



## JUDICIAL SYSTEM MONITORING PROGRAMME PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

### **Analysis of draft MSS Law on the Protection of Children (Draft Law no. /2016)**

The draft MSS Law on the Protection of Children (Draft Law) is to be commended for proposing a legal framework for the care and protection for children. It is also important for the law to be clear, consistent and realistic, so that it can be implemented effectively. The following analysis of the Draft Law considers the practical application of some of the provisions and raises some questions for MSS and Parliament to consider and address before passing the Draft Law.

#### **Preamble**

The preamble states that the Draft Law was drafted in consultation with civil society organisations involved in child protection.

*1. Please explain which civil society organisations were consulted on this Draft Law, and the process of consultation.*

#### **Local bodies with responsibilities in matters relating to children**

The Draft Law provides local bodies with responsibilities in matters relating to children with powers to intervene in situations where children are at risk, and obliges them to report children in danger to MSS (Article 4(1) and Article 8). Those bodies could include a range of government and non-government bodies – anyone who provides services to children. The Draft Law does not describe the circumstances in which these bodies can intervene and the nature of the intervention they can perform.

*2. How will local bodies that come into contact with children be provided with information and clarification about their powers and responsibilities under this Draft Law?*

#### **Child protection networks (Redes de protecção da criança)**

Article 13 states that the child protection network is to be established by joint ministerial order (diploma ministerial conjunto), in each municipality or administrative post, and comprise (under Article 15):

- 2 representatives from MSS
- 1 representative each from Education, Health, Registries and Public Notaries Services, Youth and Sports, Vocational Training and Employment
- 1 representative from the Commission on Children's Rights (KNDL)
- 1 or 2 representatives from social solidarity institutions who provide support to children
- 1 representative from the PNTL
- Representatives from other public or private bodies, or individuals with expertise or professional experience in childhood matters who are invited by the network

The network's responsibilities and powers are set out in Article 16. Articles 17 – 25 deal with procedural and administrative issues of the network, such as obligation to submit annual plans and reports (Article 25), minutes (Article 23) and terms of office (Article 20).

*3. The rede referral already exist in each municipality. The network composition is currently flexible and did not require a ministerial order to establish. The current problem is that MSS, who leads the network, are not convening meetings regularly. Is the child protection network under this Draft Law intended to formalise the existing rede referral,*

*or to replace the existing networks with a new system? How will MSS ensure meetings are held regularly and representatives will attend?*

4. *The list of representatives in Article 15(1) risks creating networks which are not relevant to child protection in that local area – representatives should come from local bodies which work with children.*
5. *The Draft Law imposes a heavier administrative burden on each local network and on MSS than the existing rede referral system, requiring annual work plans, reports and record keeping. Is it realistic to have each rede referral submit an annual work plan and report? Will MSS provide resources and funding to enable this? What is the purpose of the annual work plan and report, and who will read them?*

### **Mandatory reporting**

Article 26(1) requires any bodies with responsibilities in matters relating to children to report any “children in danger” to child protection services.

6. *People who work with children are also often subject to duties of confidentiality (e.g. doctors, lawyers). Requiring these people to report matters to child protection services may mean they breach their duty of confidentiality. Is it intended to require people to report even where they owe a duty of confidentiality?*

Article 26(2) obliges any person aware of a child in *danger* to report that fact to child protection services. Many other jurisdictions require reporting by those people and organisations who work with children (eg. teachers, police, doctors) but do not impose such a broad obligation on all people.

7. *The language of these provisions requires people to report, but does not specify the consequences of failing to report. Is it intended that there will be a penalty for failing to report under Article 26?*

Local bodies with responsibilities in relation to children are subject to mandatory reporting where there is a suspected crime against a child (Article 29). All reports must be made to the Public Prosecution Service.

As this creates an obligation to report a crime, it is possible that a failure to report a situation which amounts to a crime against a child could be a crime itself under Article 286 of the Penal Code (Failure to report). For example, anyone who is part of the rede referral who fails to report suspected physical abuse against a child has committed an offence of failure to report under the Penal Code.

8. *Is it intended that individuals who fail to report suspected criminal conduct against children should be charged with committing an offence of failure to report under Article 286 of the Penal Code?*

### **Consent for intervention**

Under Article 10, interventions to protect children at risk or in danger require the consent of:

- the child, if the child is aged 12 years or above
- and the parents or legal representative, or de facto guardian (such as de facto step-parents) of the child.

Where consent is not given by the parents or legal representative or de facto guardian of the child, a court order must be sought under Article 11.

There is an exception in emergency situations where there is “present or impending danger to the life or of serious bodily or psychological harm to the child” and there is no consent from the parents or legal representative or de facto guardian of the child. In such cases where there is no consent, the public prosecutor may order that MSS and PNTL remove the child from the situation and provide necessary health care, including medical forensic examination. (Article 69)

These provisions conflict with existing provisions on consent in cases of domestic violence, under the *Law Against Domestic Violence (Law no. 7/2010) (LADV)*. Article 5 (Consent) of the LADV provides:

- Intervention in support of a young victim of domestic violence aged 16 years or more requires only the victim's consent.
- Intervention in support of a child aged between 12 – 16 requires only the consent of the child, where the situation is urgent and consent from the legal guardian cannot be obtained in a timely manner; or where the legal guardian is perpetrator, and consent from the “entity designated by law” cannot be obtained in a timely manner.

The LADV does not require consent from “de facto” guardians, such as informal step-parents (who have not formally adopted a child under the Civil Code).

While no entity has been designated by law to this date, MSS is the entity responsible for the welfare of children and specifically mentioned in the LADV. The PNTL also have obligations under the LADV to protect victims.

#### *Example case from Ermera*

Currently, it is extremely difficult – and in some cases impossible – to get MSS and the PNTL to act in cases where children are at very serious risk of harm in the home. This is despite existing powers enabling MSS and the PNTL to intervene and protect children. Many of these cases involve informal step-parents as suspected perpetrators.

For example, in a recent case from Ermera, a 2-year-old boy was assessed by medical examiners as having suffered from serious physical abuse and mistreatment. This abuse was sustained over a long period and was highly likely to have been perpetrated by one or both de facto step-parent. One of the step-parents is a police officer. This case was reported to MSS, PNTL, PRADET and ALFeLa.

However, the child was returned to the step-parents by MSS and PNTL, on the basis that the child could not identify the abuser and there were no witnesses willing to testify. The child victim should not have been returned to such a dangerous situation, when there was clear medical evidence of child abuse. A child of 2 years could not be expected to speak and identify the abuser.

In this case, the PNTL and MSS had existing powers to remove the child from the dangerous situation, regardless of the lack of consent from the step-parents as there was evidence that they perpetrated the abuse and they are not the legal guardians of the child. Under the Draft Law on Child Protection, this child could not be removed from the home without a direct order from the public prosecutor or a court. This process could potentially take many days or weeks, during which time the child could be subject to further abuse and intimidated.

9. *Currently in DV cases, there is no requirement to get consent from a parent, legal representative or de facto guardian where the youth is already 16 years of age. The Draft Law changes this position. Was this intended?*
10. *Currently in DV cases, there is no requirement to get consent from de facto guardians, such as informal step-parents. The Draft Law changes this position. What is the basis for this change, given that informal care arrangements are not recognised under the Civil Code?*
11. *The Law Against Domestic Violence envisages that MSS and PNTL could decide to intervene in urgent cases where the parents are suspected perpetrators of domestic violence, then seek judicial authorization under the Civil Code. The Draft Law changes this position. Is this an intended consequence?*

12. *The Law Against Domestic Violence provides that in urgent and exceptional situations, a child aged 12 years and above can her/himself consent to intervention. The Draft Law changes this position. Is this an intended consequence?*
13. *How will the public prosecution service, MSS and PNTL ensure that urgent cases are properly handled within 48 hours, to ensure children are not returned to abusive situations?*

### **Consent for medical examination**

Under Article 66, consent from the child and its parents or guardians is required for child protection services to take a child to medical examinations. As is the case for interventions discussed above, there is an exception in emergency situations, but the law requires at least the public prosecutor (if not the court) to make an order to allow MSS or the PNTL to take a child to a medical examination (Article 69).

Again, this is inconsistent with the LADV, which requires the PNTL to ensure a DV victim receives immediate medical attention. As outlined above, this requires only the consent of the child if the child is over 16 years. The other exception is where the child is over 12 years of age, and the situation is urgent and consent from the legal guardian cannot be obtained in a timely manner; or where the legal guardian is perpetrator, and consent from the “entity designated by law” cannot be obtained in a timely manner.

Currently, consistent with the LADV, parental consent is not always required for children over 12 years of age for medical forensic examinations. Those examinations, conducted by PRADET, are vital to ensure appropriate medical attention for the child victim, efficient documentation of injuries, and for the effective prosecution of DV cases, and need to be carried out as soon as possible after an assault occurs. If this Draft Law means accredited medical examiners always needs parental consent before examining a child under 17 years of age, this could delay examinations where the parent is missing, or reluctant to give consent, as an order must be first obtained from the court or public prosecutor to enable a child to be examined.

14. *The Law Against Domestic Violence envisages that MSS and PNTL could decide to intervene in urgent cases and take a child to receive immediate medical examination without parental consent, before receiving approval from the public prosecutor or the courts. The Draft Law changes this position so that parental consent is required, or an order from the public prosecutor, before any medical examination or treatment can take place. Is this an intended consequence?*
15. *How will the public prosecution service, MSS and PNTL ensure that urgent cases are properly handled so that children receive immediate medical attention?*

### **Protection measures – institutional care**

A number of protection measures are described in the Draft Law, with preference given to non-institutional measures. Article 39 provides that institutions which care for children must have a Memorandum of Understanding with MSS. Article 40(3) provides that institutions that care for children will be regulated by separate legislation.

The law contains other provisions which regulate and create obligations on institutions which care for children (Articles 40, 41, 42 and 46). Currently, the majority of institutions that care for children, including safe houses for victims of abuse, orphanages and boarding houses, are run by non-government organisations. These institutions will be directly impacted by this law, and the separate legislation referred to in Article 40(3).

16. *What is the status of the legislation which regulates institutions which care for children? Has the legislation been drafted, and have institutions been consulted on the contents? What consultation has taken place with institutions that care for children in relation to the impact of*

*the Draft Law on them? How often will the MoUs with MSS need to be renewed and who will be responsible for this process?*

Article 41 requires institutions that care for children to have a technical team responsible for assessing the needs of children in care, which should include social workers, psychologists and other professionals. There are currently no formally qualified social workers, and very few psychologists in Timor-Leste and little capacity to train social workers or psychologists locally. The technical team at any institution caring for children is therefore unlikely to include these professionals.

*17. Is it realistic to require institutions to have this technical team? Does Parliament or MSS have a plan for increasing the number of trained social workers and/or psychologists in Timor-Leste, and a plan for increasing in funding for institutions to pay for qualified staff?*

Article 42(2) provides that the following bodies can request to visit institutions that care for children: Judges, Public Prosecution Service, Ombudsman for Human Rights and Justice (PDHJ), Office of the Public Defender, KNDL.

*18. Institutions that care for children often house victims whose legal cases are currently ongoing. How will MSS limit visits to these institutions to those strictly necessary, to ensure that children are not further traumatized and the location of these institutions remain confidential ?*

Article 94 provides for mandatory review of the situation of children taken into care without a prior judicial decision. It requires institutions that care for children to report those children to child protection services (MSS), who are to carry out a review and initiate proceedings for protection. It is important to ensure that all children in care are properly accounted for, but it is also important that their rights are respected in relation to any processes carried out by child protection services.

*19. Does MSS know how many cases this will involve, and will it have specialised resources for this review? How will MSS ensure that any reviews are carried out with sensitivity to ensure children are not further traumatised, and to safeguard the confidentiality and security of children in care?*

### **Protection measures – age of majority**

The draft law refers in Articles 51, 67 and 77 to protection measures terminating, or the court ceasing to have jurisdiction, once the child reaches the age of 18. However, the definitions in Article 3 refer to a child as being under the age of 17. Seventeen is the age of majority under the Civil Code. If a person is no longer a child at the age of 17, there does not seem to be a reason for protection measures to continue to the age of 18.

*20. Is the inconsistency in the age of a child (up to 17 years) and the age at which protection measures end (18 years) intended?*

### **Protection proceedings – procedural matters**

#### Restricted proceedings

Article 67 provides that proceedings in relation to child protection are restricted.

*21. Does this restriction ensure hearings in court will be closed to the public?*

Article 68 restrains the media from identifying children in reporting. It is possible that people or organisations other than the media may distribute information regarding children in danger.

*22. Should the restraint on publication of information regarding children in danger, children involved in court proceedings of any kind, or children the subject of protection measures apply to any person or organisation (not just media)?*

#### Safeguards for children involved in proceedings

Article 80(1) provides for the parents or guardians of a child to have a lawyer or request the appointment of a public defender. Article 80(2) allows for a child with sufficient age and maturity to ask the court to appoint a public defender. In protection proceedings, the interests of the parents and the interests of the child are not the same and separate legal representatives may be required in many cases. If a public defender is appointed, it should be a different representative for the parents and the child. Those assigned to children should have special training in working with children.

*23. Will the Public Defender's Office be provided with resources to enable separate representation of children where necessary and special training on working with children? Will lawyers who are not public defenders be able to represent children (eg. lawyers who currently work with children, like ALFeLa)?*

### **Inter-ministerial monitoring commission**

Article 92 provides for a commission to be established to plan for the implementation of the Draft Law and specifies representatives from several Ministries. Article 92(3) provides that the commission may also include representatives from other public or private bodies engaged in matters relating to children. It is primarily non-government organisations which are involved in providing services for children in Timor-Leste and which operate the institutions that care for children. Institutions that care for children are directly affected by this Draft Law. Those organisations need to have input into the implementation commission.

*24. Will representatives from NGOs that provide services to children be invited to the inter-ministerial monitoring commission? Will civil society be able to make submissions to the commission?*

### **Nationwide database**

Article 97 requires MSS to set up a national database to record all instances of children in danger reported to them. A database may help to keep track of reports and actions taken, but will contain sensitive information which must be kept secure and should only be used for limited purposes.

*25. What will this database be used for? How will MSS ensure the information on the database is secure and only used for intended purposes?*

### **Telephone support service**

Article 98 provides for the establishment of a free telephone service to ensure a prompt reaction to situations involving children in danger. A telephone service will require constant staffing and dedicated resources. Rather than establishing this telephone service by law, it could be set up on a trial basis without the need for legislation. The telephone service also duplicates a similar hotline envisaged under the Law Against Domestic Violence (Article 20(2), which has still yet to be established 7 years after the promulgation of the law.

*26. Does this telephone service respond to a particular need that has been identified in relation to child protection? If not, could this service be combined with the hotline service provided for under the LADV, which has yet to be established?*