

## **Critique and Recommendations related to Delegated legislation under the Juvenile Justice (Care and Protection) of Children Amendment Act 2006 and JJ Model Rules 2007<sup>1</sup>**

**Introduction:** The Centre for Child and the Law has been closely associated with processes related to the drafting of legislation on Juvenile Justice since 1999 and has subsequently submitted recommendations for reform of the law to the concerned authorities. Though we have taken a position that the law itself is in need of reform, we have continued to engage with the process of contributing to delegated legislation under both the 2000 Act as well as the 2006 Amendment. We are aware that law has only a limited role to play in social transformation, and that it is the values, principles, attitudes and rights based approach adopted by duty bearers of the state as well as civil society that ultimately impacts the lives of marginalized and excluded children and families. However, being located in the National Law School of India University, and being the only such Specialized Research Centre focusing on Child Rights in a Law University in the South Asian Region, we recognize the critical opportunity and role we have, to harness the insights from multi-disciplinary research and field practice to impact the law. These efforts will provide the space for civil society to engage with and demand accountability from the state in its *parens patriae* role.

This paper therefore attempts to fulfill two objectives – contribute to a constructive critique of the Juvenile Justice Model Rules 2007 and make recommendations for State Rules. It is our view that though the State Rules have to abide by Model Rules as far as is practicable (Sec 68 (1) Proviso of the Amendment Act), State Governments have the power to go beyond the Model Rules as long as the rules are within the scope of the parent statute.

Documents that have been used as a basis for these reflections and recommendations are the JJ Amendment Act 2006, the JJ Model Rules 2007, CCL NLSIU's recommendation for Model Rules submitted to GoI in August 2007 and recommendations for Rules under the 2000 Act - undertaken after intense inhouse research and consultations with concerned stakeholders in Karnataka. Further, in addition to desktop research, the years of field experience of the staff at the Centre, activities involving children currently residing in or discharged from the juvenile justice system, CCL's engagement with field action processes relating to marginalized children, the contribution to more effective functioning of the competent authorities through socio-legal research and advisory support and in the management of the Nagarbhavi Children's home have provided us the deep experiential insights to support these recommendations.

CCL NLSIU had done detailed research to try and impact the drafting of the Model Rules itself. Recommendations were submitted to the Ministry of Women and Child, Govt of India and Prof B B Pande, Chairperson of the Drafting Committee for the Model Rules in August 2007 even though the official deadline for submitting comments on the draft posted on the Ministry's website had long gone (30<sup>th</sup> June 2007).<sup>2</sup> Prof B B Pande, in an email response to this submission commended the initiative and work undertaken by the Centre and suggested that CCL organize a consultation on the Rules.

The Centre had roped in a few NLSIU student volunteers to assist us in research related to these Rules. Many students had expressed their interest in this work. A few of them submitted written

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<sup>1</sup> © Arlene Manoharan, (MSW) Sr. Researcher, CCL NLSIU, January 2008. This document is based on an original paper that was presented at a Consultation to arrive at Karnataka Rules under the JJA 2006, organized by DWCD, GoK on 26<sup>th</sup> Dec 2007. For information contact [ccl@nls.ac.in](mailto:ccl@nls.ac.in) or 080-23160528

<sup>2</sup> Copy of CCL NLSIU Recommendations for Model Rules 2007, dated August 2007 is available on request.

reports and contributed to the consultation organized by the DWCD, GoK on 26<sup>th</sup> Dec 2007. We are happy to say that it is through processes such as these that we are able to involve young aspiring lawyers, expose them to the social realities of children's lives, provide them opportunities to engage with debates with state and civil society actors and facilitate a deeper understanding of the vast potential to engage with law as a tool for social transformation including law reform and rule making<sup>3</sup>.

We have made a number of attempts to facilitate more efficient and democratic engagement with this delegated legislation drafting process under both the 2000 Act and the Amendment Act. We have written to almost all individuals and organizations that had sent in recommendations for Model Rules to the Ministry of WCD, GoI, requesting them to help us in identifying others who may be interested in this process and to send us copies of their recommendations. We received a very encouraging response to this. We had also spoken to and written to Dr. Shantha Sinha, Chairperson of the National Commission for the Protection of Child Rights in November 2007, requesting that she set up a subcommittee specifically to facilitate democratic debate and research at local and regional levels to contribute to his process. Though Ms. Sinha orally responded very positively to this suggestion, we have not received any written feedback or assurance that this suggestion would be implemented.

We had also written to Ms Vidya Shankar, ex CWC and JJB member, Chennai requesting her to send us copies of drafts that were being worked on in Tamil Nadu with the promise that we would in turn send her recommendations we had made in Karnataka. Recommendations made in Tamil Nadu have therefore also been included at the end of this document. We thank her and all other organizations who have shared their work with us as it has confirmed our belief that there is a deeper sense of solidarity emerging to support democratic, evidence/experience based and child rights centric law making and law reform in this country.

CCL has been unable to conduct a national consultation for a number of reasons. These documents are therefore a humble attempt to constructively critique the notified Model Rules and provide some insights for how States could utilize this opportunity to notify law that would genuinely strengthen the hands of those with the best interest of children at heart, and deliver justice to marginalized children and families.

We are also happy to see that the Department of Women and Child Devt, GoK has recognized the value in constructive collaboration with civil society in rule making processes, going by the extremely successful outputs from the 2001 process initiated by CCL NLSIU. This time around the Department has taken the initiative to call for a consultation on the Karnataka Rules on Dec 26<sup>th</sup> 2007, and implemented a suggestion we had given to form subgroups on various themes, in order to best draw from the field experience of those actively engaged in work on juvenile justice in the State. About six groups were constituted and draft reports have already been submitted. The next round of consultations is scheduled for the 14<sup>th</sup> Feb 2008. We do believe that it is such partnerships between state and civil society that can best promote progressive social policies, emerging promising practice, juvenile jurisprudence/child rights centric law and accountability of all actors (both state and civil society) in the interest of marginalized children. This is in keeping with the General Comment No 5 of the UN Committee on the Rights of the Child. However, we do recognize that so far efforts to effectively engage children, families as well as members of the CWCs and JJBs to contribute to law reform and rule making in a systematic and sensitive manner is still in its infancy.

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<sup>3</sup> NLSIU Student volunteers who have contributed to this research include Rashmi Chaudhary, Swati Aggrawal, Sushila Rao, Aviroop Dutta, Krithika Jeyaraman and Surabhi Shukla. They may be contacted at [ccl\\_nls@googlegroups.com](mailto:ccl_nls@googlegroups.com)

Further, such a process is only one step towards “a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention” which is an obligation of the State. (Para 18, General Comment No 5, UN Committee on the Rights of the Child)

Sec 68 of the Act lists the areas for Rule making. However, as per sub clause xviii) there is also space for rule making on ‘any other matter’. This document therefore provides recommendations that go beyond the basic rule making power as identified in the statute. There are also areas where recommendations could not be made, due to the lack of time. This document contains some general reflections as regards positive features and weaknesses of the notified Model Rules 2007 followed by a listing of recommendations for various Rules. Some of these recommendations are supported by detailed recommendations which have been made into Annexures. Due to lack of time, we have not been able to prepare a simple list of recommendations. However, in order to best draw from this extensive research, we have used *Italics* for all recommendations for the State Rules.

Finally, we would like to inform the reader that these documents are a result of much research, but have not been debated with Senior Legal experts as regards interpretation of the law. CCL therefore welcomes any feedback on these documents and hopes that it will be used to trigger, support and substantiate policy recommendations for delegated legislation around the country.

### **Initial listing of Positive Features of the Model Rules (MR)**

- 1. Greater compliance with the rights based approach:** The Model Rules 2007 is an attempt at greater compliance with a rights based approach into the legal framework. For example, the longer list of fundamental principles is now a substantive part of the Rules rather than a vague inclusion before the Rules as was done in the Model Rules 2001. These principles have to a large extent incorporated child rights, juvenile jurisprudence and restorative justice approaches within its purview.
- 2. Diversion:** The MR has also attempted to incorporate the Principle of Diversion, an internationally accepted principle based on the idea that children should be diverted from the formal juvenile justice system through mediation and reconciliation programmes. This principle has only been briefly referred to in the preamble of the Act.
- 3. Definitions:** The MRs has included a longer list of definitions which will help in better interpretation of the Act and limiting the discretion of the competent authorities. However some of the definitions require greater clarity such as the ‘Best interest Principle’, ‘Child Friendly’ which are highly debatable, and require individualized and contextualized application.
- 4. Child Protection Units:** The inclusion of Child Protection Units in the Amendment Act has creditable institutionalized Community Participation and decentralized the administration of justice in India. *The Rules could also draw from the rich experience of similar bodies in the UK Children’s Act, Brazil’s Statute of the Child and the Adolescent which have radically changed the relationship between children, families, wider civil society and the state and the implementation of justice. The Municipal Councils in the Brazilian statute has provided for 50 percent representation of civil society.*
- 5. Inspection Committee:** The Rules provide clear mandate and guidelines for the functioning of the Inspection Committees *vis a vis* the functioning of the system, especially the Management Committees and Children’s Committees. This will enable greater accountability and also ensure that child participation and grievance addressal systems are institutionalized in every Home. The need for ‘sensitive, independent and fair grievance addressal systems

accessible to children' has been one of the most oft made recommendations by the UN Committee on the Rights of the Child on country reports on juvenile justice.

6. **Social Audit:** It is creditable that the Model Rules (Rule 64) has interpreted the provisions of the Act in the spirit in which it has been drafted – i.e. providing for an audit for a range of services, institutions and processes. The Act states that Social Audit is to be done for Children's Homes – which in a narrow sense will mean only Children's Homes set up under Section 34 but in the wider sense should include any residential facility set up under the Act. However, the role that children and families who come under the purview of the Act has been completely forgotten. This is regrettable since the concept of Social Audit is based on the principle that 'customers or users of the service are to be the main stakeholders in such a process'. Moreover, though one may always take recourse to the Right to Information Act, *the Model Rules could have also drawn from the Gujarat Rule 31 which states that – 'These reports shall be made open to public scrutiny.'*
7. **Advisory Boards:** It is creditable that Advisory Boards are provided for at the Central, State, District, and city level in Rule 93.

### **Initial listing of Weaknesses in the JJ Model Rules 2007**

1. **Incorporation of Constitutional values, the UN CRC and international guidelines on juvenile justice:** India is proud to have one of the more progressive constitutions in the world. Yet South Africa is one country that has apparently incorporated the UNCRC effectively into its constitution, which has been a dramatic step demonstrating commitment to the radical vision of the UNCRC. Constitutional reform to incorporate the UNCRC into the Constitution itself is a matter of high priority, if we are to genuinely claim that we are a democratic country, committed to protecting the rights of all its citizens. The legally binding Vienna Convention on the Law of Treaties, states that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' (Art 26). Therefore in a country like India which has a dual legal system, we have a duty to ensure that our domestic legislation is compatible with the treaty. Yet only a cursory attempt was made to incorporate the UNCRC into the Preamble of the Juvenile Justice Act 2000. Very little was done during reform of this Act in 2006. The Model Rules, has happily attempted to incorporate some of the provisions, but there seems to be a long way to go before which the concept of indivisibility of rights, as reflected in the UNCRC and the CEDAW is fully incorporated into domestic law, as it has been done in the South African Constitution. This is particularly important with regard to the need for socio-economic rights of children to be considered justiciable and incorporated into the law itself. This would perhaps pave the way for deeper recognition of and response to the root causes that drive the majority of impoverished children and families into dependency and crime. Such a move would make Governments accountable to use national resources in the interest of all its citizens. With the Budget Session of Parliament upon us, this is a critical time for us to lobby for a greater budgetary share for children, who form more than forty percent of our nation's population.
2. **Child Code and comprehensive legislative reform to build compliance with the Constitution, the UNCRC and the CEDAW.** In the year 2000, the Government under the leadership of Justice Krishna Iyer had published the Child Code, a constructive attempt to harmonize related legislation and provide a comprehensive legal code for children in India. The laws on Juvenile Justice have revealed that this initial work urgently needs to be taken forward. This is especially with regard to problems that persist with regard to issues such as Adoption and Personal laws, the definition of the term 'street and working child' (lack of clarity as regards jurisdiction of the Child Labour Act and the Juvenile Justice Act) etc.

3. **Comparative Jurisprudence:** CCL has attempted to undertake some comparative research while arriving at the Critique on the Juvenile Justice (Care and Protection of Children) Act 2000<sup>4</sup>. The Ministry of Human Resource and Development, Govt of India organized a National Consultation on Child Rights Law in June 2005 at Delhi. A CCL NLSIU paper titled 'Guidelines for Legislative Reform' was distributed during this conference, with the hope that it would impact the law reform process envisaged at that time. This document has been included as part of the Recommendations for State Rules under the Amendment Act as *Annexure 17*. However, there is a need for much more comparative jurisprudence research, especially taking into account the experience of countries that have successfully incorporated the UNCRC and UN Guidelines into domestic law. These include south based countries such as , South Africa, Brazil, Belize etc)
4. **Faulty approach:** The Model Rules 2007 seems to have been drafted based on a faulty approach – that of working from within the box of the old Model Rules 2001. If a more creative approach had been used – to identify the list of issues for delegated legislation and then arrive at a draft that incorporates the rights based approach, juvenile jurisprudence, the experiential insights from implementation of the Acts, and the best part of State Rules through rigorous comparative research, the output would have been refreshingly different. Regrettably, the amendment of Act followed exactly the same approach. Having said that, we admit our own ability to complete such an exercise at our level at this point, though our earlier work in 2001 – 2002 included as Annexure 15 to this paper speaks for itself. Further, though CCL had initiated the process of undertaking comparative research of State Rules under the 2000 Act, this process was not completed because of limitations of time and human resources. In our view, this is a lost opportunity, to identify areas for further law reform as well, since we are of the position that the Act itself has serious drawbacks having not genuinely incorporated child rights, juvenile jurisprudence, internationally recognized principles and approaches such as diversion and restorative justice
5. **Powers and jurisdiction of the Competent Authorities:** The Model Rules have attempted to clarify the powers of the JJB and the CWC but this has not been done in a comprehensive manner. For example the role of the JJB in the context of crimes against children should have been made explicitly clear – that their role is to deal with children alleged to have committed crimes, including if they have committed crimes against other children. The JJBs should not deal with adults accused of crimes against children, which is the domain of the Sessions Court.
6. **Research into judicial trends and case law:** It would be useful for States to engage in legal research into the judicial trends and case law emerging from the implementation of the Act in various states. It is hoped that the National Children's Commission, Schools of Law, NIPPCD and others committed to impact the law reform process in the country could undertake such research which could actually trigger further law reform, despite the apparent fatigue at various levels.
7. **Democratic process drawing from the experience of implementation of the Act:** Though there have been a few studies undertaken at national level (CRY study 2004-05 and the GoI study in 2006 – 07), reports of these studies are not freely accessible to facilitate deeper democratic debate on the same or to contribute directly to this delegated legislation process. Further, the first official draft Model Rules had been placed on the Ministry of Women and Child, Govt of India's official website sometime in Feb or March 2007 for feedback on the same with a deadline of June 30th. However, organizations such as CCL and Alternate Law Forum in Bangalore who had downloaded this document in May-June 2007 and spent

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<sup>4</sup> Arvind Narrain, Juvenile Justice (Care and Protection of Children) Act 2000, Centre for Child and the Law Occasional Paper, CCL NLSIU, 2001.

considerable time working on it found that their extensive work was in a way useless, considering that this was one of the older drafts and the official Drafting Committee had apparently submitted its final document in April 2007. Though we commend the work undertaken by the Drafting Committee, we believe it would have been more fruitful if the revised drafts had been placed on the website as and when they were being processed and if they had called for local and regional consultations as well. This would enable the handful of organizations who seriously engage with such law making processes around the country to more effectively and efficiently engage with this critical process. State level, regional level and issue based consultations on the implementation of the Act so far could also have been facilitated in order to draw from the rich experiential insights all over the country. Ideally, one should have been able to learn from the rich experiences in South Africa and Latin America where democratic debates were facilitated even with children and families, recognized as the ‘users’ of the services, and partners in the process of delivery of justice. Finally, the active involvement of civil society in law reform processes will itself strengthen the belief and operationalization of democratic values.

8. **Diversion:** Though a very positive step has been taken to incorporate the universally recognized Principle of Diversion, it seems to have been undertaken in a superficial manner, without adequate understanding of the contextual realities, research into the basic legal standards/safeguards, and structuring of discretion that is required to ensure justice to children accused of crime as well as the victims of such alleged offences if any. Therefore though the Rules have incorporated certain principles, and opened spaces for bringing in procedures for diversion and restorative justice approaches, it should have included the framework for programmes such as victim offender reconciliation programmes, family group conferences, community service programmes etc instead of leaving this to the discretion of State Governments.
9. **Child Protection and Child Protection Units:** Law in India has to a large extent adopted ‘protective’ approaches to women and children. ‘Historically, both women and children were denied legal rights because of the protective value system. Emilio Garcia Mendez demonstrates how, in what he describes as an ‘exclusion pact’, the protection of women and children gave legitimacy to their legal incapacity. Protection of their person was not interpreted as protection of their rights. Realizing women’s rights is ... an interlinked dimension of realizing children’s rights.’<sup>5</sup> Our experience as well as a number of reports have highlighted the extremely custodialized approaches that have been adopted in the name of ‘protecting’ children especially girls. Yet, neither has the law or the MR provided for effective protection of children’s rights in all stages of the journey through the Juvenile Justice System. It has also not provided a clear vision for the role and function of the Child Protection Units taking into account the role and function of all other authorities and agencies in Child Protection. More importantly, considering that the proposed Integrated Child Protection Scheme will apparently not be able to fund more than two or three states, the possibility of these units being set up and functioning effectively is remote. This is especially because a number of States have not yet been able to set up the CWCs and JJBs, or run institutions/spaces such as the Special Juvenile Police Units provided for in the 2000 Act.
10. **Procedure for declaring fitness (of parent, individual or NGO) for any purpose:** Neither the Act or the Model Rules have provided legal standards or procedures by which any authority may come to a decision as regards ‘fitness’ of any individual for any purpose. Though CCL had identified these lacunae in earlier reflections on the Rules, we now know of a Mumbai High Court order that supports this view. This has been provided as Annexure 5.

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<sup>5</sup> Savitri Goonesekere, *Protecting the World’s Children, Impact of the Convention on the Rights of the Child in Diverse Legal Systems*, Cambridge University Press, 2007, Pg 4.

- 11. Child Participation and Social Audit:** Though the Rules have provided for Children's Committees, it is unfortunate that the term 'Social Audit' which in its real meaning involves the auditing of a service by users of that service has not included children, families and community organizations physically located around the institutions under the Act as well as all organizations working on issues directly related to Juvenile Justice as stakeholders in the Social Audit process. It is possible that some organizations who adopt a human rights approach and are openly critical of the human rights violations within the JJ system are left out of this extremely critical space – one that could potentially transform the quality of justice delivered to both children who come under the purview of this Act.
- 12. Capability Approach and the Law:** The writings of Amartya Sen, Martha Nussbaum and others on the Capability and Capabilities Approach are extremely relevant in this era of globalization and structural adjustment. It is extremely important that civil society lobbies for the State to effectively balance economic growth with the human development of children and their families. The child rights movement therefore needs to claim opportunities through which values that promote these ideas are introduced into laws, policies and programmes at various levels.
- 13. Inspection Committee and Advisory Board:** Rule 93 (9) states that 'District or City level Advisory Board constituted in terms of sub-section (3) of section of the Act shall also function as the inspection committee under section 35 of the Act'. This is an extremely nebulous and retrograde provision as it enables a body having only 'advisory' capacity to conduct an inspection which should be a tool for demanding and ensuring accountability and effective implementation of the Act. Instead of increasing the spaces to bring about institutional reform so critical for ensuring that justice is delivered and the rights of all children and families coming under this Act is protected, such a provision enables the State to find avenues for reducing or weakening the potency of inspection. This rule is in complete contravention of good governance and in fact reduces the spaces and opportunities to build 'openness and transparency' provided for in Rule 94.
- 14. Disqualification of persons found to be violating rights of children:** The Model Rules (MR 89) provide only for disqualification of such persons but have not made it mandatory for reporting or filing of an FIR. This is a lost opportunity to identify and penalize adults who commit crimes against children. This is especially important with the increasing evidence to support the fact that the legal machinery and the executive have become means through which violence (in its varied forms) is inflicted upon children. Though one would have ideally preferred to have law that will make it mandatory for a public register of persons convicted of such offences, such a Rule could have at least been the first significant step.
- 15. Legal standards related to Institutions for Children, Guardian Ad Litem and Special Juvenile Police Units etc:** Quality4Children Standards for children in out of home care in Europe<sup>6</sup> is the result of intense collaborative research involving the participation of children themselves. India urgently needs to undertake a similar process to arrive non-negotiable standards of care in the juvenile justice system. Though the rules have attempted to list some standards, these are drastically inadequate.  
The basic commitment to respect the views of children in matters concerning them is seriously lacking at every level, with adult centric opinions and presumptions of what is in the 'best interest of children' overriding any such effort. Though creditable, the concept of guardian ad litem, has been included in the Model Rules without any clear understanding of their role, qualifications, appointment authorities and procedures.  
Finally, though some clarity exists with regard to the Special Juvenile Police Units, the Rules do not adequately reflect the experiential insights gained in cities such as Bangalore where

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<sup>6</sup> For more information visit: [http://www.quality4children.info/ps/tmp/q4c\\_docudb/Q4C\\_colour.pdf](http://www.quality4children.info/ps/tmp/q4c_docudb/Q4C_colour.pdf)

NGOs such as ECHO and Bosco have played an important role in demonstrating constructive and collaborative NGO – Police interface in the interest of children. CCL had played a critical role in initiating the bringing together of these and other interested organizations as well as Senior Officers of the Department of Police and the DWCD, GoK to dialogue on the vision, role, procedure and structure of the SJPU over more than 23 discussions from June 2003 till August 16<sup>th</sup> 2004. It is this long and on going association with the SJPU that has enabled CCL to make valuable contributions to a subgroup dealing with children in conflict with law and the SJPU for the Karnataka Rules under the Amendment Act 2006.

- 16. Gender:** Reform initiatives on women’s and children’s rights have so far been isolated from one another, one that has resulted in a lack of convergence and solidarity on issues that impact both groups. It is time for the child rights movement to ride on the successes of the women’s movement in India, with the recent passing of the Domestic Violence Act, in order to try and draw insights from and incorporate the standards in both the UN CRC and the UN Convention on the Elimination of Discrimination against Women (CEDAW). Further, if the Model Rules making process had utilized insights drawn from comparative research on the State Rules under the JJA 2000, there would be realization that states such as Gujarat have demonstrated a commitment to pay attention to the special needs and rights of girl children in the system. Some examples of gender sensitive Gujarat rules which could be incorporated in State Rules are as follows: Rule 11 (17) – *‘In all such situations of conflict, disaster and disturbance, special care shall be made to protect girl children from abuse and exploitation; Rule 11 (3) (a) To facilitate prompt response to the emergency situation created by the conflict, commotion or calamity..... mobile toilets for the privacy of girl children; Rule 17 E (c) ‘.. all homes for girls to have a visiting gynaecologist, Rule 30 (5) – ‘For an inspection visit to a girl’s institution, there shall be only female members in the team.* In this context it would perhaps be pertinent to again point out that these Gujarat Rules have drawn heavily from the CCL NLSIU Model Rules attached as Annexure 15 of this document.
- 17. National and State Plans of Actions:** The Model Rules and the State Rules should provide the legislative framework that could provide legal standards and mechanisms that could enable and support the better implementation of National and State Plans of Actions.

### **Issues, Proposals for reform of Model Rules and Recommendations for State Rules under the Amendment Act 2006.**

- 1. Process of arriving at State Rules:** The Centre for Child and the Law, National Law School of India University, Bangalore has had a rich and long experience trying to facilitate a democratic process to creatively utilize the spaces of delegated legislation to incorporate child rights into delegated legislation. The work initiated by the Centre of its own volition has been a unique and successful one for a number of reasons. Some of these are as follows:
- a) The child rights discourse and movement in India is gradually gaining momentum over the past decade. The engagement of civil society in work related to law reform or law making has been extremely successful with regard to women’s issues but not so with regard to laws dealing with children. It is only a handful of individuals and organizations who focus on claiming this critical space or joining hands with those aiming to qualitatively impact this process. CCL NLSIU helped to facilitate the articulation of policy perspectives and capture the experience and expertise of a number of individuals and organizations during consultations held over a period of about eight months in 2001 – 02 in Karnataka. This has



- resulted in a set of recommendations for Rules under the 2000 Act<sup>7</sup> which was distributed to all State Governments and UNICEF offices in the country. This document has impacted not only the Karnataka Rules but that of Gujarat, Andhra Pradesh, Madhya Pradesh and other.
- b) Attempts were made to capture the voices of children discharged from the JJ system which in many ways helped either substantiate demands for rights centric rules.
  - c) The Karnataka Rules has been hailed as having incorporated many of the rights under the Constitution and the UNCRC which had not been fleshed out in the Act. For example provisions from the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally (3 Dec 1986) were included in this document through which it is found its way into the State Rules.<sup>8</sup>
  - d) Concerned Departments in the State Government have the responsibility to come up with drafts for Rules which are then processed and sent to the concerned Finance and Law Departments. However, we have found that there is a need to work in collaboration with these Departments in order to inform the drafting process to the extent appropriate and possible. CCL NLSIU has been able to build up a constructive and collaborative relationship with the officials at various levels and helped them understand the value of facilitating constructive dialogue with civil society in this drafting process. This is substantiated by the fact that at this very point in time the DWCD, GoK, having deeply appreciated the role played by CCL NLSIU in the 2001 drafting process has taken the initiative this time to conduct and facilitate consultations and sub group discussions under various issues, which are already yielding some excellent results. We are extremely happy that the need for democratic dialogue with those having the expertise on various issues has to a large extent been institutionalized as a practice, at least with regard to drafting of delegated legislation on Juvenile Justice in Karnataka is concerned.
2. **‘Best interest’**: Rule 2 c) Definition of the term ‘Best Interest’ and Rule 2 Principle IV) b) Principles of Best Interest: These provisions do not provide a clear definition and have confused the principle of best interest with restorative justice approaches. (For reflections and Recommendations *See Annexure 1: Principle of Best interest*.)
  3. **Child Friendly**: Rule 2 d) and Rule 9 2) and Rule 24 (3) The Definition of the term ‘Child Friendly’ and the provisions are inadequate and vague. For Recommendations and guidelines for implementation see *Annexure 2: Guidelines for Child Friendliness*
  4. **Community Service** Rule 2 e): NGOs such as Habitat for Humanity should not be listed in the Rules unless specifically recognized as a certified Community Service option in that jurisdiction. For other options and rules for monitoring and supervision see *Annexure 3: Community Services*.
  5. **Definition of ‘detention’** Rule 2 f): The MR defines this term as ‘protective custody in line with the principles of restorative justice’. This is not a clear definition as it incorporates other terms that have not been defined. Further, merely changing the meaning of the term in the definition clauses of the Rules, without genuinely incorporating a rights framework and changing the essentially criminalized approaches, attitudes and procedures in the system is at best tokenistic.
  6. **Definition of the term ‘individual care plan’** Rule 2 (h): This definition provides for the participation of the juvenile or child in determining it but does not provide for other stakeholders such as the parent/s, significant others etc. Further the objective of the Individual Care plan goes beyond what is stated in this Rule – such as permanency, etc For some recommendations see *Annexure 4: Individual Care Plan*

<sup>7</sup> Copies of this document is available with CCL on request. Kindly write to [ccl@nls.ac.in](mailto:ccl@nls.ac.in) or arlene@nls.ac.in

<sup>8</sup> See CCL NLSIU article on Key features of the Karnataka Rules 2002 available with CCL NLSIU on request.

7. **Definition of the term ‘orphan’ Rule 2 k:** The MR defines this as ‘a child who is without parents or willing and capable legal or natural guardian’. The Rules do not provide clear legal standards or procedures to assess capability or willingness of parents. *See Annexure 5 for recent Mumbai High Court judgment on Adoption of children of mentally ill parents and the role of CWCs.*
8. **Definition of ‘place of safety’ Rule 2 (l):** The appropriateness of civil society organizations running custodial set ups for children apprehended for having alleged to have or found to have committed an offence needs to be debated. Though one may find professional and well intentioned NGOs able to run such facilities, there is a potential danger that there could also be some persons/organizations who do not understand juvenile jurisprudence, principles and approaches of dealing with children in conflict with law or the risks entailed and therefore could actually engage in procedures that are not in the interest of children. However, on the other hand, there is perhaps a need to take a position that any NGO run facility would be far better than a vaguely defined ‘place of safety’ which could be potentially any place if found fit by the State Government. The Rules are not clear as to who in the State Government has the power to make this decision and on what criterion, providing wide and unscrutinized discretionary power in dealing with children who are in need of specialized care.  
**Recommendation:** The Model Rules (and State Rules) should therefore have specified that all such Places of safety should be accessible to human rights activists, recognized NGOs working on the issue of Juvenile Justice, Inspection Committees, Management Committees, Advisory Board members and Child Protection Units.
9. **Definition of ‘Street and Working children’ Rule 2 p)** This definition again uses terms that have not been defined in law and has not clarified the jurisdiction of the JJ Act vis a vis the Child Labour Act..  
**Recommendation:** The Rules should clarify the specific jurisdiction of authorities under this Act and the authorities under the Child Labour Act with regard to dealing with child labourers. Further, only those street and working children who are found to be in need of care and protection by virtue of their being exploited, neglected, abused or having no support from family or recognized NGO should be brought under the purview of the Act. Another approach could be that only those children should be brought before the CWC if it can be proved that non-intervention would place them at significant risk of harm (as in the UK Children’s Act).  
These issues require much more debate taking into account the various schools of thought with regard to child labour and child work, and whether all street children are in need of intervention by the State. This is especially since all street children are viewed as dependent, at risk and in need of care and protection. Not much attention is given to the inherent resilience that has enabled them to survive the streets – which if considered could help individual care plans to be made out that will enable children to continue to live in the community but with sponsorship and counseling support routed through recognized NGOs. Instead, when brought under the purview of the JJ Act, most of these children are sent to custodial institutions with little or no quality education or life skill training that would empower them or help them develop independent living skills to live with respect and dignity in the community. This results in them being made to live in conditions where they are in between the devil and the deep sea – neither able to get mainstreamed along with other children who could go to local government schools while residing in JJ institutions, neither being able to continue to develop their survival skills under sheltered workshop type of arrangements with NGOs working with street children.
10. **‘Empanelled Case worker’:** The Rules could include a new definition of an ‘empanelled Case worker’ who is a person found fit and appointed by the competent authorities to assist

them in their inquiries, preferably with a professional degree in social work or equivalent training or recognized experience in the field. Unfortunately the term ‘Social Worker’ has not been defined neither are there any official standards for licensing and recognition of social workers. This results in the appointment of persons who do not necessarily have the experience, knowledge, skills and values essential to engage in such work. At the same time, genuine persons who have years of experience but no qualifications suffer the risk of disqualification, which is a potential loss. The International Federation of Social Workers defines Social Work as follows - ‘The social work profession promotes social change, problem solving in human relationships and the empowerment and liberation of people to enhance well-being. Utilizing theories of human behaviour and social systems, social work intervenes at the points where people interact with their environments. Principles of human rights and social justice are fundamental to social work<sup>9</sup>.’ Though the term social work has not been defined, it is important that persons empanelled have the competence and rights based approach. It is also a well known fact that there is a drastic shortage of qualified and sensitive Probation Officers in the JJ system. Further, the term ‘Probation Officer’ is often used loosely to include those individuals who undertake the role of social worker or counselor even in the care jurisdiction.

**Recommendation:** An open ended term such as ‘empanelled social worker’ be adopted, who could play either the role of a PO or a Case worker. This term will help to differentiate between government appointed officers and competent appointed persons fulfilling these roles. Criteria for determining fitness of such persons and their roles could be provided in a GO in order to supplement the Rules. The content of this GO could be arrived at after suitable discussion on this subject drawing from the experience of Schools of Social Work and other such agencies.

11. **Juvenile or child or child in conflict with law to be presumed as innocent** Rule 3 (2) I a) and d) ii): **See Annexure 6: Principle of Presumption of Innocence.**
12. **Guardian Ad Litem** Rule 3 2) d) iii): The Rules have failed to provide for the basic qualifications and role of Guardian Ad Litem. **See Annexure 7: Guardian Ad Litem**
13. **Non-stigmatizing language** Rule 3 2) Principle VIII: This Rule provides for one way by which procedures could be made child friendly. A change in the use of language could help change the basic orientation and attitudes towards children, moving away from adult criminal jurisprudence approaches. What is surprising is that the Model Rules itself includes thirty violations of this very principle! **See Annexure 8: Violation of Principle VIII: Non-stigmatizing language**
14. **Form and Modalities to protect privacy and confidentiality** Rule 3 2) Prin XI:  
This is an important principle and recommendations for the same are given below. However, there is need for a broader consensus on whether in the Indian context; the hearings should be conducted with only duly authorized persons, persons directly involved in disposition of the case and the parents and guardians of the child being allowed to be present during the proceedings before the Board and the Committee. In the adult criminal proceedings, one of the means by which the hearings are monitored to ensure fairness is to have these hearings in open court.

**Recommendations:** The substantive part of the Rules should include the following:

‘The JJB or CWC may conduct in camera proceedings when appropriate in compliance with the principle of protecting the privacy of the child.’

‘The Juvenile Justice Board or the CWC shall take suo moto action against anyone who has prima facie violated the provisions and direct the Police to register an FIR incorporating Sec 21 (2) of the Act.’

<sup>9</sup>Downloaded from IFSW Website: <http://www.ifsw.org/en/p38000279.html>

15. **‘restored back to the same socio-economic and cultural status’** Rule 3 2) Principle XIII a): The wording of this phrase is peculiar as it prevents the competent authorities, functionaries and others involved in responding to the needs of children who come under the purview of the Act to pass orders that could improve the quality of life of the child and his/her family through statutory provisions such as Sponsorship, Foster Care and Adoption.  
**Recommendation:** The entire sub clause a) should therefore be deleted as sub clause b) is adequate.
16. **Diversion:** A number of provisions have been made to try and incorporate the principle of Diversion. This is indeed a welcome measure, since it recognizes the internationally recognized principle to divert children from formal court proceedings as was only referred to in the pre-ambule of the Act. However, there is need for much more provisions to ensure that diversion is done in a manner that protects children in conflict with law, without exposing them to adhoc decisions without due process of law. Attempts have been made in the following Rules - Rule 3 2) Principle VII b) ‘Reduce the need for intervention under the law’ – clarity and guidelines; Rule 3 2) Principle XIV b) ‘promote measures for dealing with children alleged or recognized as having impinged the penal law, without resorting to judicial proceedings.’; Rule 11 (7); Rule 11 (8); Rule 11 (11); Rule 13 a) Definition of the term ‘trivial’; Rule 13 (2) d). For detailed notes and recommendations *See Annexure 9: Diversion*
17. **Reducing pendency of cases** Rule 5 1): Implications and recommendations related to the proviso – enabling JJB to take appropriate steps to reduce pendency of cases. *See Annexure 10: Reducing Pendency of cases*
18. **Performance Appraisals** Rule 6 3): Reflections and Recommendations for Performance Appraisal of competent authorities *See Annexure 11: Performance Appraisal*
19. **Place of sittings:** Rule 9 1) Allowing sittings of JJB and CWC (Rule 24 1)) in any institution under the Act is not in the interest of children as this Rule could potentially legitimize the sitting of the CWC in an Observation Home or Special Home and sittings of the JJB in a Children’s Home when the Act itself prohibits the housing of both sectors in one institution. For bringing children before the respective competent authority, they would need to be transferred and housed in this institution for a few hours. Further this could exacerbate the stigmatization of children in need of care and protection.  
**Recommendation:** ‘Sittings of the JJB shall not be conducted in a Children’s Home or Shelter Home and sittings of the CWC shall not be conducted in an Observation Home or Special Home.’
20. **Number of sittings per week:** Rule 9 3): If JJBs are going to be set up in every District, there may not be a need to conduct sittings on all working days.  
**Recommendation:** ‘The JJBs shall sit once a week for a minimum of 5 hours per week.
21. **Functions of the Board** (Rule 10): There is a need to discuss the rules related to diversion that could enable the JJB divert children and whether the JJB can close a case even without a charge sheet. (See point 1 c) of minutes of 14<sup>th</sup> Jan 2008 discussion on the same)
22. **Minimum standards of justice** and treatment are maintained in the Spirit of the Act’ (Rule 10 e): Further research needs to be undertaken to incorporate recommendations and guidelines based on DK Basu v State of West Bengal AIR 1997 SC 610, NHRC guidelines etc. Children who are found guilty and happen to be living or working on the street without adequate family or community support are often apprehended repeatedly for offences they may not have committed placing them at risk of police abuse and also the painful procedures of going through the JJ system. Some initial recommendations that could help the JJB to monitor the police are below

### **Recommendations<sup>10</sup>:**

- a) The JJB shall ensure that children should not be apprehended except as a measure of last resort. If they are apprehended, they should be in detention for the minimum period of time.
- b) 'The JJB shall call for written reports by the police person who has apprehended the child in order to make sure that while apprehending the child he/she has made a memo of apprehension, which has been attested by at least one witness who is either a family or a respectable member of the locality. This memo should have been also signed by the child or his/her fingerprint taken and a copy of the memo should be given to her/him' (DK Basu Guideline for adults. This point needs further debate as taking signatures and fingerprints of children itself could place the child at risk)
- c) 'The JJB shall call for a written report that as soon as a child alleged to be in conflict with law was apprehended by the Police, such information was passed on to the lawyer at the District Child Protection Unit and jurisdictional Special Juvenile Police Unit.'
- d) The JJB shall call for a written report that the nearest Legal Aid Committee was informed as soon as the apprehension was made so that the child can take legal assistance (Sheila Barse vs State of Maharashtra 1983 2 SCC 96)
- e) The JJB shall call for a written report that information about the apprehension and about the place where the child was being detained was sent to the State Police Headquarters within 12 hours of the apprehension. (DK Basu Guidelines)

### **23. Amendment of Model Rules to delete the phrase 'law breaking behaviour': Rule 11 5):**

**Recommendation:** This Rule requires an amendment because it has labeled the child's behaviour as 'law breaking' at the pre-hearing stage which is in total contravention to the Principle of Innocence.

**24. Probation Officers - Guidelines for appointment and of voluntary probation officers, rules relating to their role, function etc. Rule 11 (12):** Probation is one of the key roles with regard to inquiries and supervision of children alleged to be and found to be in conflict with law. It is a well recognized fact that in all States, there is a dearth of adequate number of sensitive and trained POs.

**Recommendation:** The rules should clearly state the PO: Child ratio which could be something like 1: 20 children at the most. More POs should be recruited to ensure this ratio is maintained. Volunteer POs could also be recruited. Criterion for their recruitment, training, and role need to be clarified through adequate research and debate. This could initially form the basis for a Government order which could subsequently be notified as part of the Karnataka Rules.

### **25. Medical Board for the determination of age - Rule 12 (3) b): Rules**

related to Medical Board for the determination of age. Though the Model Rules provide for such a Board there is no clarity as to who should be members of this Board.

**Recommendation:** Members of the Medical Board could be – a Senior Practicing Forensic Doctor, Paediatrician, Radiologist and Dentist from the local Government Hospital or a recognized Private Hospital. Kindly note, this is a suggestion from a lay person's point of view and requires more clarity.

**26. University Legal Services to support the JJ system: Rule 14 5):** Recommendations for roles and tasks and organizational arrangements for legal services by law students: A draft for this is being prepared by NLSIU student volunteers who have been associated with work on JJ.

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<sup>10</sup> Source: Adapted by CCL NLSIU from Guidelines for Police Officers on making arrests, Commonwealth Human Rights Initiative downloaded from website: [website: http://www.humanrightsinitiative.org](http://www.humanrightsinitiative.org)

27. **Place of safety** - Rule 15 (11): It is important that clear guidelines, non-negotiables and responsibilities of the persons responsible for place of safety are important because the Act itself is very vague on this.  
**Recommendations:** The experience of organizations such as ECHO and Bosco who have received children alleged to be or found to be in conflict with law needs to be understood and taken into account. These Rules should clearly state that the rights of the child as per the constitution and the JJ Act need to be specially enforced and this place should not be an excuse for violation of the same. At the same time, the Rules should explicitly state that the State Government shall set up facilities specifically for children alleged to be and found to be in conflict with law who have a history of violent behaviour. These facilities shall be open to scrutiny by the Inspection Committees, Management Committees, Legal Services Authorities, members of the Juvenile Justice Board, Child Protection Units and the SJPU.
28. **Child friendly version of the Act and Rules** - Rule 16 (4): The State Government should allocate funds for appropriate individuals or organizations to evolve such documents which could then be distributed.  
**Recommendation:** NGOs and Legal services providers having the expertise to communicate with children should also be asked to conduct regular orientation programmes for children in the Observation Home and those children who have been granted bail who come for the JJB hearings.
29. **Subsistence amounts** - Rule 17 (12):  
**Recommendation:** The subsistence amount shall be not less than minimum wages.
30. **Jurisdiction of the JJB vis a vis Sec 23 - 26-** Rule 18: Clarification as regards procedures for each Section and especially with regard to jurisdiction of the JJB and the criminal Courts – See Rule 18 3) – with regard to offences committed by adults listed in Section 23 – 26. These Rules have been written in a vague manner which may give some JJB members (as well as some CWC members who have recommended that they be given the powers to conduct such hearings) the idea that they have the power to hear cases related to the adults who commit offences against children  
**Recommendation:** The JJBs shall not hear cases of adults who commit offences against children. They however shall direct the Police to file an FIR so that the case is brought before the appropriate criminal court.
31. **Persons not eligible for selection to CWC – conflict of interest:** Rule 20 (3) Selection Committee to ensure that no members selected have a background of working in Adoption Agencies: It is understandable that individuals working in Adoption Agencies should not be eligible for the post of member or Chairperson of the CWCs. However, the rules should also try to ensure that the hearings of the competent authorities are in accordance with the principles of natural justice. This is specifically because the majority of children who are brought before the competent authorities come from impoverished and marginalized families without genuine legal aid and support. Therefore it is highly improbable that children or their families would have the knowledge or reasonable opportunity to allege bias in any order that is passed which they perceive as not being fair or in their interest.  
**Recommendation:** The rules should specifically state that all hearings conducted by the competent authorities need to follow the Principles of Natural Justice. Further, specific rules should also be included wherein the appointment order and the code of conduct for CWC members for each person specifically states that they shall step down from any hearing in which there is a possibility of bias or conflict of interest.
32. **Qualifications for CWC members** Rule 22 –. Persons in government service should be disqualified. Further the minimum age criterion of 35 years could possibly preclude the possibility of young and committed professionals to occupying this post. Another key aspect

that requires debate is whether at least one person in the CWC should have a background in law, so that the basic principles of natural justice and other legal issues are understood by the Committee. However, such a provision has the risk of completely changing the nature of the inquiry making it more legalistic. Care should be taken to ensure that each member of the CWC functions independently and that the Chairperson facilitates discussion from a multi-disciplinary perspective, without giving undue importance to unnecessary legal procedures.

**Recommendation:**

- a) The Rules should disqualify persons who are in government service for appointment to the CWC or JJB.
- b) The minimum age for a person to be selected as members of the CWC or JJB shall be 30 years.
- a) The Rules should be amended to state that at least one member of the Committee should have a background in law.

33. **Functions and Powers of the CWC - Rule 25 and Procedures to be adopted by CWC and inquiries - Rule 26 and 28:** It is necessary that separate procedural guidelines are notified for CWCs to perform their role and function based on principles of natural justice, and keeping in mind jurisdictions of other statutes, statutory and judicial authorities. CCL NLSIU has undertaken some work with regard to a Manual for CWC members and other individuals and groups have undertaken similar work. It is suggested that State Governments study these documents and draw from them in order to incorporate non-negotiable legal standards and procedures which would provide clarity to the mostly non-legal CWC members who are expected to conduct inquiries and arrive at final orders which may be subject to appeal or revision.

34. **Panel of experts to support CWCs - Rule 27 (12):** This rule specifies that such persons may be empanelled only to assist in dealing with abused children.

**Recommendation:** The rules should state that persons may be empanelled to support any of the functions of the CWC or JJB.

35. **Guidelines for prevention of CSA - Rule 31:** Organizations having worked on the issue of Child Sexual Abuse need to contribute to this section of the Rules. CCL has initiated research on this issue which is currently being taken forward by TULIR Centre for Prevention and Healing of Child Sexual Abuse, in Tamil Nadu.

36. **Adoption Guidelines - Rule 33:** Though the Act provides for children to be adopted under the JJ Act, it is important to recognize that such adoptions do not guarantee that such children will have all the rights of a biological child of that family. This is because it is only the definitional clause in the Model Rules which have defined who an adopted child under this Act is and no substantive provisions have been made to ensure that the provisions of this law will prevail irrespective of provisions of any other law in the time being in force. Since such a non-obstante clause is absent with regard to adoption under the JJ Act, personal law will supercede the JJ Act with regard to issues such as inheritance etc.

**Recommendations:** The Rules should clearly state that personal law will have precedence over the Act and Rules, therefore ensuring that prospective adoptive parents, the CWCs and the JJBs are fully aware of this reality and children given in adoption could find themselves in a situation years later, where their inheritance rights are challenged. For more information on this contact Ms Sarasu Thomas, Management Committee Member, CARA and Faculty member, NLSIU. Also see article on this issue in publication of the Voluntary Health Association of India Publication – Seen but not Heard.

37. **Procedure for counseling parents about relinquishment Rule 33 (4) b):** It is suggested that audio visual tools be prepared that could help inform prospective mothers wanting to

relinquish their child about these critical issues. These should be made available to the public through all available means and not only in these Rules.

38. **Guidelines for Sponsorship programmes** Rule 37: Govt of Karnataka's sponsorship scheme, the recommendations made in CCL NLSIU Model Rules 2002 in Annexure 15 need to be incorporated.
39. **Standards for Institutions** Chapter VI:- It is critical that the Rules put in place clear legal standards not only for institutions but for all relevant services and procedures. Here again, CCL has made recommendations for the Rules in the CCL NLSIU Model Rules 2001 which need to be incorporated. Another CCL document on Standards in the Karnataka Rules 2002 as well as minutes of a meeting held in November 2007 on this issue at the DWCD, GoK are worth looking at. Kindly see *Annexure 14 Standards in Karnataka Rules 2002*
40. **Models for Education Programmes** -Rule 47: CCL is currently undertaking research to identify strategies and solutions for how the Right to Education can be ensured to children residing in institutions coming under this Act. Examples of bridge courses and other life skill programmes need to be identified and funds made available for their implementation in each and every institution under this Act. Organizations and campaigns working on Right to Education need to converge with those working on Juvenile Justice in order to meet this objective. After all children who enter the JJ system are almost always marginalized, excluded or pushed out of mainstream society and schools. The Right to Education needs to be protected within all statutory institutions on a priority basis.
41. **Management Committees:** Rule 55: CCL has played a crucial role in impacting the process of formalizing Home Committees in Karnataka, by including a copy of a Government Order issued in Andhra Pradesh 'Proceedings of the Commissioner of Juvenile Welfare, Correctional, Services & Welfare of street children, A.P, Hyderabad (Proc.No.P2/28/2000) dated 07.03.2001 in the CCL NLSIU Model Rules (Annexure 15). Further, as member of the Monitoring and Evaluation Committee of the Nagarbhavi Home, Bangalore Rural we have been able to understand how critical these spaces are for ensuring accountability of the state. CCL has also played a pioneering role in drafting Bye Laws for the School Monitoring and Development Committees, for the Department of Education in Karnataka. We recommend that similar bye laws be formulated for Home Monitoring and Development Committees or the new Management and Inspection Committees under this Act.
42. **Recommendations for Children's Committees** Rule 56: This is an extremely critical and valuable space to help promote and protect children's right to participation as well as right to fair and independent grievance addressal systems as recommended by the UN Committee on the Rights of the Child. Organizations having the expertise in setting up Children's Sanghas especially the National Working Children's Unions and the Concerned for Working Children, Bangalore need to be roped in to provide clear legal standards and guidelines for how such Committees should function. It is important that these processes be undertaken in a sensitive but rights based approach, and that children are not penalized for having expressed their views on any issue concerning themselves or the implementation of the Act.
43. **Inspection** - Rule 63, Rule 40 5) iv) – inspection of food articles, Rule 52 – search and inspection of children's belongings (no direct role of Inspection Committee but required, Rule 63 for Inspection Committee itself: The Rules do not specify what should happen for non-implementation of findings of the Inspection Committee, though it provides for submission of an action taken report.

**Recommendations:**

- a) The Rules should include the following - 'Non-implementation of the recommendations of the Inspection Committee report shall be the basis for a show cause notice to the respective functionary and appropriate action for negligence under Sec 23 for willful negligence'.



- b) The Rules should also state that Inspection Committee reports and action taken reports should be submitted to the State and Central Governments in order that they contribute to the Social Audit to be conducted under Sec 36 and MR 64.
- c) Considering that the Child Protection Units may not be set up in all states due to lack of funds from the ICPS, it is important that action taken reports and suggestions of the Inspection Committees get submitted not only to the State Government but also to the State Advisory Board. Rule 93 provides for the Advisory Boards to also ‘inspect the various institutional or non-institutional services in their respective jurisdictions; and the recommendations made by them, shall be acted upon by the Central Government and the State Government.’
- d) **Deletion:** Rule 93 (9) states that ‘District or City level Advisory Board constituted in terms of sub-section (3) of section of the Act shall also function as the inspection committee under section 35 of the Act’ should be deleted.<sup>11</sup>
- e) Advisory Boards could conduct sample inspections but rely mostly on the reports submitted to them by the Inspection Committees themselves.
44. **Social Audit** – Rule 66: This is one of the most important and radical provisions of the Act. It is important that children, their families and community based organizations and all those individuals/organizations working directly on JJ issues be automatically stakeholders in such a social audit process.
- Recommendation:** The Rules should include the following – ‘Children and families of children who are currently being dealt with at any stage of the juvenile justice proceedings under this Act as well as those discharged from any of the institutions or non-institutional programmes under this Act shall have the right to be represented in the Social Audit process. Individuals or organizations working directly on issues concerning juvenile justice shall also be stakeholders in this process. Social Audit reports shall be placed on the State Government’s website and made available for public viewing through appropriate means.’
45. **Determining fitness of individuals and organizations:** Rule 69 (4): This is an extremely important provision as it enables individuals and organizations to assist the state in its *parens patriae* role. However, the exact procedure and criterion (sub rule 6) for how the competent authority or the state government may come to the conclusion of fitness has not been specified as a legal standard. There should be different criterion for different purposes – for example criterion to declare a person fit to escort a child should be different from criterion for a person to whom temporary custody is given when a child is released on bail etc. This gives room for abuse of this power and status. In fact a recent Mumbai High Court order relating to the ability and power of the CWCs to determine fitness or unfitness of a mother alleged to have mental illness and therefore declaring her child as ‘fit for adoption’ was brought into question<sup>12</sup>.
- Recommendations:**
- The experience of judicial authorities in assessing fitness (Family Courts, authorities under the Mental Health Act etc) needs to be understood and suitable legal standards evolved to enable sound judicial or executive recommendations to determine fitness.
  - Different legal standard criterion needs to be evolved for different purposes such as fit to be a foster carer, take responsibility for a child alleged to be in conflict with law, to escort a child etc as explained above.
  - Rather than maintaining a ‘list’ of fit institutions, CWCs and JJBs could update this list during their sittings as and when suitable persons/organizations are identified. A List is static and updated only once in a while, therefore language should be different.

<sup>11</sup> See point 7 of the section dealing with Weaknesses of the Rules.

<sup>12</sup> See Annexure 5 Mumbai High Court order.

- d) Advisory Board to derecognize institutions - These rules need to also be read along with rules related to recognition or derecognition of institutions - Rule 70 (5): (For more details and recommendations - see work undertaken by Credibility Alliance, and CCL NLSIU paper authored by Arlene Manoharan's on the OCH Act presented in Dec 2005 at DWCD Meeting.)
46. **State and District Child Protection Units - Rule 80 and 81:** The Rules have not clarified the exact role, function and mandate of these Units. Further with the knowledge that the proposed Integrated Child Protection Scheme will not have adequate funds to support more than two or three states in this Plan period – it is possible that the Amendment Act and the Rules have created another institutional space without adequate resources to fund those created under the 2000 Act or these units under the Amendment. This is a clear example of how socio-economic rights of children are blatantly kept on the backburner. 'Socio-economic rights in regard to basic needs such as health, food, security, education and shelter continue to be perceived as discretionary and distinct administrative initiatives that fall into the realm of social policy rather than enforceable law.'<sup>13</sup>

**Recommendations: See Annexure 12 – Child Protection Units**

47. **Special Juvenile Police Units Rule 84:** The SJPU is a critical space in the Act through civil society individuals and organizations can work in partnership with the Police to protect and promote the human rights of children. Ideally it would be extremely valuable if the proposed diversion envisaged in the Model Rules and in the preamble of the Act could be facilitated at this level. However, we need to recognize the fact that such community based diversion and restorative justice approaches such as victim offender reconciliation units etc require specialized training and resources to ensure the due process rights of children alleged to be in conflict with law. Countries such as Uganda, Kenya, South Africa and other developing countries have managed to institutionalize this, but there seems to be some clarity that India is not ready for this yet. It is also important to recognize that SJPU have the mandate to deal with both children alleged to be in conflict with law as well as those alleged to be in need of care and protection. The Bangalore experience has indicated that some organizations and individuals have looked at this space as only to deal with children alleged to be in conflict with law. The Model Rules in 84 (2) has stated as follows - 'The District Child Protection Unit or the State Government shall provide services of its two social workers to the Special Juvenile Police Unit for discharging their duties'. It is important that NGOs with the competence, potential and child rights approach working in that jurisdiction are given preference to partner with the police. This is because the CPUs may or may not be set up and even if they are the Social Workers could be on contract and performing a number of roles. SJPU work requires special skills to enable sensitive first contact with children and their families as well as to deal with the police and probation officers. Another question that requires more clarity is the roles to be played by civil society individuals and organizations working in these SJPU and that of the Police. Numerous local, regional and national consultations have come to a consensus that the interface between children and the police needs to be minimized to the maximum extent possible, though recognizing that the police have a very specific and important role to play. The debates relating to community policing and also the various guidelines issued for Police at various levels have laid down some clear standards. It is important that these standards and guidelines get incorporated into legislation – and this is one such critical opportunity. For more information and recommendations see *Annexure 13: Minutes of consultation to discuss issues related to children in conflict with law, Jan 2008*

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<sup>13</sup> Protecting the World's Children, Impact of the Convention on the Rights of the Child in Diverse Legal Systems, UNICEF, 2007 Cambridge University Press, Savitri Goonesekere Pg 5.

48. **‘Disqualification’ of staff -Rule 89:**– Language of this Rules should not be ‘suspended’ – this word should be deleted. It should be mandatory to file an FIR rather than provide for a vague – ‘due inquiry’

**Recommendation:** The State Government or any other person who has prima facie evidence to conclude that any person working in the juvenile justice system, whether a functionary of the State Government, a member of the competent authority or any other person is allegedly guilty of an offence relating to a child, it shall be compulsory to register an FIR under Sec 23 of the Act. Non registration of an FIR should also attract a penalty, pending provisions that need to come under the proposed Offences Against Children Bill which has been in the pipe line for some years now.

49. **Selection Committees -Rule 91 and 92:** The Selection Committee has a very critical role to play in appointing the best possible candidates to fulfill the judicial responsibilities under the Act. The effective functioning of the Selection Committee has critical implications for children and families as well as for the State in question. It would naturally obviate the criticism of arbitrariness on the part of the Executive in such appointments. CCL NLSIU had made a number of observations and recommendations which have been submitted to the DWCD and members of the Selection Committee, GoK on 30<sup>th</sup> Nov 2004 and subsequently in 2006 - 07. Rule 63 (1) provides for the State Government to constitute State, District or city level inspection committee on the recommendation of the Selection Committee constituted under rule 91. It is therefore critical that members appointed as members of the Selection Committee be persons of repute with demonstrated experience in the field of juvenile justice and child rights.

**Amendment:** A member of the State Child Protection Unit has also been identified as a representative to the Selection Committee in Rule 80 c) though Rule 91 has not included such a provision. This is a contradiction and may require an amendment to resolve the same. However, it should be recognized that the ICPS will not cover all states; and therefore this position may be left vacant in most states.

**Recommendations:**

- a) **Application Forms:** In June 2006, CCL had made a recommendation to and assisted the DWCD, GoK (Recommendations in letter dated 20<sup>th</sup> June 2006) in revising the application form for persons wishing to apply as members of the CWC or JJB. A copy of the same may be notified in the Rules itself. If this is not desirable, other State Governments may request for a copy of the same in order to inform their procedures.
- b) **Application Fee:** A sum of approximately Rs. 300 should be remitted by the candidate in any brand of the State Bank of India to a head of account to be specified in the Rules to cover expenses that may occur as part of the Selection Process.
- c) **Xerox copies of applications:** The advertisement should state that a copy of the application form should be sent along with the original.
- d) **Advertisements:** As per Rule 91 1) a), the State Government shall issue a public advertisement to solicit applications for these posts. The Rules fail to mention that this advertisement should be in the Government Gazette as well as in one National Newspaper and one prominent Vernacular paper. Further the Rules fail to mention the content of the advertisement. It is important that key information be included in this advertisement. For example that these are honorary posts, the application fee, the criterion and qualifications for selection etc. Copies of all these advertisements should be presented to the Selection Committee for verification.
- e) **Nominations:** On 30<sup>th</sup> Nov 2004 CCL had recommended to the Selection Committee and the DWCD, GoK to follow the statutory procedure contained Rule 3 (3) of the Karnataka Rules 2002 to call for nominations from reputed institutions of social work etc. This part

of the Rule should also be incorporated into the Model Rules and State Rules– ‘For the purpose of selection of the members of the Juvenile Justice Board and the Child Welfare Committee, the Selection Committee shall invite nominations from qualified candidates....’ The letter from the concerned Department seeking nominations should state that the nomination list be addressed to the authority authorized to receive applications for this process. Copies of all these nominations should be submitted to the Selection Committee.

- f) Confidentiality: All applications should be addressed to the concerned authority in a sealed condition. No other person should be allowed to open the seal of any application form, to reveal its contents or to pass it on to any person who is not a member of the short listing sub committee. The recommendations of the Selection Committee should be kept strictly confidential. No officer of the Registry or its staff must be present during the proceedings
- g) Sub committee for short listing: A subcommittee needs to be constituted to receive and short list the applications according to the criterion listed in these Rules. Even though applications would be addressed to the Director of the concerned Department (or any other authority as stated in the advertisement), the said authority should forward these applications to this subcommittee without opening the seal.
- h) Opening of sealed applications: A representative from this subcommittee shall be the only person authorized to open and register any application. On opening each and every application, this authorized person shall immediately affix his/her signature on the first page of the application form with the date. This authorized person shall maintain a special inward register of all applications received. The corresponding register number needs to be affixed on the original copy of the application form.
- i) Final list of short listed and rejected applications: The received applications will be forwarded to the subcommittee who shall short list suitable applications. A list of short listed applications and rejected applications shall be maintained. Clear reasons for rejecting applications need to be recorded in a separate column on the same short list. The list of applications rejected shall be placed before the Selection Committee for endorsement. The Selection Committee shall check whether the number of short listed applications and rejected applications should tally with the register maintained in the inward register in the dispatch section of the Department.
- j) Summary Table: A summary table shall be prepared by the short listing sub committee listing the name, register number, qualifications, experience and any other important information for easy reference for the Selection Committee.
- k) Information to be given to members of Selection Committee in advance: A fortnight’s notice of the Selection Committee meeting should be given to the members informing them of the number of vacant posts to be filled up, the dates on which the vacant posts have arisen or would arise, a listing of all the Sections, Rules and guidelines to be followed by the Selection Committee in conducting their proceedings.
- l) Xerox copies of short listed applications to be handed over to each Selection Committee member along with Summary Table: It would be preferable that a xerox copy of each person’s application is made and handed over along with the summary table similar to the one prepared. This would help to provide additional information or to correct any mistakes that may have been made in the preparation of the table, which could put the candidate at a disadvantage.
- m) Transparency: Information about applications received, short listed and rejected should be made public so as to enable transparency of this critical process – one that results in appointment of persons who have the power to make decisions that dramatically affect

the lives of children – to the extent of separating them from parents and committing them to custodial institutions.

- n) **Written test:** A written test needs to be given to provide a more objective assessment of merit as the interview is too short a time to assess the caliber of the candidate. This will strengthen the selection process and provide written information to support the interview. The State Government should constitute a sub Committee to evolve the syllabus and the manner in which this written test is conducted in order that the candidates competence is tested through means that would complement the interview<sup>14</sup>.
- o) **Interview:** Whatever the number of applications, each candidate should be given adequate time to present his/her case before the panel. A minimum of ten minutes should be allotted for each candidate who should be allowed to speak in his/her language of preference. At the interview time, short listed candidates may be informed of their role, power and the code of conduct expected from them. This is so as to ensure that these persons are fully aware of the implications of taking up such a role.
- p) **Preserving the independent functioning of members of the competent authorities:** In the event that both a husband and wife have applied for membership to a CWC or JJB, this fact should be brought to the notice of the Selection Committee, who if finding both applicants suitable should recommend that they be appointed to two separate Committees or Boards<sup>15</sup>.
- q) **At least one persons with background in law to be appointed in each CWC:** The Selection Committee should take into account the recommendations made as regards qualification of CWC members above.
- r) **Signature of panelists to endorse selections.** It is important that the final list of candidates selected is endorsed by a quorum of members of the Selection Committee and this information maintained as official documentation of the Selection Committee.
- s) **Curbing of discretionary powers:** The discretionary powers given to State governments to go against the recommendations of the Selection Committee need to be curbed since this provides the space for political persons to be appointed.
- t) **Recording of minutes:** Papers relating to the meeting along with the minutes prepared by the Member Secretary should be kept in an envelope and sealed in the presence of the Secretary for keeping in his/her safe custody. This is to ensure that appropriate procedure is followed and the selection is transparent.
- u) **Extension of tenure:** Rule 6 (3) states – ‘Any extension of the tenure of members of the Board shall be on the basis of their performance appraisal by the District Child Protection Unit of the State Government and on the recommendation of a Selection Committee constituted for the purpose and the performance appraisal of members of the Board shall necessarily assess their participation in the proceedings of the Board and contribution in case disposal.’
- v) For a detailed note and recommendations see *Annexure 14 Critique of Model Rules 2007 Selection Committee*.
- w) **Procedures for members appointed to the CWC and JJB to take office:** Once a list of candidates who have been selected has been made, these persons need to formally take office. All members should be made to take an oath of office similar to that taken by Magistrates. The concerned Department could propose Rules by which this procedure is conducted. Members should be made to sign a document stating their responsibilities and

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<sup>14</sup> See recommendations made by CCL NLSIU to the Selection Committee and DWCD GoK in September 2006 for suggestions of a framework for this test.

<sup>15</sup> Karnataka has had experience of both husband and wife being appointed to the same CWC, and the Department had to take appropriate action once it was brought to their notice by CCL NLSIU in letter dated 11<sup>th</sup> August 2004.

commitments, their terms of reference (honorarium, travel allowance, etc) and a declaration that they will abide by a Code of Conduct. Members should be presented with a written copy of the Guidelines, Rules and the Act on taking office. They should be encouraged to seek any assistance required in terms of training support etc. The Department should consider Drafting and notifying Service (Recruitment and Conditions) Rules for these members.

**50.** Overall recommendations for Rules: As mentioned in the introduction, CCL NLSIU has facilitated a rich and meaningful process of arriving at recommendations for Rules under the JJA 2000. Months of research and insights from a number of consultative processes has gone into this document. Major portions of this document are still relevant despite the Amendment Act 2006. A copy of the same is included as ***Annexure 15: CCL NLSIU Model Rules 2002***

## **Recommendations identified from suggestions made in Tamil Nadu<sup>16</sup>**

1. “community service” implies service rendered to the society by juveniles in conflict with law in lieu of other judicial remedies and penalties, which is not degrading and dehumanizing *but under the supervision of officers designated by the Board*

2. Full time employees applying for appointment to the CWCs/JJBs must get a No-Objection certificate from the employer that they will be permitted to fulfill their responsibilities as Chairperson /member of the Board.

3. The social worker member or Chairperson shall not be a retired person within a period of three years from the Department of Social Defence

### **4. A Review and licensed discharge of cases**

*The Superintendent of the Special Home can approach the Legal Services Authority with*

- ❖ *petitions from the Juveniles or Children for review of their cases*
- ❖ *probation officer’s report on guardians willingness to accept them*
- ❖ *Report of the Superintendent on the conduct of the juvenile in the home so far*
- ❖ *Report from the District Juvenile Guidance/ Resource centre on the mental health of the juvenile.*

*The report from the Superintendent may include details of his period of stay in the observation home if it is beyond 4 months in order that the appellate authority may consider the period to offset the sentence.*

### **( MR 27: Production of a Child before the Committee)**

*(21) The Committee where necessary shall enquire the child in need of care and protection and shall record the statements of the child in camera*

*(22) If the Child Welfare Committee either on enquiry, or on the report of the Probation Officer/Medical Officer, or in any manner has ascertained that the child in need of care & protection produced before it has been abused physically or sexually or in any other manner by an adult, the Child Welfare Committee shall make a complaint and direct the police to file an FIR,*

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<sup>16</sup> Portions in italics are recommendations made by Ms. Vidya Shankar, and those with underline are recommendations that emerged from a consultation in TN in 2007.

*investigate the case and take necessary action as per the law. The CWC shall further direct the police to furnish a status report on the case periodically*

Model Rule (23) The committee shall record the statement of the child and arrange for such medical and forensic evidences as it is deemed fit to initiate medico-legal case against the adult offender. Arrangements shall also be made for taking the colour photograph of the injury, enabling it as evidence for the prosecution of the adult offender

(24) The committee shall also arrange for counseling and guidance services and support including the placement of a child in an appropriate place of safety.

(6) Restoring an abused child to the care of the parents or legal guardian should not be made without proper enquiry, which may go against the best interest of the child and hamper the legal action against the offender.

*For MR 31 (include CPUs also)*

*For MR 33: (viii) Incase the Probation officer traces the parent during inquiry, he shall ask her to come before the Committee to explain her situation, and sign the surrender documents. If she does not turn up, 3 registered posts to her address with a gap period of 15 days for each shall be sent to her with this information. If she fails to come before the committee her position may be treated as incapacitated and the adoption clearance certificate may be issued.*

*For MR 34: Children in institutional care to be considered for foster care*

- *Children of dysfunctional families*
- *Children of families in crisis or sickness.*
- *Children below 12 years with no claimants or visitors living in Institutions, who cannot go in adoption due to lack of paperwork,*
- *Children having extended families or interested persons in their communities, willing to take back children with financial support.*

**Steps involved:**

- a. *Production of eligible children from Institutions who need family care before the Child Welfare Committee*
- b. *Probation officers report on the background and need of the child besides recommendation for foster care*
- c. *Presenting of a petition by an eligible couple for fostering a child.*
- d. *Probation officers report on the Family with recommendation to place a suitable child*
- e. *Declaring the parent as a **Fit Person** and issuing a certificate by the Child Welfare Committee*
- f. *Foster care agreement between the Institution and the parent.*
- g. *Submitting the Copy to the Child Welfare Committee*
- h. *Follow up reports by either the Institution or the Probation officer.*

*(3) Select Child care institutions who are not involved in adoption placement shall be recognized for the purpose of foster care placement in every district.*

*(4) The Child Welfare Committees shall also place children in foster care from institutions other than those recognized for this purpose and direct the recognized agencies to do the follow up of the children so placed.*

*(5) The foster parents on completion of 3 years of foster placement may apply to the High court for guardianship of the child under Guardian and Wards Act of 1890.*

*(6) The “Fit Person” certificate issued by the Committee shall enable the foster parent to seek admission for the child in schools.*

Changes to MR 35 (1) (ix) the family should be willing to sign an agreement and to return the child to the *Institution recognized for Foster care specialized adoption agency* whenever called to do so;

**36. Pre-adoption Foster Care.** ~~In case of pre-adoption foster care, the provisions contained in sub-section (1) of section 42 and the corresponding guidelines notified under subsection (3) of section 41 of the Act, shall apply.~~

1. *In order to encourage the practice of adoptable children receiving parental care and attention and minimizing their stay in an institution, Pre-adoption foster care is provided for them. Children received by Adoption Agencies shall be placed in selected families who have undergone training and are willing, with commitment to spend time and efforts for the children so placed.*
2. *The Training shall be for a period of 2 days conducted by the District Child Protection Unit with assistance from Adoptive Parents Association and a pediatrician.*
3. *The payment to the foster family, for such services shall be fixed from time to time by the District Child Protection unit, depending on the age and the need of the child, and an agreement shall be signed by the family accepting the terms and conditions for the same.*
4. *Criteria for selection of families for pre-adoption foster care shall be*
  - a. *Families with basic housing and facilities required for the child*
  - b. *Physically, emotionally and financially stable*
  - c. *Maturity and capacity to deal with challenges in short term foster care*
  - d. *Families should be willing for visiting authorities and also attending training programs from time to time*
  - e. *Families should be willing to abide by the terms and conditions of the agreement of Pre-adoption foster care, and provide periodic reports of the health and development status of the child.*
5. *The District Child Protection Unit shall monitor the progress of the child in the family till the permanent placement in an adoptive family.*
6. *A prospective adoptive family may not be considered for the service of pre-adoption foster care on any account.*

*For MR 37:*

*(6) Families receiving sponsorship shall receive quarterly payments @ Rs 500 per month per child. They shall produce the child once a year to the Board or the Committee who have ordered the Sponsorship to the family. . This amount can be revised in the years to come to provide for price escalation.*

*(7) Selection criteria for sponsorships shall be*

- a) *Biological families*
  - b) *Extended families with a history of good practices in childcare*
  - c) *Institutions offering Group foster care*
- In that order of preference.*



**Recommendations for Place of safety:** *Government run or recognized institutions for juveniles in conflict with law, who have received final orders of institutional treatment after their attaining the age of 18 years. The place may have special guarding staff and provisions for vocational training and continuing education, cognitive therapy, behavior modification and spiritual healing programs.*

MR 47 (7) A mental health care plan shall be developed for every juvenile or child by the *Case worker* ~~child welfare officers~~. (Check use of term 'child welfare officer' in the MR)

**MR 57. Rewards and Earnings.** The rewards to a juvenile or child, at such rates as may be fixed by the management of the institution from time to time, may be granted by the Officer-in- Charge as an encouragement to steady work and good behavior; and at the time of release, the reward shall be handed over after obtaining a receipt from the parent or the guardian who comes to take charge of the juvenile or child or juvenile or child himself *by depositing in a post office account which can be transferred to his/her place of residence.*