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<p>Clause 2 Interpretation</p>	<p><b>“child”</b> – the definition in the Bill is the same as that used in section 2 of the Interpretation Act 1967. Is there a reason why the term child is not defined by reference to the Interpretation Act? It can just say – <u>“has the meaning given in section 2 of the Interpretation Act 1967”</u></p> <p><b>“child in conflict with the law”</b> – Language and more importantly, precise use of language in legislation is critical to the way words are interpreted by the Court and those that have to explain to children what words and their ‘effect’ mean.</p> <p>The first part of the definition states <i>‘means a child above the age of 14 years’</i>.</p> <p>Again, the <i>Interpretation Act 1967</i> provides a definition for the term <i>‘young person’</i> as follows:</p> <ul style="list-style-type: none"><li>• <u><i>Young person means a person who is 14 years of age or upwards and under the age of 18.</i></u></li></ul> <p>Suggest that where the <i>Interpretation Act 1967</i> provides a definition, link it to that definition. If carve out need to be made, they can be made and applied to the use of the term in a division etc.</p> <p>The following words <i>‘alleged to have committed, accused of, charged with, or found guilty of, committing a criminal offence’</i>, mean very different things and carry different legal effects. Aside, from using a catch all phrase to label</p>
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different parts of a process, there needs to be further thought about the way children are labelled.

Suggest simply using young person + the actual action or conduct. This is important because a defined term has bearing on the way that term is used in certain Parts or divisions of the Act.

For example: ‘a young person charged with an offence’ – might be defined as:

*‘References to a ‘young person charged with an offence’ may include a reference to a young person who—*

*(a) was charged with an offence; and*

*(b) is receiving, or is the subject of, a service provided for the purpose of—  
(i) dealing with the child under this Act for the offence; or*

*Example—*

*an assessment prepared for sentencing the child for the offence*

*(ii) Helping rehabilitate the child.*

*Example—*

*counselling and rehabilitation programs provided for the purpose of meeting particular needs of the child relevant to the child’s offending behavior,’*

There are also different implications for a child that is charged with an indictable offence, or a child charged with a summary offence.

- Please reconsider recasting the term and meaning of a “*child in conflict with the law*”

Given the *Interpretation Act 1967* already provides for the term’s ‘*child*’ and ‘*young person*’ it is superfluous to redefine those terms given they are the same. Further, it appears that the underlying policy position is that 14 + year olds are the cohort to the proposed Bill is means to provide for. The terms should be drafted more tightly and more precisely to reflect a child charged with an offence or when a court finds the child guilty of an offence.

**“Diversions”** – suggest including that diversion may be initiated by the police, or the DPP or the court.

- Police may choose to use alternatives to investigating or starting proceedings via the DPP, such as diversion plans, and community conferences mentioned in Part 3 and Part 4.
- Given the increase in substance abuse amongst children and young people, the Bill should consider possible court outcomes for young people appearing before the court. Those options may include
  - Diversion, dismissal or withdrawal of case. For example: divert a defendant who is suffering from a mental health condition into the care and treatment of mental health professionals rather than dealing with them through the criminal justice system
  - unsupervised options: cautions, fines, recognizance

	<ul style="list-style-type: none"> <li>○ community-based orders: recognizance, probation or community service orders</li> <li>○ custodial orders</li> <li>○ Restorative justice - conference.</li> </ul>
<p>Clause 3</p>	<p>Sub cl (a) suggest breaking this up and reframing it to something akin to:</p> <p><i>The principal objectives of this Act are—</i></p> <ul style="list-style-type: none"> <li>– <i>to establish the basis for the administration of a child justice system; and</i></li> <li>– <i>to establish a child justice court (<u>see my feedback in relation to Part 6 and the establishment of child justice court</u>)</i></li> <li>– <i>to establish a code for dealing with children who have, or are alleged to have, committed offences; and</i></li> <li>– <i>to provide for the jurisdiction and proceedings of courts dealing with children; and</i></li> <li>– <i>to ensure that a child that commits an offence is treated in a way that diverts the child from the courts’ criminal justice system, unless the nature of the offence and the child’s criminal history indicate that a proceeding for the offence should be started; and</i></li> <li>– <i>to ensure that courts that deal with children who have committed offences deal with them according to principles established under this Act; and</i></li> <li>– <i>to recognize the importance of families of children and traditional or community leaders, civil society and community members in the provision of services designed to—</i> <ul style="list-style-type: none"> <li>(i) <i>Rehabilitate children who commit offences; and</i></li> <li>(ii) <i>reintegrate children who commit offences into the community.</i></li> </ul> </li> </ul> <p>Shorter sentences lend itself to easier interpretation of provisions.</p>
<p>Clause 6 Age determination</p>	<p><u>Sub clause (5)</u> It is unclear what s. cl (5) is trying to do.</p> <p>Sub clause (2) makes it clear that the person’s age <u>must</u> be determined by the court.</p> <p>Sub clause (3) sets out the factors the court has regard to and sub clause (4) clarifies that the person’s age must not be based on physical appearance alone. This seems to indicate that if one of the other matters in (3) is met, then the person’s physical appearance may be used.</p> <p>However, sub clause (5) provides: <i>‘Where there is doubt as to the age of a person who appears or claims to be under the age of 18 years, the benefit of the doubt lies with the person claiming or who appears to be under the age of 18 years’.</i></p> <p><u>Query:</u></p>

	<p>Is (5) meant to apply only if the Court has undertaken the mandatory age assessment to determine the person’s age in sub clauses (2) to (4) and is still unable to determine the age of the person?</p> <p>If, so suggest, redrafting subclause (5) to make it clear that it only applies if the court has applied sub clauses (2) to (4) and cannot determine the person’s age.</p>
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**Part 6 CHILD JUSTICE COURT**

	<p><b>Suggest definitions for Part 6</b></p> <p>In this Part —</p> <p><i>Child Justice Court magistrate</i> means a magistrate appointed to the Child Justice Court.</p> <p><i>Child Justice Court judge</i> means a High Court judge appointed to the Child Justice Court.</p> <p><i>court</i> means the Child Justice Court.</p> <p><i>judge</i> means a Child Justice Court judge.</p> <p><i>procedure</i> includes practice.</p> <p><i>rules</i> means the Child Justice Court Rules.</p>
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<p>Clause 34</p>	<p><b>Please omit clause 34.</b></p> <ul style="list-style-type: none"> <li>• The Chief Justice does not have the authority or the power to establish a court. Only written law can establish a court.</li> </ul> <p><b><u>The Constitution of Fiji</u></b></p> <ul style="list-style-type: none"> <li>• Section 97 provides for ‘<i>Judicial Authority and Independence</i>’. Relevantly, subsection (1) provides: <p style="text-align: center;"><i>The judicial power and authority of the State is vested in the Supreme Court, the Court of Appeal, the High Court, the Magistrates Court, <b><u>and in such other courts</u></b> or tribunals as are <b><u>created by law</u></b>.</i></p> </li> <li>• Section 102 provides for ‘<i>Other courts</i>’ and states: <p style="text-align: center;"><i><b><u>‘A written law may establish and determine the authority of other courts, tribunals or commissions, which may have a status similar to the High Court, the Magistrates Court, or other subordinate courts’.</u></b></i></p> </li> </ul> <p><b><u>RECOMMENDATIONS:</u></b></p> <ul style="list-style-type: none"> <li>• <b>Omitting clause 34 and replacing it with something akin to:</b></li> </ul>
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***Child Justice Court established etc.***

- (1) *The Child Justice Court of Fiji is established.*
- (2) *The court is a court of record.*
- (3) *The court is to have a seal, which must be judicially noticed.*

**RECOMMENDATIONS continued:**

- **Inserting a new clause that provides for the ‘Members and constitution of the Child Justice Court.’**
- **Inserting sub clauses that provide, something akin to that outlined below:**

***Members and constitution of the Child Justice Court***

- (1) The members of the Child Justice Court are the judicial officers mentioned in (insert relevant clause number referring to definitions for pt 6).
- (2) If a written law expressly requires the Child Justice Court to be constituted by a Child Justice Court judge, the court must be constituted by either of the following—
  - (a) a Child Justice Court judge;
  - (b) if a Child Justice Court judge is not available—a High Court judge.

*Example of when a Child Justice Court judge is not available—*

1 A child is to be tried or sentenced before a Child Justice Court judge at a place where the Child Justice Court sits only a few times in a year. At the time the child would ordinarily be dealt with at the place, there is no Child Justice Court judge available, but a High Court judge is available. The High Court judge may constitute the Child Justice Court and deal with the child.

- (3) If the Child Justice Court is not required to be constituted by a Child Justice Court judge, it may be constituted by—
  - (a) a Child Justice Court magistrate; or
  - (b) if a Child Justice Court magistrate is not available—any magistrate.

**RECOMMENDATIONS continued:**

- **Inserting a new clause that provides for jurisdiction**

***Jurisdiction***

- (1) The Child Justice Court has the jurisdiction conferred on it by this Act and any other written law.

**RECOMMENDATIONS continued:**

- **Inserting two new clauses that provide for:**
  - **Child Justice Court Judges; and**
  - **Child Justice Court Magistrates.**

***Child Justice Court Judges***

- (1) The Chief Justice may, appoint 1 or more High Court judges as Child Justice Court judges.

	<p>(2) In choosing a High Court judge to be recommended as a Child Justice Court judge, the Chief Justice must have regard to the appointee’s particular interest and expertise in jurisdiction over matters relating to children.</p> <p>(3) The appointment of a person as a Child Justice Court judge does not affect the person’s appointment as a High Court judge or the person’s powers as a High Court judge.</p> <p><b><i>Child Justice Court magistrates</i></b></p> <p>(1) The Chief Justice may, appoint 1 or more magistrates as Child Justice Court magistrates.</p> <p>(2) The appointment of a person as a Child Justice Court magistrate does not affect the person’s appointment as a magistrate or powers as a magistrate.</p> <p>(3) For the purpose of the <i>Magistrates Court Act 1944</i>, the duties of a magistrate include those performed as a Child Justice Court magistrate if the magistrate is a Child Justice Court magistrate.</p>
<p>Clause 35 Rules of Court</p>	<p><b>Please insert a sub clause before (1) that provides:</b></p> <p><i>(1) The procedure of the Child Justice Court is governed by the Child Justice Court Rules.</i></p> <p>and renumber, etc.</p> <p><i>(2) The Chief Justice may make rules of court (The Child Justice Court Rules) for regulating the practice and procedures under this Act.</i></p> <p><b>Please also insert the following sub clauses:</b></p> <p><i>(3) A rule may make provision about any matter—</i></p> <p><i>(a) that is required or permitted to be prescribed under a law giving jurisdiction to the Child Justice Court; or</i></p> <p><i>(b) that is necessary or convenient to be prescribed for carrying out or giving effect to a law giving jurisdiction to the Child Justice Court.</i></p> <p><i>(4) In particular, a rule may make provision about the procedure of the Child Justice Court, including the matters that may be dealt with in chambers or by a court official.</i></p> <p>The above suggestion is made so that there is a head of power to cover the kinds of rules, which are unique to children in child justice proceedings. See for example: section 15(9) of the Constitution of Fiji.</p> <p>The rules should include arrangements for ‘special witnesses’ or whether or not a child is to give evidence or be cross examined in proceedings or the ways in which a child may be supported to give their evidence etc.</p>
<p>Recommend inserting a clause about ‘Directions’ After Clause 35</p>	<p><b>RECOMMEND:</b> Inserting new clause with the heading “<b>Directions</b>” and with the following sub clauses.</p>

	<p>(1) To the extent that any matter relating to Child Justice Court procedure is not provided for by the rules, the matter may be dealt with by directions under this section.</p> <p>(2) The Chief Justice may issue directions of general application with respect to the procedure of the court.</p> <p>(3) A Child Justice Court judge may issue directions in relation to a particular case before the court when constituted by the judge.</p> <p>(4) After consulting with the Chief Justice, the chief magistrate may issue directions of general application with respect to the procedure of the court when constituted by a Child Justice Court magistrate, magistrate or justices.</p> <p>(5) A Child Justice Court magistrate, a magistrate or justices may issue directions in relation to a particular case before the court when constituted by the Child Justice Court magistrate, the magistrate or justices, as the case may be.</p> <p>The purpose of including a clause that provides the court with the power to issue ‘directions’ is because rules do not always foresee the way a matter might unfold before a court. In the interests of resolving issues that arise in a timely manner and where the rules don’t guide ‘how’ to deal with such an issue, the issue of ‘directions’ is a useful tool that can be made by the presiding judge or magistrate.</p>
<p>Recommend new clause</p>	<ul style="list-style-type: none"> <li>• <b>Recommend</b> a new clause be inserted that provides for approval of ‘Court Forms’ that will be developed and used under this Bill.</li> </ul> <p><b>New clause with the heading ‘Approved forms’</b></p> <p>The [name person] may approve forms for use under this Act.</p> <p>I am not sure who approves court forms for use in the Courts, but that person’s title should be used in the proposed clause.</p> <p>**For example, in Qld, the President of the Childrens Court approves all-court forms used in the Childrens Court. The approval sits with the President to ensure that changes to forms can be dealt with in a timely manner and not subject to lengthy approval processes.</p>
<p>Clause 45 Appeals</p>	<p>Further work to develop the pathway for ‘<i>Appeals</i>,’ is required.</p> <p>It is inadequate to say:</p> <p style="text-align: center;"><i>‘An appeal by a child in conflict with the law against a conviction or sentence under this Act is governed, <u>with necessary modifications</u>, by the Criminal Procedure Act 2009 and any other written law’.</i></p> <p>If the underlying policy is to make the justice system for children and young people easier to navigate then it is important that children or young people understand the appeals framework that is available to them.</p> <p>Is the decision of a Child Justice Magistrate appealed to a Child Justice Judge?</p> <p>I anticipate it will follow the current criminal appeal steps available to adult offenders, but care should be taken to ensure that the protections unique to children and the underlying policy for establishing a Child Justice Court is</p>

maintained. Given, this is a new Court, it is critical that the work to map out the processes is determined.

I understand that the Bill will not commence immediately. As such, the detail around the appeals could be made in the rules. However, it is preferable that it is included in the Bill.

Matters the department may wish to consider:

- Appeal rights generally - (for example: *'Other than as expressly provided, this part does not affect the right of any person to appeal, or apply for leave to appeal, under a written law or otherwise against the order of a court or judicial officer'*).
- Community based orders stayed during appeal
- Appeals to Court of Appeal
- Appeals to Child Justice Court judge (noting that references to a High Court judge would be taken for the purpose to be references to the Child Justice Court judge).
- Reviews of sentences by Child Justice Court judge (A Child Justice Court judge on application, would review a sentence order made by a Child Justice Court magistrate).

This would cover, for example: who may bring an application, preliminary procedure, stays, conduct of review, review of decision and orders at end of review.

For who may bring application:

- *'An application may be made by—*
  - *a child against whom the sentence order was made; or*
  - *the Director, acting in the child's interests; or*
  - *the complainant or arresting officer for the charge for which the sentence order was made.'*
- Time to appeal – *'An application must be made within 28 days after the sentence order is made or within a later period that may at any time be allowed by the Child Justice Court judge'.*