accordance with the Constitution and international human rights standards. We therefore recommend inserting a new Article 69A as follows:

#### **“Article 69A. Preconditions for the Use of Diversion**

69A.1 In order to implement diversion proceedings prior to sentencing, the police, prosecutor or Children Judge must ensure that the following are satisfied:

- a. The child admits responsibility for the alleged offence freely and voluntarily without undue influence;
- b. The child understands his or her right to remain silent;
- c. There is sufficient evidence to prosecute the child;
- d. The diversion process and options have been explained to the child, his or her parents or guardian, and if necessary, any community representatives; and
- e. The child freely and voluntarily consents to the diversion process”.

- ii Moreover, once a diversion option is selected, it may be necessary to provide an alternative diversion option where probation officers are not available. Accordingly, it is recommended that Article 71, which addresses diversion options, be amended to include Article 71.2.A as follows:

“Where a probation officer is not available, the Children Judge may appoint a responsible adult to perform this task. Where possible, this adult will be connected to the diversion institution in question (e.g. a counsellor, trainer or teacher)”.

- iii In addition, Article 71.2 should be amended to include the possibility of the police selecting diversion. Article 71.2 should be amended as follows:

“Upon the selection of a diversion option, the Children Judge or police officer responsible for the diversion order must identify a probation officer to monitor the child’s compliance with the selected diversion option”.

- v In order for the child to feel comfortable enough to express their opinions and answer honestly the questions of the judge, it is important that proceedings are kept informal and that they occur privately behind closed doors. The following amendment is therefore recommended:

**“Article 75A: Proceedings to be Informal**

75A.1. When dealing with a child offender, the proceedings of the court shall be informal. In particular, the presiding judge shall ensure that:

- a. Technical language is not used during the hearing;
- b. No person wears an official uniform or professional robe unless absolutely necessary for the purposes of identification or evidence as the court may authorise;
- c. There are regular breaks with such provisions for the child as the presiding judge deems necessary; and
- d. Children with disabilities are accorded assistance to meet their special needs where necessary.

75A.2. All hearings involving child offenders should be conducted privately behind closed doors, except for in exceptional cases where the interests of justice require open proceedings”.

***13.6. Completion of the Diversion Order***

- i Since a main purpose of diversion is for the child offender to avoid the stigma of criminal sanctions, it is important to emphasise in the JJJ that the use of diversion will lead to the closure of the case and will not be recorded as a criminal conviction. As such, the addition of the following article is advised:

**“Article 73A. Completion of the Diversion Order**

73A.1. Completion of the diversion order shall result in the definite and final closure of the case.

73A.2. No child who has been diverted should be viewed as having a conviction. Any records kept of the diversion proceedings for administrative or review purposes shall not be considered “criminal records” and shall be kept confidential at all times”.

**14. Conclusion**

14.1 It is hoped that these proposed amendments, if implemented, will ensure a clearer and more comprehensive JJJ. The recommendations also serve to achieve a more complete system for diversion to ensure that children are not subjected to the criminal justice system unless absolutely necessary. Where diversion is properly applied, it can result in several positive outcomes for children, such as allowing them a second chance, continuing with their education, learning from their mistakes, being rehabilitated, and being accepted back into their community. Of course not all offences are appropriate for diversion, and this needs to be clearly reflected either in the JJJ and/or a comprehensive diversion policy.

14.2 The recommendations in this paper are also aimed at achieving positive outcomes for the justice system as a whole. Where children are diverted from the formal justice system as early as possible, and detained only as a last resort, the burden on

the prosecution, courts and prisons is reduced. Accordingly, amendments to the JIL can result not only in greater respect for children's rights in accordance with the Constitution and international human rights standards, but also a more efficient justice system in Somaliland.