NAVIGATING MALAYSIAN CIVIL LAW AND MAQASID AL-SHARIAH IN THE BEST INTERESTS OF MUSLIM CHILDREN BEYOND CONTROL: A CASE STUDY IN PENANG

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A CASE STUDY IN PENANG

by

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<td>AH</td>
<td>After Hegira (Anno Hegirae)</td>
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<tr>
<td>CE</td>
<td>Common Era</td>
</tr>
<tr>
<td>CRCI</td>
<td>Covenant on the Rights of the Child in Islam</td>
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<tr>
<td>DSW</td>
<td>Department of Social Welfare</td>
</tr>
<tr>
<td>DSWKL</td>
<td>Department of Social Welfare Kuala Lumpur</td>
</tr>
<tr>
<td>DSWP</td>
<td>Department of Social Welfare Penang</td>
</tr>
<tr>
<td>HREC</td>
<td>USM Human Research Ethics Committee</td>
</tr>
<tr>
<td>IPHRC</td>
<td>Independent Permanent Human Rights Commission</td>
</tr>
<tr>
<td>ISDEV</td>
<td>USM Centre for Islamic Development Management Studies</td>
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<tr>
<td>JAKIM</td>
<td>Jabatan Kemajuan Islam Malaysia</td>
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<tr>
<td>NGO</td>
<td>Non-government organisation</td>
</tr>
<tr>
<td>OIC</td>
<td>Organisation of Islamic Cooperation</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCRC</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>UNICEF</td>
<td>United Nations International Child Education Fund</td>
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<td>USM</td>
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MENGKAJI UNDANG-UNDANG SIVIL MALAYSIA DAN MAQASID AL-SYARIAH DEMI KEPENTINGAN KANAK-KANAK DI LUAR KAWALAN: SATU KAJIAN KES DI PULAU PINANG.

ABSTRAK

Di bawah undang-undang Malaysia, kanak-kanak luar kawalan merupakan satu fenomena yang unik kerana mereka tidak melakukan jenayah tetapi mereka telah melanggar norma-norma kehidupan bermasyarakat antara ibu bapa dan anak-anak dalam budaya Malaysia. Permasalahan ini menarik minat kerajaan Malaysia untuk menangani isu tersebut mengikut undang-undang berpandukan prinsip dan praktis kehakiman Latin Kristian pada awal abad ke-19 kerana kesan undang-undang kolonial Inggeris. Tradisi Judeo-Kristian mempunyai persamaan dengan falsafah Maqasid al-Shariah dan undang-undang Islam, namun begitu terdapat beberapa perbezaan asas untuk menangani konflik dalam kekeluargaan. Undang-undang Islam dan tradisi sivil menekankan aspek perdamaian dan konsep keharmonian dalam kalangan keluarga dan komuniti, melampaui hal-hal berkaitan perlanggaran norma. Namun begitu, pendekatan Malaysia dilihat tidak selaras dengan piawaian antarabangsa, apabila seorang kanak-kanak diberikan hak penjagaan atau berada di bawah pengawasan negara selama tiga tahun jika tidak mematuhi ibu bapa mereka. Penyelidikan ini bertujuan meneroka tindakan yang dilakukan untuk mencegah atau membebaskan kanak-kanak ini daripada terjebak dalam sistem yang sedia ada selaras dengan komitmen Malaysia terhadap ekspektasi Pertubuhan Bangsa-Bangsa Bersatu. Pada masa yang sama, penyelidikan ini turut meninjau potensi untuk mempertimbangkan falsafah keadilan dan rekonsiliasi Islam dalam respons sekular yang dibingkaikan kepada keluarga Islam dalam krisis. Dengan menggunakan kaedah kajian kes, kajian
NAVIGATING MALAYSIAN CIVIL LAW AND MAQASID AL-SHARIAH IN THE
BEST INTERESTS OF MUSLIM CHILDREN BEYOND CONTROL:
A CASE STUDY IN PENANG

ABSTRACT

Beyond control children are a unique phenomenon under Malaysian law, they have not committed a crime, rather they have trespassed on the normative expectations of propriety between parent and child in Malaysian culture. The state has declared its interest in this relational breakdown and its response remains rooted in Latin Christian judicial principles and practices that sailed out with British colonial law, early in the 19th century CE. Maqasid al-Shariah and Islamic justice philosophies share many similarities with Judeo-Christian traditions, however there are some fundamental differences when it comes to addressing conflicting families. Islamic legal and civil traditions promote reconciliation and mediation to restore harmony in families and communities, rather than elevating a social wrong against an individual which results in retributive punishment and expectations of atonement against the wrong doer. Malaysia’s treatment of beyond control children is incongruent with international standards or expectations, when a child can be held in custody or remain under state surveillance for up to three years for disobeying their parents. The research objectives were to explore what was being done to prevent children’s entry into the existing social welfare system or to extract them from it, considering Malaysia’s commitments to the United Nations’ expectations of preventing unnecessary institutionalisation. Furthermore, to establish whether there was potential in considering Islamic justice and reconciliation philosophies in the secularly framed responses to Muslim families in crises. Utilising a case study methodology, twenty-eight respondents, which
included eight beyond control children reveal a process that is destined to punish and add distance in the fractured parent and child relationship, rather than repair it. The research highlights systemic failures in expectations of fairness, system compliance and judicial protection for children and their families. System duty bearers adopted a moral authority to deliver retributive pain and punishment to children and families who had failed to meet Malaysian social expectations. Maqasid al-Shariah and Islamic justice practices, such as the ancient *sulh* (amicable settlement) process are examples that meet the aspirations of modern international justice system responses to children in conflict with the law. Malaysia is perfectly situated to take the lessons learnt in the Malaysian Syariah Courts following their inclusion of the *sulh* practice early in the 21st century. Reimagining the state’s response is needed to one that promotes modern expectations of early intervention and diversion from formal justice systems into customary reconciliatory traditions, thereby preventing unnecessary surveillance and institutionalisation of children.
CHAPTER 1 – INTRODUCTION

1.1 Philosophies of Truth and Meaning in Human and Social Development

How humankind has developed and advanced is one of the big philosophical questions that remains without a definitive answer because of the premise towards a universal understanding and acceptance of truth and meaning, particularly around the philosophies of theology and the metaphysical in rational thought. These cognitive states of being are value and morally laden concepts that have, and continue to provide fertile ground for oppression, benefit and conflict. They provide an intellectual governance framework to individuals and institutions which transforms rationality and logic into seemingly obvious conclusions that manifest in empires, nations, cultures, systems and individual’s decision-making. Truth and meaning remain contested and will always be, because of their very nature to be historically and epistemologically rooted (Evans & Evans, 2008 & Ragab, 2014).

Fundamental to the understanding of human and social development is to acknowledge the analytical importance of the continual reflection and critique of human existence. Aristotelian logic and deductive reasoning in philosophies of thought remain as relevant today, as they were to the ancient Greeks (Russell, 1935 & Smith, 2016). What this foundational critiquing process brought to humankind is the framework to inquire on perceptions of truth, meaning and rationality. Inevitably, this leads to reflecting upon and a continual shift in human’s beliefs, interpretations and ways of being. The fluidity of the space to critique and reflect remains a significant, often bloody, contested concept, particularly when it comes to the various spiritual or mythological beliefs and governance systems of humans and their
societies. For example, for over 1000 years, the critical reflection of why humans need to believe in, or pay homage to spiritual or mythological beings, or the purpose of it, largely during the ‘ancient societies’ and the ‘Age of Reason’, was replaced with a dominance of religious servitude and acquiescence during the Renaissance (Gottlieb, 2016). Bertrand Russell (1872–1970 CE), the British analytic philosopher, mathematician and historian, believed it is through the continual oscillation between rational and irrational thought and behaviour; “Rationalism and anti-rationalism have existed side by side since the beginning of Greek civilisation, and each, when it has seemed likely to become completely dominant, has always led, by reaction, to a new outburst of the opposite.” (Russell, 1935, pg. 68).

Along with the centrality of Aristotelian logic and rational thought was the rise of scientific reasoning which challenged human and social structures in the faith of believing in a higher or omnipresent power. Within Judeo-Christian philosophical traditions, the French scientist, mathematician and philosopher, Rene Descartes’ (1596–1650 CE) ‘dualism’ is regarded as seminal because it brought together theology and the science of physics to describe human existence. Primary in Descartes’ theories of a ‘mind and body split’ was the innateness of the mind’s knowledge, in other words, humans are born with a soul and a reverence to God, and the body is purely a physical organism that supports the mind (Gottlieb, 2016). Descartes based and articulated his dualism theory on scientific reason, largely in his belief that the soul, which innately shapes the mind and emotions, is a product of the pineal gland, a small organ in the middle of the brain (Lokhorst, 2016). The use of science to propose an understanding of human belief systems was significant; it naturally leads to debates on ‘nature versus nurture’ in human and social
development. It also provides fertile space for critical reflection, adaptation and the rise of the rational and irrational in its application or dismissal.

In contrast to Descartes’ belief in the innateness of the human psyche was the theory put forward by Scottish born philosopher, David Hume (1711–1776 CE). Hume argued for ‘naturalism’ in human understanding; humans are part of the continuum of nature and there is no radical difference between us except for our lived experiences (Gottlieb, 2016). Hume focused on causal relationships and how these shape humans’ thoughts, actions and systems. Within this framework of critical reflection, the assumptions of religious doctrine, scientific inductive reasoning and rationalist’s ‘proofs’ were challenged and brought into question under Hume’s central tenet that passion and perceived experiences, rather than reason, governs human behaviour and morality (Gottlieb, 2016; Morris & Brown, 2017). Hume’s trust in human’s lived experiences to define their moral truths, rather than institutions and doctrine, cannot be understated and remains prevalent to this day, with his philosophy being popular among both atheists and scientists (Gottlieb, 2016). His moral philosophy is attributed to having influenced Adam Smith (1723–1790 CE), a foundational philosopher on the political economy model, Charles Darwin’s (1809–1882 CE) theories on evolution, and Immanuel Kant (1724–1804 CE) who extended and sharpened Hume’s theories with the assertion that reason is the source of morality (Morris & Brown, 2017; Nassar, 2016).

A key component of any philosopher’s reflections and their potential to have impact and provide meaning is the intellectual space they can occupy and the interests of those who control the space. A historical view of human and social
development reveals the significance of religious doctrinal commitment, trade, education, military supremacy, scientific advancement and social cohesion to advance empires or repel invaders (Ragab, 2014; Evans & Evans, 2008; Abdalla, 2016; Rahman, Street & Tahiri, 2008). It also reveals a darker side of human existence, such as slavery, racism, colonialism, oppression, subjugation of spiritual belief systems and a dominance of intellectual reasoning, often to justify overriding perceptions of truth and meaning.

A contemporary example of dominance in intellectual reasoning and narratives that shape worldviews and subsequent engagements is the treatment of Islamic philosophy’s and societies’ contribution to human and social development. The Western narrative that Islamic science only contributed to scientific meaning between periods of classical Greek thought and the Renaissance in western Europe remains a prevalent discourse. Furthermore, it was a religious version of scientific knowledge, and a specific cultural product, rather than a universal project (Evans & Evans, 2008, p.95). From this revisionist narrative of history, the premise is that post-Renaissance European thinking kept advancing and is value neutral, while the Muslim world remained stagnant and a non-contributor to knowledge, somehow acting as a critical observer on the sidelines, stuck in the past. Understandably, this narrative is contested and has been subject to realignment from scholars in both Islamic and non-Islamic circles (Ragab, 2014; Evans & Evans, 2008; Rahman, et. al., 2008; Abdalla, 2016; Al Sharrah, 2003; Sabra, 1996). Edward Said’s *Orientalism* (1978) reflects on the Western discourse towards the East, arguing how Western historical and constructed narratives primarily create and maintain an Eastern ‘other’ who are not seen as equals but more as curiosities and objects of usefulness to
maintain power in all its forms. Power is the objective, not a meaningful engagement based on egalitarianism. However, history has also shown that empires and systems of thought and governance have risen and fallen because truth and meaning, rational and the irrational, are in a continual state of evolution and contestation.

Science and religion remain joined in the same purpose of knowledge-building for the betterment of humankind. What Evans and Evans (2008) call a “warfare narrative” is the conflict between religious and scientific scholars over competing truths on worldviews and human existence (pg.88). They believe it is unhelpful to talk in competing narratives because each discipline can cohabit and contribute understanding and meaning (Evans & Evans, 2008). Primarily, truth conflicts over creationism and the end of life remain, but these are accommodated and not exclusionary to a mutual respect of each other’s role in human and social development because no one has been able to provide absolute proof either way (Evans & Evans, 2008). These conceptions remain in the contested space of logical reasoning and/or theological revelations to provide meaning and truths in worldviews and governance of societies.

1.2 Belief, Faith and Consciousness in Human and Social Development

The power of faith and belief in the human psyche, and the social structures and systems of governance that spring from them, is critical in the advancement of humankind. Any inquiry into systems of belief and how they manifest soon starts to reveal terms such as hope, values, culture, morality, social order, normative, identities, nations and communities. While these are largely positive, there is also the language of exclusion and ‘othering’ with problematic terms such as savages, uncivilised man, lower religions, assimilation and uneducated (De Vattel, 1844; Coe,
Critical examination of the links between individual and a collective consciousness and morality leads into deconstructing what role religion or belief systems play and how their meaning is defined in human existence and societal expectations of inclusion or exclusion. Critical reflection is fundamental to human development, but what could be considered useful is the philosophical framework of inquiry adopted, thereby influencing perceptions, promoting self-reflection and resulting in the most appropriate engagement and decision-making. A sociological perspective is rooted in phenomenological assumptions of competing truths in social order doctrines of belief (Csordas, 2004; Evans & Evans, 2008; Sherkat & Ellison, 1999; Coe, 1904; Ellwood 1913 & 1918; Mitchell, 2007). These conflicting truth narratives can quickly transfer into a discourse of superiority for one belief system over another and inflated convictions, or a rise of the irrational over the rational. An anthropological view could provide more clarity, or meaning, because it is founded in cultural relativism, which is localised and custom centric, rather than universal, essential and enduring (Evans & Evans, 2008, pg.96). An anthropologist’s view is to understand how belief systems create meaning and are transported across cultural boundaries and geographies, rather than determining their validity to exist.

Modern and post-modern social theorists have given considerable thought to the reason for religion, and its role and function in society, resulting in various theoretical positions. Functionalists, such as Emile Durkheim (1858–1917 CE), the French philosopher and sociologist, and Talcott Parsons (1902–1979 CE), the American sociologist, were generally positive, seeing religion as providing social
cohesion, bringing order and stability, along with a collective conscience, but failed to acknowledge how it can divide society through exclusion and conflict (Van Krieken, et. al, 2006). Karl Marx (1818–1883 CE), the German Philosopher, saw religion as a tool of oppression that reinforces class distinctions and exploitation of the proletariat (Van Krieken, et. al, 2006). Critical realists, who challenge empiricist and idealist philosophies, argue that our understanding of ‘what is real’ needs to accommodate things apart from our own experiences and knowledge bases (Bhaskar, 2008 & De Souza, 2014). Although a broad feminist critique is that religion is inherently patriarchal, this has been created by the men of religion, not the religion (Van Krieken, et. al, 2006). Human rights theories, shaped by the principles of positivist universalism, secularism and a rule of law see religion as a factor in realising the individual’s inalienable human rights (Reynaert, Bouverne-De Bie & Vandervelde, 2009; Kaime, 2010; An-Na’im, 2000).

While these positional snap-shots are useful to define, and delineate differences of theoretical opinion, they stop short at understanding the faith of believing in a greater purpose or a consciousness of the spiritual self. Consciousness is fundamental to human existence and has been defined as a qualitatively subjective experience that is socially constructed, fluid and individually developed on our personal interpretation of the world, which manifests primarily in our morality (Searle, 2007 & Dennett, 2011). In terms of faith, a consciousness of faith is a separate state of being from the rituals and mythology of theological scripts or the application of social patterns; it relates to an individual’s inner conviction and commitment towards their spiritual constructions of truth and meaning (Ellwood, 1913 & 1918). Consciousness guides interpretation and constructs meaning and belief, within
whatever system of thought and governance an individual exists and remains a continual work in progress because human existence is constantly evolving and being reinterpreted.

The development of belief and consciousness are fundamental to understanding human and social development, particularly when viewed through the various faith paradigms that provide some means of understanding how humankind has advanced, constructed meaning, established values and imposed boundaries of social inclusion or exclusion. What Ellwood (1918) calls “the commonly accepted seven stages of religious evolution” (p.342) provide definable systems of belief that are linked with human development, namely: pre-animism (spiritual energy in objects); animism (supernatural power that animates the universe); totemism (spiritual connection and identity of individuals or kin groups through animal or plant totems); ancestor worship (deceased family members can influence the present and future); polytheism (worship of multiple gods and deities); henotheism (patron god for family, tribe or group); and monotheism (belief there is only one God). They also provide clarity on what is considered ‘sacred’ and ‘divine’ to create social order and meaning where they are adopted (MacLennan, 1922). When Charles A. Ellwood (1873–1946 CE), the American sociologist, uses the phrase “religious evolution” (1918, p. 342), it can subtly lead the reader towards a perception that the natural conclusion, at the seventh stage, is monotheistic belief and this is the correct order of how humankind has developed from primitive beings into an enlightened state of consciousness of a single God. However, this position is problematic when considering the significant contributions to human development from the believers of Taoism, Hinduism,
Buddhism and those whose spirits live in totems, such as Australian indigenous First Nations communities.

MacLennan (1922), in his work *Religion and Anthropology*, brings a perspective of how various religions, such as Hinduism, Christianity, Judaism and Buddhism have used belief systems (animism, polytheism, monotheism, etc.) to reinforce the centrality of what is ‘sacred’ and ‘divine’ in their construction of meaning, and how this is more of a human tendency towards interpretations and application to create and maintain social order. In support of this argument, MacLennan links societal evolution from kinship groups into nations, where the focus of the group went from family and tribal allegiances to patriotism, “through this the individual emerges as a ‘subject’ of rights and duties in himself” (p.606), plus has obligations to the state (p.606). Loyalty to the sovereign or state and the various methods of authoritative control that manifest through institutions, law and custom is expected. In this process, religion, or systems of belief, transform and are characterized by the national identity of sovereigns and states, rather than individuals’ relationship with their religion (p.606). This interpretation of religion’s role in human and social development goes beyond a consciousness of thought towards a higher power. It develops into a system of rules and shared cultural moralities that are implicitly or explicitly defined and obligated by the collective, thereby regulating inclusion or exclusion. This resonates with the arguments around the manipulation and use of theology and mythology to meet social or political objectives, rather than the interests of the individual’s consciousness in faith (Auda, 2007 & 2008).
1.2.1 The Social Contract

Also underpinning MacLennan’s reflections are the principles of social contract theory; the move from a state of nature, meaning without government, into civil society, which is based on a reciprocity of interest, obligations and liberty between citizens and the model of governance adopted and accepted by the collective (Gottlieb, 2016; Lloyd & Sreedhar, 2014). Thomas Hobbes (1588–1679 CE), the British moral and political philosopher, is famous for his pioneering work on social contract theory, with the often-quoted adage, that life in the natural world, meaning without sovereignty and government, would be “nasty, brutish and short” (Gottlieb, 2016). Hobbes believed that when man comes out of the natural world and into a collective, there needs to be a common understanding and agreement of what is good and virtuous, and this is represented in the authority of the sovereign power; for Hobbes, this meant monarchy and their absolute legal authority (Lloyd & Sreedhar, 2014). In his 1651CE seminal publication, *Leviathan: the matter, forme and power of a common-wealth ecclesiasticall and civill*, Hobbes wrote about the “lawes [sic] of nature” which were established on a rational understanding of what is best and good for the world. Hobbes believed that man in nature is at war with himself and, once brought into civil society, which is based on fairness, protection and progress, man naturally advances for the betterment of himself and society (Lloyd & Sreedhar, 2014). Critiques of Hobbes’ natural law and his social contract theories have highlighted the problematic assumptions of a universal expectation from society, particularly from a class perspective, and the benevolence of a sovereign monarch, that contrast with history or lived experiences (Russell, 1961, pg. 540-41).

Unsurprisingly, monarchs appreciated this theory, but Hobbes also faced considerable resistance from religious authorities of the era, who challenged his faith
in God’s order, even labelling him an atheist (Russell, 1961, pg. 532-33). Although Hobbes’ theory was of its time, the fundamentals of social contract theory, in terms of a reciprocity of interest, social justice and civil obligation to be part of a community or nation remains, either consciously or sub-consciously, in the human psyche. Often contested within the scope of contemporary Western liberal democratic narratives and interpretations is Hobbes’ overarching principle of the rights and obligations between citizens and those who are chosen to govern to be equal partners in the social good and to be virtuous to realise a harmonious society. It also gives some insights into the philosophies of truth and meaning that were circulating in ‘civilised Europe’ and their expectations as European colonisation extended and firmed its grip on ‘new worlds’ into the 18th century CE.

1.2.2 Maqasid al-Shariah

With a considerable resurgence of interest in the late 20th century, maqasid al-Shariah (objective or meaning of Shariah) has been, and continues to be, within the critical intellectual space of Islamic scholars, academics and jurists (Kamali, 2012). Maqasid al-Shariah represents the unequivocal, clearly defined, Islamic social contract for the ummah (Islamic community) across the world, particularly when the five pillars of Islam form its foundation. To establish and agree on what the meaning and objective of Shariah is, and then to transfer this into sovereign law that regulates social values, moral expectations and governance of societies, is a significant challenge that has been considered for centuries. Eminent Islamic scholars between the fifth and eighth Islamic centuries defined al-Shariah’s meaning and purpose, with the final stratified iteration being attributed to Abu Ishaq al-Shatibi (d. 1388 CE) (Auda, 2008; Kamali, 1999, chapter 20, 2008 & 2012; Alwani, 2014).
The intention of the Islamic scholars, including al-Shatibi, was to give an overarching philosophical imagining to what Islamic society would be under al-Shariah, along with a set of tangible objectives for Islamic ulema (sacred law and theology scholars) and jurists to achieve while addressing social issues using the Islamic juristic deductive process of usul al-fiqh (Kamali, 1999 & 2012). In basic terms, the maqasid al-Shariah doctrine answers the essential questions that law addresses, namely, what type of society do we want and what effect does this law have in achieving it? Based on his examination of the Quran and ancient literature, including al-Shatibi’s reflections, Kamali (1999, page 396) believes the overarching philosophy of maqasid al-Shariah is an Islamic society built with justice (qist),
compassion (rahmah) and education of the individual (tahdhib al-fard), primarily to achieve the virtue of God’s consciousness (taqwa).

Abu Ishaq al-Shatibi defined and prioritised Islamic values, drawn from the Quran and Sunnah, that consider maslahah (public interest) through focusing on essentials (daruiyyat), complementary (hajiyyat) and embellishments (tahsiniyyat) (Auda, 2007 & 2008; Kamali, 1999, chapter 13 & 2008). The most important are the ‘essential’ values, namely the preservation of religion, life, intellect, lineage and property, because Shatibi believed these are the fabric that bind the Muslim ummah and without them society becomes unbalanced and dysfunctional (Auda, 2008; Qadir & Sultan, 2013; Kamali, 1999; Ibn Khaldun, 1958). The complementary maqasid (hajiyyat) are not as specific as the essential, but principally relate to granting concessions to reduce hardship (Kamali, 2016b). An example is removing the obligation of fasting for the sick or the traveller during Ramadan. The embellishment maqasid (tahsiniyyat) are limitless in definition and largely focus on behavioural expectations of Muslims (Kamali, 2016b). An example is cleanliness, which brings beauty to the individual and when applied to community settings, comfort and peaceful surroundings. The complementary and embellishment maqasid are supporting expectations drawn from the Quran and Sunnah that, when combined with the essential maqasid, serve as a holistic Islamic way of being, which realises the Lawgiver’s message (Kamali, 2016a & 2016b).

Shatibi encouraged the application of maqasid al-Shariah to interpret and give meaning to the divine commands and prohibitions of the Lawgiver because this critically reflective process will better reveal the intent (Shabiti, cited Kamali, 1999,
p 403). Moreover, the values defined are about a society that is built on inclusion, justice and compassion rather than a rigid and forced compliance to Shariah through fear or coercion (Ibrahim, 2014; Kamali, 1999, chapter 20)

In contemporary Islamic academic publications, maqasid al-Shariah is being seen, and called upon, to bring Islamic jurisprudence into the 21st century CE to address modern dilemmas such as human development, bioethics, domestic violence, child custody and child sexual abuse (Auda, 2007 & 2008; Kamali, 2008; Ali, 2014; Saifuddeen, Rahman, Isa and Baharuddin, 2013; Husni, Nasohah and Kashim, 2015). There are concentrated attempts to not only apply this framework to 21st century concerns but also to further elaborate and introduce modern language to the Shabiti framework (Abdul Rauf, 2015, pg. 27). This is intended to make it more accessible and move it towards being linguistically inclusive of universal basic values, more specific in meaning and for it to be based on the Quran rather than Islamic heritage and medieval period interpretations and determinations which still resonate (Auda, 2008). Contesting some of these views are Islamic scholars who believe the existing maqasid al-Shariah articulation is inherently flexible and has the capacity to accommodate the modern world and any change of language would impact established meanings (Ibrahim, 2014 & Kamali, 2008).

The maintenance of maqasid al-Shariah’s truth and meaning, while advancing the Islamic ummah’s broad interests in fairness, compassion and not causing hardship in the 21st century, underpins the promotion of maqasid al-Shariah in current Islamic philosophy. Language usage and interpretation is only one element of the usul al-fiqh process. Meaning and objectives require equal consideration because
without a full comprehension of maqasid al-Shariah, a well-considered, inclusive decision is not possible and individual interest and opinion can take precedent, leading to literal interpretations and problems in social harmony, potentially bringing hardship (Kamali, 1999, chapter 20, 2008 & 2012; Auda 2007 & 2008). The process of constructing and interpreting Shariah law and the subsequent application of rulings, is one of the primary concerns for modern Islamic scholars who believe there is need for discussion and consideration of how maqasid al-Shariah can provide an exclusively Islamic answer to modern concerns that represents what was intended by the Lawgiver (Auda, 2008; Kamali 1999, 2008 & 2012, Saifuddeen, Rahman & Baharuddin, 2013; Ibrahim, 2014).

1.3 Childhood in Islamic Jurisprudence

Islamic law and teachings have a clear path set for children and childhood which is defined by stages and obligations towards being both connected and guided by Allah through the teachings of the Quran, and obligations to their parents and the Muslim ummah (Al-Krenawi & Graham, 2000; Olowu, 2008; Rajabi-Ardestiri, 2009). Parents also have obligations to their children and will be questioned on Judgement Day regarding their treatment; they are rewarded, if they raise a pious and caring child (Stacey, 2010 & Olowu, 2008). Throughout the Quran, there are references to the importance of children and their treatment from the womb to maturity. Shariah law places importance not only on physical wellbeing but also on the importance of family and community relations, education, seeking knowledge and spiritual guidance (Olowu, 2008; Habashi, 2015).
The Quran and the teachings of the Prophet Mohammad preceded the 20th century’s CE United Nations Convention of the Rights of the Child (UNCRC) by centuries (Van Bueren, cited in Hashemi, 2007). Children’s importance and vulnerabilities were acknowledged and addressed well before the UNCRC, through guidance from the Quran and Sunnah. The treatment and development of children remains a central hub of the Islamic way of life, with a concentration and clear articulation of how children should be treated and their role and obligations within Muslim society (Hashemi, 2007 & Olowu, 2008). Under guidance of the Quran, Muslim children are exposed to and taught their religious duties from an early age, with equal reinforcement of their obligations to community duties (fard kifayah), broadly defined as consistently ‘doing good’ and avoiding ‘evil’ personally or in/with others (Olowu, 2008). A comprehensive review of Quranic teachings and Shariah law and their guidance on contemporary discourses towards child’s rights and childhood was carried out by UNICEF and Al-Azhar University in Cairo, Egypt (2005 and 2016). From this work, importance is placed on the interconnectedness of Islamic rules, law and guidance that form a ‘childhood jurisprudence’ which is squarely aimed at bringing children into adulthood with a clear understanding of Allah, the Quran and their role and responsibilities to these, plus to themselves, their parents, their extended family, their community and Islamic society in general. Moreover, through the principle of reciprocity, parents, kinship groups and communities have responsibilities to raising and guiding children (UNICEF & Al-Azhar University, 2005; Olowu, 2008, Rajabi-Ardeshiri, 2009).

Obligations and rights under Shariah law are clearly defined for children and the broader Muslim ummah. They are based on both the ability to receive rights and
to bear moral and legal responsibilities to them (Olowu, 2008; Abolaji, et. al., 2014), through the concept of ‘dhimma’, defined under Islamic law as “a quality by which a person becomes fit for what he (or she) is entitled as well as what he (or she) is subject to” (Abdallah, 1978, cited in Olowu, 2008). Obligations and rights are morally trusted to humans based on their capacity to equally comprehend their entitlements, along with their obligations to them (Olowu, 2008). Explicitly for children, al-Shariah gives further guidance on these issues through legally defining four stages of childhood capacity development to obtain rights and obligations (ahliyyat wujud) (Olowu, 2008; Abolaji, et. al., 2014).

During the first stage, from conception to birth, the foetus has ‘incomplete receptive capacity’ (ahliyyat wujud nakisa) and no obligations but has rights to inheritance and what is determined under Shariah law for the offspring of the parents (Olowu, 2008; Abolaji, et al., 2014). The second stage is from birth until the ‘age of understanding’ (tamyiz), approximately seven years of age, where the child obtains the reasoning capacity to know right from wrong and ‘complete receptive capacity’ (ahiyyat al-wujud kamila) and “receives or claims all obligations due to him, such as inheritance, maintenance, etc.” (Olowu, 2008 & Abolaji, et. al., 2014).

The third stage is from the age of understanding until maturity (baligh) where the child has ‘incomplete active legal capacity’ (ahliyyat ada nakisa) and is increasingly given and takes more responsibilities which have legal ramifications, with the presence of a guardian or adult to support and to ratify the actions is necessary (Abolaji, et. al., 2014). The fourth stage is from maturity until death, where the child becomes an adult and acquires ‘complete active capacity’ (ahliyyat
ada kamila), complete rights and obligations under Shariah law (Hashemi, 2007; Olowu, 2008; Abolaji, et. al., 2014). This juristic and moral framework has significance in the construction of who is a child, childhood and when a person gains maturity to act on their own behalf and to be held fully accountable to their actions within communities.

1.4 Childhood and the United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (UNCRC) is one of the leading global obligations for nation states and has been signed or ratified, either partially or fully, by all 197 United Nations member states (United Nations Human Rights Commission, 2016). Importantly, this includes nations with Muslim majority or minority populations. While there has been widespread acceptance of the principle acknowledging children need special consideration, there have been many reservations from these and other nations around particular sections of the UNCRC, including those relating to children’s rights towards religion, the age of adulthood (18 years) and how they participate (Hashemi, 2007; United Nations Treaty Collection, 2016).

Malaysia ratified the UNCRC in 1995 initially with 12 reservations, now reduced to five (Nini Dusuki, 2015a, chapter 3). There are remaining friction points on how Malaysian cultural and social norms challenge the UNCRC’s perceptions on children’s punishments, education, freedom of religion, age of reaching adulthood, birth registration and discrimination (Malaysia, Ministry of Women, Family and Community Development, 2010; Child Rights International Network, 2010; Child Rights Coalition Malaysia, 2012; Nini Dusuki, 2015a). These points and Malaysia’s
compliance with UNCRC expectations are monitored by the United Nations Committee on the Rights of the Child, whose remit is to keep account of the status and progress of the Malaysian Government towards meeting its obligations under the UNCRC agreement through official reports and governmental appearances before the committee in Geneva, Switzerland.

There have been reservations and criticisms of the sociologically rooted UNCRC regarding the universalist western-centric construction of childhood it articulates and promotes, and how it fails to fully interpret and accommodate the social, cultural and historical constructions of children and childhood in non-Western states and indigenous communities (Morrow, 2011; Fleer, et. al., 2008, Reynaert, et al., 2009; Olowu, 2008; Rajabi-Ardeshiri, 2009; Nieuwenhuys, 1998). A clear example of these reservations comes from the Organisation for Islamic Cooperation’s (OIC) Covenant on the Rights of the Child in Islam (CRCI) (2005a). The CRCI was drafted by OIC members and has been signed by the 57-member states, including Malaysia (Organisation for Islamic Cooperation, 2016). It is designed as a clear declaration of Islamic values towards what constitutes an Islamic childhood and the role and function of Muslim children, parents, the ummah and Islamic nations. The CRCI acknowledges the UNCRC and they share similar, overarching themes to enable a healthy child and childhood. However, there are fundamental differences regarding a child’s freedom of religion, adoption, the parent and child relationship, the role of the state and 18 years of age being the marker of adulthood. The CRCI firmly centres Islamic jurisprudence as the best interest of Muslim children, rather than a universal interpretation and construction of a child’s rights (Organisation of Islamic Cooperation, 2005a).
An extensive discourse analysis of international UNCRC literature was undertaken on the 20th anniversary of the 1989 UNCRC (Reynaert, et al., 2009). Three primary themes pervade and present in academic literature over the period, namely: “autonomy and participation” are the new norm for children in practice and policy; “children’s rights versus parental rights”, meaning the incursion of judicial and social expectation on parents towards their children; and finally, the “global children’s rights industry” and their technically positivist presentation of child rights in policy and practice that can be inconsiderate of alternative points of view and other possibilities (Reynaert, et al., 2009, page 518). Reynaert and colleagues (2009, page 529) propose that the child’s rights discourse, reflected in documents such as the UNCRC, is part of a wider construction of children and childhood that commenced in the 19th century CE, where a process of ‘educationalization’ has taken place. Children’s lives and development have been institutionalised and decontextualized and brought into a global normative space of rights and production that is primarily focused on an expectation of what they will, or should, become, rather than on what is really happening for them in the present (Reynaert, et al., 2009 & Morrow, 2011).

An accompanying factor of the UNCRC discourse, as highlighted by Reynaert and colleagues (2009) has been the rise of child-focused organisations both within the United Nations system and non-government sectors, acting both globally and locally. These organisations bring a uniformity of principle and often the same in actions and expectations, sometimes leading to misinterpretations of intentions and, at worst, conflict in host communities (O’Leary & Squire, 2012; Squire & Hope,
Concurrent with the evolution of human and child rights discourses has been a rise in academic and social policy interest in children. Until the middle of the 20th century CE, children had primarily been regarded as pending adults under tutelage who would be heard and acknowledged upon reaching adulthood, either in their early 20s or upon becoming economically active and visible through entering the workforce (Reynaert, et al., 2009 & Morrow, 2011). What this means for the state is pressure at the global, national and local levels by organisations and individuals with human rights expectations and voices that are easily heard and buoyed with modern communications methods.

The location of Allah, the Quran and the principles of Islamic child development is a friction point within the child rights discourse under the UNCRC, which advocates for children to be seen beyond these types of frameworks and more as participatory individual agents of their own destiny (Morrow, 2011; Fleer, Hedegaard & Tudge, 2008; Reynaert, et. al., 2009). Children and their protection are matters for state involvement, where individual rights holders keep duty bearers accountable to achieve their inalienable rights. The state, with all its legal enforcement capacities, is brought into the family dynamic, thereby constructing obligations within the parent and child relationships (Morrow, 2011 & Fleer, et. al., 2008). UNCRC advocates see this in a positive light because, largely imagined through Western universalist, secular and legal lenses, it not only better protects children, it also ensures them agency in how their lives are shaped and which direction they take (Reynart, et al., 2009). Thereby, moving children from being receptors of adult knowledge and custom, to being acknowledged as citizens and...
identified as contributing and constructing their own cultural space and understanding (Morrow, 2011 & Fleer, et. al., 2008).

1.5 Children’s Welfare and Protection in Malaysia

The 1957 Malaysian Federal Constitution (Malaysia, 2010) declares Islam as the religion of the Federation, along with freedom to practice other religions (article 3(1), plus the ability of religions to manage their own affairs and establish institutions to do so (article 11(3). These are legislatively controlled at the state level, under Federal authority (Malaysia, 2010). The result for Muslim Malaysians is regulation by two legal systems, namely the ‘civil’ which deals with general law and order issues that are common and applicable to the entire population, and Syariah Courts, whose remit and authority is to the regulation of Muslims’ personal and community matters.

The concurrence of the ‘civil’ and the ‘Syariah’ regulatory systems has been problematic for many years and is criticised as a colonial hangover that minimised Islamic jurisprudence within Malaysia’s governance (Kamali, 2007 & Karmaruddin, 2012). It is the realisation of 19th century CE secular European ideals that separate public interests from private lives, primarily through judicially monitored itemised statues and the displacement of religious institutions from government (Mian, 2016 & Kamali, 2007). This separation of the public and private is incongruent with Islamic jurisprudence and governance, leading to Islamic scholars calling for better efforts to reconcile civil and Syariah law expectations in Malaysia (Kamali, 2007; Kamaruddin, 2012; Tun Abdul Hamid Mohamad, as cited by Abdul Rauf, 2015). Conversely, and specifically for families and children, UNCRC advocates, such as
United Nations International Child Education Fund (UNICEF) and child-focused non-government organisations (NGOs), believe an increased strengthening of the secular Malaysian Child Act (Malaysia, 2001 & 2015) is required to remove anomalies between the concurrent systems and to increase preventative intervention by the state in the family unit to achieve compliance with the UNCRC (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013; Child Rights Coalition Malaysia, 2012; Child Rights International Network, 2010).

1.5.1 Department of Social Welfare (Jabatan Kebajikan Masyarakat)

Vulnerable Malaysian children’s welfare and protection is monitored and regulated by the various states via the Department of Social Welfare (Jabatan Kebajikan Masyarakat Negeri), under central Federal control and direction (Jabatan Kebajikan Masyarakat) (DSWK). The primary legislative mechanism that affords power to the social welfare departments and determines accountable processes to be applied to children, is the Child Act (Malaysia, 2001 & 2015). The development and passing of this act saw three child-focused Malaysian laws consolidated into one (Nini Dusuki, 2015b, chapter 2), and for the resulting Child Act (Malaysia, 2001 & 2015) to be in line with the principles and expectations of the UNCRC (United Nations, 1989; Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013; United Nations Treaty Collection, 2016).

The Child Act (2001 & 2015) applies to all Malaysian children and holds authority over Malaysian Syariah Courts when it comes to ‘civil law’ matters but not Shariah law offences, as determined by the Malaysia Syariah Criminal Offences Acts and the various state Syariah Criminal Offences Enactments. These are dealt with by
the Syariah Courts, under State regulation and Federal Constitutional authority (Malaysia, 2006c; Malaysia, State of Penang, 1996; Rahim and Yusof, 2014). Syariah Courts are only empowered to deal with Muslim ‘family’ and ummah matters, such as marriage, divorce, child custody, allegations of sexual relations or proximity outside marriage, public morality and zakat compliance. The courts are linked to Islamic affairs departments, such as the Malaysian Islamic Development Department (Jabatan Kemajuan Islam Malaysia) (JAKIM) that hold responsibilities to regulate authoritative committees, religious enforcement officers and Mosques. JAKIM’s Religious Enforcement Officers investigate complaints against Syariah Law, which is regulated by the Syariah Court system. JAKIM’s organisational structure mirrors the Department of Social Welfare, through having a central body located in Kuala Lumpur and representation at the individual state level.

Child protection is a dedicated discipline of a child welfare system and focuses on the protection of children from all forms of violence, abuse and exploitation. Current formal responses bring the state into the family unit with clear identification of a victim, legal powers and consequences for the child and their parent or guardian. The Malaysian Child Act (Malaysia, 2001 & 2015) empowers ‘protectors’ and the court for children to act in the best interest of a child’s safety and development. This includes, at the extreme end of the spectrum, removing children from parental or guardian control and for the child to be placed in state care (Malaysia, 2001 & 2015). Once in state care, and if there is no hope of returning the child to their parent or guardian, the state has an obligation to the child to find solutions that best develop the child into a responsible adult. Options include placing children in foster families, adoption, government run hostels, schools and centres that focus on their

Figure 1.2: Children in Probation Hostels (Asrama Akhlak), Malaysia 2003-15.

Concerns have been noted about the capacity of state social welfare departments to best respond to children in need of protection. Of primary concern is how these children are unnecessarily criminalised through their removal from family and community connections and kept in institutions, where concerns are being raised about the quality of their development (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013 & 2013a; Child Rights Coalition Malaysia, 2012). The Department of Social Welfare assesses vulnerable children they identify or are referred to them and they make recommendations to the court for children in the relevant state. The court for children can use protection orders or civil law custodial penalties to place children in state run institutions (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013 & 2013a; Child Rights Coalition Malaysia, 2012; Malaysia, 2001).
Figure 1.3: Children in Approved Schools (Sekolah Tunas Bakti), Malaysia 2003-15

For behavioural and petty criminality, this process is contrary to international standards and expectations under the UNCRC (United Nations, 1989) and has been recognised by the Malaysian government as a problem. They would prefer to see the better use of internationally recognised practices, such as court diversion and community-based restitution and reconciliation responses, which are widely acknowledged as being better for children and society (UNCRC, 1989; Child Rights Coalition Malaysia, 2012; Malaysia, Ministry of Women, Family and Community Development, 2010).

1.6 Beyond Control Children

Beyond control children are a dedicated group of children that are legally determined and regulated by the Child Act (Malaysia, 2001 & 2015). Beyond control children have not been convicted of a crime, rather they are brought under the purview of Malaysia’s legal and child protection systems upon request of their parent(s) or guardian because of their alleged behaviour. The Child Act (Malaysia,
2001 & 2015) does not provide a definition of what behaviour constitutes being beyond control, however, the wording of the Act puts the onus on parents or guardians to make application to the court for children, citing the behaviour of concern. Some of the reasons for children being considered beyond control have included smoking, disobeying parental direction, petty criminal activity, sexual activity and motor cycle racing (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a; Child Rights Coalition Malaysia, 2012).

Following the formal application by the parent(s) or guardian to the court for children through the Department of Social Welfare, a court for children hearing takes place, with the child, in the respective state to assess the application and the need for protection. If suspected to be beyond control, the child is placed on a one-month temporary custody order and incarcerated in a probation home (Asrama Akhlak). During this month, an assessment is carried out by Department of Social Welfare staff of the child, resulting in a report for the court for children. This report is pivotal.
as to whether the child is released unconditionally or placed on a further court order and their liberty deprived through a mixture of custody and surveillance by the Department of Social Welfare for up to a maximum of three years (Malaysia, 2001 & 2015; Department of Social Welfare, 2016; Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a; Child Rights Coalition Malaysia, 2012; Malaysia, 2001). During the court ordered periods, beyond control children are placed in, or under constant threat of return to either probation homes (Asrama Akhlak) or approved schools (Sekolah Tunas Bakti), which also accommodate children serving sentences for criminal acts (Department of Social Welfare Statistics Report, 2009, 2010a, 2011, 2012a, 2013a, 2014 & 2015a).

Concerns have been raised by child rights groups about the ‘criminalisation’ of parental disobedience and petty anti-social behaviour and how children are unfairly persecuted for behaviour that is deemed ‘beyond control’ because of their child status, while, if they were adults, the likelihood of detention or detection for similar behaviour would be minimal, or non-existent (Child Rights International Network, 2016).
Table 1.1 List of Probation Homes (Asrama) and Approved Schools (Sekolah Tunas Bakti) in Malaysia, by State, 2015.
(Malaysia, Department of Social Welfare Statistics Report: 2015a)

<table>
<thead>
<tr>
<th>Institution</th>
<th>State</th>
<th>Institution</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asrama Pokok Sena</td>
<td>Kedah</td>
<td>STB Jerantut</td>
<td>Pahang</td>
</tr>
<tr>
<td>Asrama Silibin</td>
<td>Perak</td>
<td>STB Kota Kinabalu</td>
<td>Sabah</td>
</tr>
<tr>
<td>Asrama Bukit Baru</td>
<td>Malacca</td>
<td>STB Kuching</td>
<td>Sarawak</td>
</tr>
<tr>
<td>Asrama Rusila</td>
<td>Terengganu</td>
<td>STB Teluk Air Tawar</td>
<td>Penang</td>
</tr>
<tr>
<td>Asrama Sentosa</td>
<td>Selangor</td>
<td>STB Sungai Besi</td>
<td>Selangor</td>
</tr>
<tr>
<td>Asrama Paya Terubong</td>
<td>Penang</td>
<td>STB Taiping</td>
<td>Perak</td>
</tr>
<tr>
<td>Asrama Kempas</td>
<td>Johor</td>
<td>STB Sungai Lereh (females)</td>
<td>Malacca</td>
</tr>
<tr>
<td>Asrama Bahagia (females)</td>
<td>Selangor</td>
<td>STB Miri (females)</td>
<td>Sarawak</td>
</tr>
<tr>
<td>Asrama Jitra (females)</td>
<td>Kedah</td>
<td>STB Marang (females)</td>
<td>Terengganu</td>
</tr>
<tr>
<td>Asrama Akhlak Kuching</td>
<td>Sarawak</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 1.2: Children in Probation Hostels (Asrama Akhlak) by Gender and Ethnicity, Malaysia, 2011-15.

<table>
<thead>
<tr>
<th>Year</th>
<th>Gender</th>
<th>Malay</th>
<th>Chinese</th>
<th>Indian</th>
<th>Indigenous &amp; Others</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Male</td>
<td>Female</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>185</td>
<td>92</td>
<td>257</td>
<td>9</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>2012</td>
<td>126</td>
<td>80</td>
<td>193</td>
<td>3</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>2013</td>
<td>119</td>
<td>64</td>
<td>165</td>
<td>6</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>2014</td>
<td>117</td>
<td>60</td>
<td>156</td>
<td>10</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>2015</td>
<td>123</td>
<td>34</td>
<td>137</td>
<td>6</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>670</td>
<td>330</td>
<td>908</td>
<td>34</td>
<td>41</td>
<td>17</td>
</tr>
</tbody>
</table>

Conditions inside the hostels and schools have been reported as being problematic towards addressing the reasons for beyond control children’s detention and their needs for development and transition into adulthood (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a; Child Rights Coalition Malaysia, 2012). The hostels and schools adopt a strict program of education, religious studies and physical activity. Restoring the children’s morality is
an important focus of the Department of Social Welfare, headquartered in Kuala Lumpur (DSWKL) and is primarily achieved through discipline, religious studies and counselling (Department of Social Welfare, 2016; Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a; Child Rights Coalition Malaysia, 2012).

Table 1.3: Children in Approved Schools (Sekolah Tunas Bakti) by Gender and Ethnicity, Malaysia, 2011-15.


<table>
<thead>
<tr>
<th>Year</th>
<th>Gender</th>
<th>Ethnicity</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Male</td>
<td>Female</td>
<td>Malay</td>
</tr>
<tr>
<td>2011</td>
<td>729</td>
<td>359</td>
<td>833</td>
</tr>
<tr>
<td>2012</td>
<td>929</td>
<td>289</td>
<td>948</td>
</tr>
<tr>
<td>2013</td>
<td>806</td>
<td>304</td>
<td>864</td>
</tr>
<tr>
<td>2014</td>
<td>788</td>
<td>314</td>
<td>875</td>
</tr>
<tr>
<td>2015</td>
<td>706</td>
<td>365</td>
<td>868</td>
</tr>
<tr>
<td>Total</td>
<td>3958</td>
<td>1631</td>
<td>4388</td>
</tr>
</tbody>
</table>

Children in the hostels and schools have provided mixed reviews, with some saying the conditions are better than home, while others have stated they believe they are being unfairly punished and efforts should be put into determining why they conflicted with their parents, and work together to resolve it (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a). A failure to comply with the program or running away from the hostel or school results in increased levels of discipline and restrictions on children’s freedom of movement. The most recalcitrant are transferred into Henry Gurney Schools, run by the Malaysian Prisons Department, which are juvenile prisons by any other name (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a).
1.6.1 Beyond Control Children in Penang

The experiences of beyond control children in Penang replicates their treatment across Malaysia (Respondent 7; Dr. Nini Dusuki, personal communication, June 14, 2017; S. Sekaran, personal communication, June 14, 2017). Parents or guardians bring them to the attention of the Department of Social Welfare (Children and Community Service Order Division) (DSWP) and the court for children in the five districts of Penang, namely Timur Laut (Georgetown), Barat Daya, Seberang Perai Utara, Seberang Perai Selatan, Seberang Perai Tengah. Once in contact with these Malaysian government departments, an established process of assessment and court orders commences, which is based on legal and policy standards set by DSWKL and the Malaysian Justice Ministry (Malaysia, 2001 & 2015)

Table 1.4: Beyond Control Children in Penang, 2012-16
(Supplied by the Department of Social Welfare, Children and Community Service Order Division, Penang, 12/5/17)

<table>
<thead>
<tr>
<th>Year</th>
<th>Gender</th>
<th>Ethnicity</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>2012</td>
<td>22</td>
<td>16</td>
</tr>
<tr>
<td>2013</td>
<td>7</td>
<td>29</td>
</tr>
<tr>
<td>2014</td>
<td>20</td>
<td>35</td>
</tr>
<tr>
<td>2015</td>
<td>10</td>
<td>20</td>
</tr>
<tr>
<td>2016</td>
<td>18</td>
<td>22</td>
</tr>
<tr>
<td>Total</td>
<td>77</td>
<td>122</td>
</tr>
</tbody>
</table>

Custodial locations for beyond control children in Penang are the Asrama Paya Terubong (probation hostel) and the Sekolah Tunas Bakti, Teluk Air Tawar (approved school). Both institutions are managed and overseen by the DSWP and only accommodate male children. Female beyond control children from Penang are
processed by DSWP and courts for children but are subsequently accommodated in female only hostels and approved schools in other states (see Table 1.1).

Tables 1.5 and 1.6 present data on the total number of children in the Penang probation hostel and approved school, including beyond control children, for the nominated period.

Table 1.5: Children in Probation Hostel (Asrama Paya Terubong), 2011-15

<table>
<thead>
<tr>
<th>Year</th>
<th>Gender</th>
<th>Ethnicity</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>2011</td>
<td>26</td>
<td>0</td>
</tr>
<tr>
<td>2012</td>
<td>25</td>
<td>0</td>
</tr>
<tr>
<td>2013</td>
<td>16</td>
<td>0</td>
</tr>
<tr>
<td>2014</td>
<td>13</td>
<td>0</td>
</tr>
<tr>
<td>2015</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>87</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 1.6: Children in Approved School (Sekolah Tunas Bakti, Teluk Air Tawar), 2010-15.

<table>
<thead>
<tr>
<th>Year</th>
<th>Gender</th>
<th>Ethnicity</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>2010</td>
<td>28</td>
<td>0</td>
</tr>
<tr>
<td>2011 (renovations)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2012</td>
<td>43</td>
<td>0</td>
</tr>
<tr>
<td>2013</td>
<td>190</td>
<td>0</td>
</tr>
<tr>
<td>2014</td>
<td>148</td>
<td>0</td>
</tr>
<tr>
<td>2015</td>
<td>154</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>563</td>
<td>0</td>
</tr>
</tbody>
</table>
1.6.2 Pivot Points

State care is not the best place for children to be. The importance of the family unit in child development is recognised by the Department of Social Welfare (Department of Social Welfare, 2016). Along the journey into state care there are crucial pivot points that can change whether the child enters the custodial system and how long they stay there. These include the initial social assessment carried out by the Department of Social Welfare staff upon request of the court for children; the review carried out by the ‘Board of Visitors’ who are responsible for assessing the child in state care on a regular basis and determining their probability of release; and the on-going monitoring of beyond control children by DSWP probation officers on court orders post-release from probation hostels or approved schools. These pivot points are where the cooperation and coordination of multifaceted stakeholders should be at their highest level and a best interest determination made for the child. It is at these points where religious teachers, probation officers, case officers and psychological counsellors are being brought into the assessments with the purpose of trying to prevent children being kept in custody and to correct the child’s behaviour (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a; Child Rights Coalition Malaysia, 2012).

Significantly, the inclusion of other stakeholders into the decision making and potential diversion of the child from a probation hostel or approved school through the court for children being given options for placing a child in the care of a ‘fit and proper person’ have come into effect through amendments to the Child Act (Malaysia, 2001 & 2015). The efficacy of this amendment and has not been clearly identified in literature, rather it is mentioned as an option in the established process.
and perhaps something that could be more rigorously deployed within diversion from custody principles under UNCRC expectations (United Nations, 1989; Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a).

1.7 **Best Interest of the Child**

The best interest of the child is an imprecise human judgement principle of child protection and welfare practice that requires constant vigilance and review. Concurrent to the best interest principle is best interest decision-making, which happens daily in courts, government departments, non-government organisations, schools and families. Accountable and inclusive decision making, particularly due to the impact poor decisions by duty bearers can have on a child’s life course and/or their safety, is a serious consideration of Malaysian law makers and Syariah Courts (Malaysia, 2001, 2006a, 2006c, 2006d & 2015).

The best interest of the child is mentioned explicitly in article 3(1) of the UNCRC (United Nations, 1989) and is further clarified by the United Nations Committee on the Rights of the Child (United Nations Committee on the Rights of the Child, 2013). The United Nations believes determining the best interests of a child is a disciplined, reviewed process, conducted by suitably qualified individuals who need to make balanced decisions which consider the child’s point of view and meet the obligations of the UNCRC (United Nations, 1989; United Nations Committee on the Rights of the Child, 2013; UNHCR, 2008). Moreover, adults’ judgements do not take precedence over the child achieving their rights under the UNCRC (United Nations, 1989 & United Nations Committee on the Rights of the Child, 2013). The Malaysia Child Act, 2001 in section 30(5&6) specifically requires
the court for children to act in the best interest of the child and to make it the “paramount” decision following assessments of social and environmental factors (Malaysia, 2001).

The terminology of best interest of the child is not as explicit in Islamic references as it is in United Nations documents and western child protection literature and practice. Regardless, Islamic jurisprudence is clear on what are the best interest of a child and speaks more about children’s wellbeing being achieved through reverence to Allah, education and understanding their obligations to themselves, their parents and their community (Al-Krenawi & Graham, 2000; Olowu, 2008; Rajabi-Ardeshiri, 2009). In short, nurturing a well-rounded, pious, educated, respectful Muslim child. While this is what is hoped for all Muslim children, there are many instances where Malaysian Muslim children are involved in civil and Syariah legal proceedings involving their behaviour, custody, inheritance and/or having been victims of sexual abuse, physical violence and/or neglect by Muslim parents (Kahar and Zin, 2011; Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013). It is within these situations that there is a need for child protection decision making and culturally appropriate mechanisms to be mobilised to meet the best interest of the Muslim child and for the child to achieve what is hoped for them by civil and Islamic jurisprudence.

1.8 Maqasid al-Shariah and Best Interest Decision Making

The overarching expectations of maqasid al-Shariah are to achieve justice (qist), mercy/compassion (rahmah) and education of the individual (tahdhib al-fard), primarily to achieve the virtue of God’s consciousness (taqwa) in individual and
community decision-making (Kamali, 1999, pgs. 395 & 396). Logical, rational and deductive decision-making is fundamental to the achievement of maqasid al-Shariah and is primarily realised, or not, through the application of the *usul al-fiqh* juristic decision-making process when it comes to written law (Auda, 2007). However, achievement of maqasid al-Shariah does not solely rely on legal doctrines. Being the meaning or objective of al-Shariah, it implicitly surrounds written law but equally promotes individual reflection and consciousness toward thoughts, actions and behaviour, to be consistently acting for good, against evil (Dr. Mohamed Azam Mohamed Adil, personal communication, June 13, 2017; Kamali, 2016a & 2016b). One of the essential maqasids is the protection of lineage, meaning children and their best interests to achieve their rights and meet their obligations within Islam. An example of logical deduction involving modern science to achieve the protection of lineage, is the use of DNA testing to provide proof of paternity (Kamali, 2017). In Malaysia, this proof facilitates the Muslim child to be protected and receive the property and entitlement rights afforded to him/her under both civil and Syariah law and to fulfil their obligations to their parents (Respondent 3 & Malaysia, 2016a). Normative logical expectations would be that decisions made, post-proof of paternity, are to achieve the best interest of the child to achieve their rights and meet their obligations. The civil and Syariah laws regulate entitlements, custody and access, however, an individual’s conscious decision-making is a requisite factor and can impact on the best interest of the child, particularly when parents and families are in conflict. This example highlights the often-competing interests and complexity of factors present in best interest decision-making, reflecting how sometimes principles do not meet practice.
Another significant element of the paternity example is where the civil and Syariah laws overlap to act in the best interest of the Muslim child to protect their rights and entitlements. A problematic occurrence has been the language of demarcation and labelling that separates Malaysian civil and Syariah law because it is possible that both streams hold similar principles of law and are equally applicable and acceptable under al-Shariah and Latin-Christian legal traditions (Tun Abdul Hamid Mohammad, as cited in Abdul Rauf, 2015). For example, Islamic juristic notions under maqasid al-Shariah of rationale and effect (hikmak illah) align with the Latin-Christian traditions of reason for law (ratio legis) and reason for the decision (ratio decidendi) (Kamali, 2016a). However, the polarising language of un-Islamic, human rights, secular law, Hudud law and Shariah compliant, politicises and trenches the dialogue. Rather than working on harmonised points of common agreement, more emphasis is placed on what is disagreed (Tun Abdul Hamid Mohammad, as cited in Abdul Rauf, 2015).

In her work on child sexual abuse and whether maqasid al-Shariah and maslahah (public interest) can challenge honour ideologies in communities dominated by traditions, Mariya Ali (2014) identifies polarising dialogue as a hindrance to finding workable intersections that are present in human rights and Shariah law. Ali (2014) does not locate her work in a specific country, rather she exposes the incompatibility of some Muslim community’s responses to child sexual abuse when they are framed as being Islamic, while equally cautioning human rights advocates regarding their positivist positions in responses to the same. The nub of Ali’s (2014) argument is how child sexual abuse is seen and responded to by these two groups, primarily in their competing judicial concepts of an individual victim’s
protection being prioritised over community harmony to repair a social wrong (Al-Ramahi, 2008; Othman, 2007; Fassin, 2016b). Drawing on Islamic doctrine, the principled logical and rational case is made, namely the Quran does not allow sexual relations outside marriage, however, a person forced into sexual acts should not be punished and child sexual abuse impacts on the achievement of maqasid al-Shariah (Ali, 2014, pg. 508 & 509). The practical application of this principled position is not easy when it comes to addressing child sexual abuse within conservative, tradition-based communities, where an individual boy or girl’s victimhood can be superseded by family honour and maintaining community harmony. It is within this latter environment where options such as marriage between the child and perpetrator are taking place and compensation agreed upon in mediation (sulh) proceedings. While this honour ideology is based on misinterpretation of rulings and cloaked in the word tradition, the response to it needs to be culturally sensitive and aligned with community capacities, because of the harm that ill-conceived responses can incite or effect (Ali, 2014; O’Leary & Squire, 2012; Squire & Hope, 2014). Through the harmonisation of human rights aspirations and Islamic principles found within maqasid al-Shariah and the public interest (maslahah), there is a possibility of addressing the concerns of all parties (Ali, 2014, pg. 508). Pragmatic solutions to a complex problem are being encouraged in the practice of best interest of the child decision-making. Decisions based on dialogue, respect for positions, finding and working from points of agreement and acceptance that logical rational principled expectations might not be directly achieved.

For beyond control children in Malaysia, the principle and practice of best interest decision-making is being realised daily and can be just as challenging as the
work highlighted by Ali (2014) in its complexity. The principle position is that the Child Act (Malaysia, 2001 & 2015) allows for alternatives to custody, and institutionalisation is the last resort. However, the practice of best interest decision-making faces the complexity of systemic and social expectations relating to parent-child relationships, family conflict, DSWKL and DSWP capacities, to name a few. Navigating these and finding outcomes that accommodate expectations and a child’s best interests remains a constant challenge.

1.9 Statement of the Problem

Healthy and safe child development is a priority concern for all nations. How this is done and who is involved in determining what are the best interests of the child have historically produced different points of view. Since the inception of the United Nations’ Universal Declaration of Human Rights (United Nations, 1948) and the subsequent United Nations Convention of the Rights of the Child (United Nations, 1989), there has been an all-pervasive push towards a universal construction of children and childhood under a Western-centric, secular, human rights doctrine, that challenges cultural, historical and religious beliefs (Reynaert, et. al., 2009). Push-back against the human rights industry by Muslim states has been coordinated by the Organisation of Islamic Cooperation, who have released numerous Islamic human rights documents that declare Allah and al-Shariah as being central to rights and the development of Islamic society (Organisation of Islamic Cooperation 1987, 1990, 2005, 2005a, 2005b and 2008). The key Organisation of Islamic Cooperation document for children is the Covenant on the Rights of the Child in Islam (Organisation of Islamic Cooperation, 2005a) which articulates a vision of a safe, healthy and protected Islamic childhood. Regardless of this document, the
dominance of the UNCRC (United Nations, 1989) in global public discourse and policy development at the nation state level remains.

The theoretical framework for this piece of research is formulated and guided by the expectations of maqasid al-Shariah being justice (qist), compassion (rahmah) and education of the individual (tahdhib al-fard), primarily to achieve the virtue of God’s consciousness (taqwa) in decision making (Kamali, 1999, pg. 396). There is a growing recognition by the United Nations and national governments that engagement with religious communities is essential to better protect children from harm (UNICEF 2012; Religions for Peace and UNICEF, 2010; Kayaoglu, 2012; UNICEF & Al-Azhar University, 2005 & 2016). Islamic thinking and its processes which support the protection of children have not substantially informed the design of child protection initiatives in Muslim communities. While there is a wealth of Islamic teaching on the care of children (UNICEF and Al-Azhar University, 2005 & 2016), there remain few examples of how these teachings can be integrated into approaches used by government agencies in response to issues such as child physical and sexual abuse, early and unintended pregnancy, child labour, school drop-out or children living with domestic violence (Squire & Hope, 2013 & Hutchinson, O’Leary, Squire & Hope, 2014). There is a need to integrate Islamic thinking and mechanisms into child welfare initiatives to better protect Muslim children, due to the centrality of these expectations in their lives and development.

A Muslim child in need of protection in Malaysia is split between two systems and seen quite differently by each system. The Malaysian civil law decision-making mechanism processes the child as a neutral Malaysian citizen under 18 years of age,
with an itemised individual concern that is addressed by a single statute and resolved with state authority and intervention in the family unit. Al-Shariah’s justice systems see the child as a Muslim, with inherent social and moral rights and obligations, who lives in a family and community with an established holistic system of life, built on ancient values and expectations. Within these synoptic descriptions, it needs to be acknowledged in both justice systems that children do come to harm, are abused and need protection. The cultural and protective efficacy of either process, or the combination of both, to address potential harms in the best interest of the child, is an area of inquiry that is lacking.

The focus of this research is Muslim children determined to be ‘beyond control’ under the authority of the Child Act (Malaysia, 2001 & 2015) which is regulated by the Malaysian Court for Children under civil legal authority. These children are a unique group under law because they have their liberty deprived for up to three years upon request of their parent(s) or guardian for behaviour which is primarily seen as ‘anti-social’ and they can be detained because they are children (Malaysia, 2001 & 2015; Child Rights International Network, 2016). The Malaysian state and relevant departments acknowledge that custody or being on monitoring orders is not in the best interest of these children and remaining with their family or community is a better option (Child Rights Coalition Malaysia, 2012; Malaysia, Ministry of Women, Family and Community Development, 2010).

Beyond control children’s journeys into and out of the custodial probation hostel (Asrama Akhlak) and approved school (Sekolah Tunas Bakti) in Penang are based on human assessments and judgements. Decisions made along this journey are
pivotal because they either place or keep the child in custodial conditions or under monitoring orders for up to three years. A fundamental consideration in the decision-making continuum is the best interest of the child. This principle is consistent with both civil and Islamic juristic principles, they both want children to be safe and to have full and healthy lives (Malaysia, 2001 & 1996; Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013; Organisation for Islamic Cooperation, 2015a). How this is achieved, who is involved, and if consideration of religious and culturally appropriate support mechanisms is included are significant reflections in practice and decision-making. They are also regarded as highly sensitive inclusion points, considering the ongoing tensions and friction points in Malaysia regarding Islam’s inclusion in the constitutionally framed, secular public sphere (Guan, 2011 & Hoffstaedter, 2013).

This research exposes gaps in the current knowledge bases of Malaysian Government child welfare departments, who maintain a principled position of institution as a last resort for beyond control children but are failing to meet this organisational mantra. Modern responses to families in conflict are incorporating early intervention strategies and policies that actively include systemic diversion away from custodial options into monitored and supported programmes that focus on repairing and reconciling families (McGrath, 2013; UNICEF, 2017; Foussard & Melotti, 2016; Mohammad & Azman, 2014; Clark & Stephens, 2011; Raoul Wallenberg Institute, 2015). Importantly, these policies and practices actively engage and recognise the prioritisation of customs, culture and religious governance in communities and families (McGrath, 2013; UNICEF, 2017; Foussard & Melotti, 2016; Mohammad & Azman, 2014; Clark & Stephens, 2011; Raoul Wallenberg
Institute, 2015). Considered steps are taken to ensure these concurrent interests are accommodated, while equally maintaining legal protections under civil law regulations and obligations (Spence, 2018).

Maqasid al-Shariah’s objectives are consistent and compatible with Latin-Christian juristic principles that underpin Malaysia’s post-colonial legal environment (Tun Abdul Hamid Mohammad, as cited in Abdul Rauf, 2015 & Kamali, 2016a). The treatment of beyond control children already has multiple cross-over points between civil law legal principles and Islamic social and cultural expectations. Exploring and articulating the potential of workable outcomes, in the best interest of Malaysian children, their families and communities is needed and the focus of this research.

1.10 Research Objectives

Using maqasid al-Shariah’s objectives of justice, fairness and compassion, analyse the existing Department of Social Welfare’s response to Muslim beyond parental control children in Penang through:

1. Analysing the steps taken and the strategies adopted, to prevent Muslim children from being declared beyond parental control.

2. Analysing the process and efforts made to promote Muslim beyond parental control children’s early release from custodial settings and court for children monitoring orders.
3. Analysing where Malaysian civil law and Islamic juristic principles and practices accommodate and overlap with each other, in the best interests of Muslim beyond parental control children.

1.11 Research Questions

The research will address the following questions:

1. What steps are taken to prevent Muslim children from being declared beyond parental control by the Penang Courts for Children?

2. What strategies are adopted to promote early release from custody and monitoring orders for Muslim beyond parental control children in Penang?

3. Where do Malaysian civil law and Islamic juristic expectations overlap in the processing of Muslim beyond parental control children in Penang?

1.12 Significance of the Study

Ultimately this research aims to create an applied knowledge base that can be utilised by Islamic scholars, Islamic community members and child protection specialists when considering the care and protection of Muslim children in Penang. Moreover, it aims to identify culturally appropriate support mechanisms that can be understood and valued by Malaysian state child protection duty bearers and the Islamic community to prevent Muslim children being unnecessarily detained in institutional care. Focusing on what civil law duty bearers and Islamic communities have in common, rather than where they disagree, this research aims to better shape the effectiveness of the investment made in Islamic communities regarding child
protection to ensure its cultural appropriateness and to assist in improving best interest of the child determinations.

This research has significant implications for how child protection interventions are designed and implemented in Malaysia and beyond. While there is a growing recognition that child protection agencies need to meaningfully engage with religious communities to better protect children (Religions for Peace and UNICEF, 2010; Kayaoglu, 2012; UNICEF & Al-Azhar University, 2005 & 2016; UNICEF, 2012; UNICEF, Al-Azhar University and Coptic Orthodox Church, 2016), there are few published and available case study examples of how Islamic juristic and cultural practices could be explored to augment civil law initiatives to protect children. Publications that have promoted the use of maqasid al-Shariah to address child protection concerns such as child custody decisions in Syariah Courts or child sexual abuse challenging the honour of Muslim families have located the discussion at the social policy development level (Auda, 2008 & Ali, 2014). However, they have not attempted to explore the epistemological and ontological complexities of individual case studies in a decision-making process.

1.13 Key Definition of Terms

1.13.1 Child

For this research, a ‘child’ as defined by the Malaysian Child Act is a person under 18 years of age (Malaysia, 2001 & 2015). This definition has determined their status as a child who is beyond control and under custodial control or consideration of the state. This contrasts with the Organisation of Islamic Cooperation’s (OIC) Covenant on the Rights of the Child in Islam (CRCI), which is aligned with al-Shariah jurisprudence, that declares a child is a human being who “has not attained
maturity” (Organisation for Islamic Cooperation, 2015a), meaning puberty (baligh), 15 years, under Shafi’i Islamic jurisprudence, with ‘complete active capacity’ (ahliyyat ada kamila) (Organisation for Islamic Cooperation, 2005a; Hashemi, 2007; Olowu, 2008; Abolaji, Ismail & Malik, 2014; Malaysia, 2006c).

1.13.2 Best Interest of the Child

Defining and determining what the best interests of a child are is complex and is aided considerably by law, policy definitions and continual systemic review of decision-making. In the UN, OIC and Malaysian Islamic legal instruments, no clear definition of what constitutes the best interests of a child or the decision-making process is present. What is intimated is the application of broad legal and moral principles that seek multiple stakeholder participation in coming to a decision. Furthermore, those being asked to take responsibility for the decision are to be suitably qualified, and to balance options that contemplate as many factors as possible, considering the impact on the child (Organisation for Islamic Cooperation, 2005 & UNHCR, 2008). This considered approach towards reaching a determination is consistent with the objectives of this research.

1.13.3 Maqasid al-Shariah

The stratified framework provided by Islamic scholars from the fifth to the eighth Islamic centuries and finalised by Abu Ishaq al-Shatibi (d. 1388 CE) defines and prioritises Islamic values, drawn from the Quran and Sunnah, that ensure a balanced and functional Islamic society (Auda, 2007 & 2008; Kamali, 1999, chapter 13 & 2008; see Figure 1.1). Importantly, according to Kamali (1999), Abu Ishaq al-Shabtibi also promoted reflection upon these values to ensure decisions taken under their authority were what the Lawgiver intended and met an overarching
philosophical desire to create and maintain Islamic societies with justice (*qist*), mercy/compassion (*rahhmah*) and education of the individual (*tahdhib al-fard*), primarily to achieve the virtue of God’s consciousness (*taqwa*) as its reason for being (pg. 396). This clear interpretation and articulation by Kamali (1999, pg. 396, 2008, 2016a, 2016b & 2017), which is supported by other leading contemporary Islamic scholars (Auda, 2007 & 2008; Abdul Rauf, 2015), provides the research with a moral lens and practical guide to examining the treatment of Muslim beyond control children in Penang.
CHAPTER 2 – LITERATURE REVIEW

2.1 Introduction

The treatment of beyond control children in Malaysia is not isolated from history, religion, politics or social constructions of childhood propriety, it is a result of it. Human and social development is in a constant state of evolution and is situational, resulting in the rise and fall of dominant ideologies, empires and systems that influence and rationalise decision-making. Competing truths claims have established and continue to influence what constitutes justice and compassion, often with problematic consequences.

Malaysian Muslim beyond control children’s treatment is rooted in Latin-Christian constructions of justice and punishment that were transferred into the Asian region by colonial authorities and occupiers (Dusuki, 2002). Christian righteousness underpinned the evolving dominance of colonial truth and justice claims over Islamic and indigenous communities across the Oceania region (de Vattel, 1844; Commonwealth of Australia, 1997; Okon, 2014; Chidester, 2013; Ogunbado, 2012; Pettit, 2015). Recognisable links to British legal traditions and secular Western truth doctrines, such as the UDHR and UNCRC, are present in the Malaysian Constitution (Chevallier-Govers, 2010 & Malaysia, 2010) and Child Act (Malaysia, 2001 & 2015). The dominance of this discourse is something that emerges from the literature as being problematic and contestable when acting in the best interest of the child.
Existing research on beyond control children’s treatment in Malaysia is primarily framed by the UNCRC child rights discourse (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013 & 2013a; Child Rights Coalition Malaysia, 2012; Reynaert, et al., 2009, United Nations, 1989), which is largely compatible with al-Shariah in wanting the best for children (Organisation for Islamic Cooperation, 2005a). Maqasid al-Shariah’s aims and objectives are consistent with the conception of human rights, the sticking points can be how they are applied in the Malaysian secularly governed public space and who is being considered or included in the process (Auda, 2008; Olowu, 2008; Kamali, 1999, 2008 & 2012).

The incremental creep of colonial legal doctrines in Malaysia, since their arrival in the 19th century CE (Dusuki, 2002), has resulted in the contemporary prioritisation of the universalist secular legal principle of individual interests to address Muslim beyond control children. Interests that challenge and contest the importance of religious beliefs and compassion in the regulation of social relationships and governance (Al-Ramahi, 2008; Othman, 2007; Fassin, 2016b). The literature reveals knowledge and practice gaps are present in the current DSW response to Malaysian Muslim families in conflict, particularly where individual interests are being centralised over the potential inclusion of culturally appropriate communal support functions.

Islamic truths and traditions play a vital and pivotal presence in how Muslim communities and individuals form their worldviews and engage with the secular public space (Hoffstaedter, 2013; Guan, 2011; Nada Ibrahim, personal...
communication, July 18, 2017). Islamic justice practices and philosophical positioning could be a resource for existing secular practices and responses in Muslim communities. Islamic justice and community mediation or settlement options (sulh) have been part of tribal law that preceded Islam and is a fundamental response to communities and families in crisis (The Nobel Quran, 1998/1419AH, 49:9; Al-Ramahi, 2008, pg. 3; Othman, 2007, pg. 65). The potential adaptation or inclusion of these principles and practices is an overarching question for this research. Importantly, the literature reveals the philosophical and historic evolution of the current response to Muslim beyond control children, thereby enabling a deeper understanding of the past to better inform the future.

2.2 Islamic Human and Social Development

Muslims and the Islamic faith have been, and remain, a significant contributor to the advancement of humankind. Like its Judeo-Christian brothers, the contestation of truth and belief narratives has made its mark on empires, dynasties, sectarianism, schools of thought, nations and systems of governance over centuries and remains part of the on-going evolution of the global Islamic ummah. Islamic philosophies and social values reflect the closeness and interconnectedness of the Judeo-Christian faiths and their influence on each other, from their foundational similarities (Abdulla, 2016). Aristotelian logic, rational thought and scientific reasoning remain as cornerstones to the advancement of Islamic societies and without a commitment to these during a critical time of human development between the 8th and 13th centuries CE, celebrated European histories could have been quite different (Abdulla, 2016; Haddad, 2008; Moaddel, 2002; Al Sharrah, 2003; Aydin, 2004; Sabra, 1996; Rahman, et. al., 2008; Back, 2008). What remains consistent across centuries of
Islamic thought and development, is the contested space regarding the interpretation and application of revealed knowledge and shariah law in the governance of Islamic empires, nations and societies (Lemu, 2013; Auda, 2007, 2014 & 2016; Hurvitz, 2003; Wisnovsky, 2004).

2.2.1 *Bayt al-Hikma (House of Wisdom)*

What has been called the ‘golden age of Islam’ is between the 8th and 13th centuries CE, where the Islamic Caliphate brought to humankind an advancement of scientific knowledge through its application in medicine, astronomy and mathematics, under a spirit of multi-faith inclusion and cosmopolitanism (Abdulla, 2016 & Rahman, et. al., 2008). A central part of this was the Baghdad-based, house of wisdom (bayt al-hikma) where the 300-year translation movement, between the 8th and 10th centuries CE, saw the bringing together of the great texts and philosophies from across the Caliphate to be translated into Arabic (Rahman, et. al., 2008 & Abdulla, 2016). The Arabic-Islamic translation period was an instrumental contribution to evolving world views and multiple universal truths through collating knowledge, adding to it and defining a scientific discipline based on logic and reason, rather than solely on theological revelation, that could be considered valid and accepted by those seeking knowledge (Back, 2008; Rahman, et. al., 2008; Street, 2015).

A critical part of the house of wisdom’s success was the political and intellectual commitment towards its objectives of bringing together knowledge and seeing it as fundamental in the advancement of Islamic society and humankind by the Umayyad (661–750 CE) and Abbasid (750–1258 CE) Dynasties (Rahman, et. al., 2008). The roots of this thinking come from a position of searching for and
acknowledging other forms of knowledge beyond their existing epistemological bases. This also involved seeking knowledge and truths from sources beyond theology, in the areas of science and philosophy and reconciling them within Islamic teachings and social structures (Abdulla, 2016). The search for truth and knowledge is an obligation of Muslims (Rahman, et. al., 2008 & Abdulla, 2016) and the house of wisdom, under the authority of the Caliphate, with truth and meaning seeking Islamic philosophers such as al-Kindi (c.801–873 CE) and Ibn. Qutaybah (c.828–889 CE), brought ground-breaking results in the areas of medicine, science, mathematics and astronomy to the known world and for centuries to come.

2.2.2 From Philosophical Meaning to Theological Truths?

A foundational principle of the house of wisdom was to seek and question truth and meaning in established knowledge bases, which is classic Aristotelian logical inquiry. What comes from the human cognitive process of reflective inquiry and expanding questions about the world and Islamic truths within it, is to look at the relationship between theological revelation and evolving scientific discoveries. The reconciliation of theological and scientific truths and their meaning remains current across all religions and recurs throughout human and social development, often with bloody consequences. Arguably, the impact of Islam’s reconciliation, or lack of it, depending on your perspective, between the 8th and 13th centuries CE, contributed significantly to the growth of a literalist interpretation and strict application of al-Shariah across the Islamic world. Primarily, this was facilitated through the rise in power and influence of the various schools of thought (madhhab) and their madrasas, and a decline of a merciful and wisdom-led interpretation of Islamic faith and a consciousness of God’s will, guided by maqasid al-shariah (Auda, 2007, 2014 & 2016; Back 2008, Rahman et. al., 2008; Sabra, 1996; Wisnovsky, 2004; Haddad,
2008; Hurvitz, 2003). In other words, differences emerged between those who developed a consciousness of God message and those who saw God only through his revealed knowledge in scripture. However, as truth, meaning and consciousness are continually evolving and situational, a key question to reflect on is: what else was happening to give currency to the rise or decline of truths?

As the Caliphate rose, extending its reach easterly to India and western China, across the Middle East, northern Africa into Spain and southern Europe, the impact of internal power struggles and successional politics of the Caliph were being felt (Hurvitz, 2003 & Haddad, 2008). Maintaining a harmonious and united empire requires a loyal army, a clarity of ideological purpose, geographic demarcation, law, order and services to the people. As the Caliphate evolved, critical intellectual space was being created and power bases challenged, bringing continual reflection on its philosophical and theological underpinnings following further scientific discoveries, geographical expansion and multi-cultural inclusiveness. Over the centuries, two definable groups began to appear, namely those who reflected on their faith and the Caliphate through science and *falasifa* (philosophy), and the practitioners of *kalam*, the *mutakallimun*, traditional Islamic doctrinal theologians, primarily in Basra and Baghdad, the seats of power (Sabra, 1996; Wisnovsky, 2004; Haddad, 2008; Back, 2008). What began to emerge and be nurtured as a source of fundamental difference and contention between the groups, was the source of truths and the disputed concept of ‘proof’ between God’s revealed knowledge in the Quran, and the accommodation of God and faith, in those who were loyal to the Aristotelian discipline of logical scientific analytic reason in the natural world (Haddad, 2008 & Adamson, 2013).
The evolution of Islamic philosophical thought over centuries indicates the space and vibrancy that was present to question and debate the role of revealed or natural truths and their role in creating a functioning Islamic society. Luminaries of Islamic philosophy such as Al-Farabi (c.872–c.950CE), ‘the second master’ after Aristotle, from central Asia; Ibn. Sina (Avicenna) (c.980–1037CE), the Persian philosopher and logistician and Ibn. Rushd (Averroes) (1126–1198CE), the Spanish theologian, scientist and philosopher, were advocates of exploring, debating and accommodating competing conceptions of God in people’s lives within a cosmopolitan worldview that rejected the reduction of truth claims to systems of control (Back, 2008). All three reflected upon and developed perspectives regarding the value of deductive reasoning and logical proof in establishing meaning and purpose in the revealed knowledge of God. A prominent example of this is through Ibn. Sina’s theories to provide a logical argument for God’s existence, commonly known as the ‘proof of the truthful’ (Adamson, 2013). Aristotle argued for God’s existence through natural world proofs; Ibn. Sina went away from this and argued from a perspective of rationalist cause and effect. Essentially, Ibn. Sina proposed that for something to exist it relies on a preceding entity, for example, son to father, father to grand-father and so on. This interconnected, chain-like preposition is applied universally to all that is material and immaterial, regressing all the way to the construction of the universe, with the natural logical conclusion being God exists because the universe is ‘necessarily contingent’ on an existent cause and that is the creator, God (Adamson, 2013). While this theory has been questioned and critiqued by various theologians and philosophers for centuries after its articulation, Ibn. Sina’s ‘necessary existence’ theory remains ground-breaking for its time and influential (Adamson, 2013). Within the spirit of philosophical debate and evolution,
Al-Ghazali (1058–1111CE), the Persian theologian, jurist and philosopher, did not hold Ibn. Sina’s convictions towards a necessary contingency of God and saw God and his work without these human constraints of reason. Al-Ghazali, drawing on his Ash’arite school foundational beliefs, rejected Ibn. Sina’s cause and effect reasoning in favour of theological revelation, seeing God’s work as free-willed and beyond the frailty of man’s logical interpretation (Adamson, 2013).

Historically, primarily in Latin-Christian developmental discourse, al-Ghazali has been largely seen as a pivotal figure in the development of a literalist interpretation of Islam and problematically treated. He is considered as a significant influence who moved Islamic thought away from the influences of Hellenistic philosophy, rooted in scientific logic, into a dominance of canonised theological truths, thereby holding back Islamic social development (Sabra, 1996; Aydin, 2004; Haddad, 2008; Ragab, 2014). A more nuanced reflection of al-Ghazali’s work reveals that Aristotelian logic remained part of his analytical framework and in his writing, but he had persuasive convictions that shifted and evolved overtime. Al-Ghazali published several written works that reveal his critical lens, particularly towards the falasifa and their truth claims. Two leading works are the Incoherence of the Philosophers (1095 CE) and The Decisive Criterion for Distinguishing Islam from Clandestine Unbelief which serve as a historical record of al-Ghazali’s reflections and, in some cases, are unfairly interpreted to demonise him (Griffel, 2016). In the first, al-Ghazali outlines 20 chapters that are aimed at contesting the assumptions and reasoned proofs that are posited by the falasifa towards metaphysics and natural sciences (Griffel, 2016). Al-Ghazali also takes the opportunity to single out Ibn. Sina and three of his philosophical teachings on the beginning of time,
God’s knowledge, and the souls of the dead. Issuing a *fatwa* (Islamic scholar’s legal ruling), Al-Ghazali believed these were against the Quran and if anyone taught them publicly, they were an unbeliever and could be killed (Griffel, 2016). Significantly, as Ghazali’s knowledge base evolved, he moved towards Sufism and concluded that the *falasifa*’s teachings were aligned with mystics’ teachings from the pre-Islamic period and the Sufi’s discipline towards a consciousness of the inner spiritual commitment to God’s message and the necessity to purify the soul through virtue (Griffel, 2016). Ghazali continued his work and reflections with a more holistic vision of Islamic faith being about advancing humankind from what was revealed in the Quran and Sunnah and was one of the first Islamic jurists to introduce the concept of *maslahah* (public interest) in Islamic jurisprudential considerations (Griffel, 2016).

Incorrectly using al-Ghazali’s critical work on the *falasifa* is convenient for those who want to see Islamic social development in reductionist binary frameworks of theological reflections and interpretations as hindering social advancement. This narrative is naïve and assumption-laden in its premise and contested through examination of historical texts where the *kalam* adopted the teaching of Ibn. Sina, and other *falasifa* in their madrassas and theological teachings (Wisnovsky, 2004). It is also contested by al-Ghazali in his second work, ‘*The Decisive Criterion for Distinguishing Islam from Clandestine Unbelief*’, where he unequivocally declares three doctrinal principles that are sacrosanct, namely monotheism, Mohammad as the Prophet, and the Quran’s descriptions of life after death. Beyond these, all other teachings and beliefs need to be heard, might be correct and could be adopted, if it is in accordance with the truths of God’s revelation in the Quran and the Sunnah.
(Griffel, 2016). Perhaps a better framework to view the relationship between the *falasifa* and *kalam* is from a perspective of critical intellectual Islamic thought development that overlaps, mixes and gains validity, or is rebutted, within the circumstances and time that it occupies.

2.2.3 Caliphate to a Commonwealth of Islamic Nations and Communities

While the Caliphate was strong and stable the *falasifa* and *kalam* could be accommodated and co-exist, but during the ninth and tenth centuries CE, the Abbasid Caliphate was in serious trouble, leaving a vacuum for power struggles, intellectual distinctiveness and religious authority (Haddad, 2008). Extended periods of unstable centralised rule and often brutal Caliph successional politics gave rise to the power of the various Shia and Sunni *madhahib* (schools of Islamic jurisprudence). The Sunni Islam Hanafi, Maliki, and Shafi’i *madhahib* were attracting large numbers of followers from the middle of the eighth century CE and the Hanbali *madhab* came into prominence during the serious troubles of the Abbasid Caliphate (Hurvitz, 2003, pg. 986). The various *madhahib* became significant institutions of power, that included the detailed regulation of followers’ lives, legal doctrines and their application in dedicated courts, political alliances and institutes of learning. They were defined by a “commonly held worldview of jurists and their congregations” rather than a top down, distant interpretation from the educated elites over an illiterate community (Hurvitz, 2003, pg. 987). All these competing social and political structures created loyalties within the ruling class and the body politic, in addition to geographically defined social alignments in families, tribes and ethnic groups. The Shia and Sunni *madhahib* were, and remain, a system of social
advancement or exclusion through their ability to give identity and legal authority to communal decision-making.

Of interest, from an Islamic and non-Islamic human and social development perspective, is how systems of rule or governance such as empires, caliphates, dynasties and national governments, rise and fall. Ibn Khaldun (1334–1406 CE), the North African historiographer and historian, wrote extensively on this subject, articulating his theory of asabiyyah (solidarity or group feel) in his 1377 CE pioneering book, *The Muqaddimah* (Khaldun, 1958). A central position of Khaldun’s asabiyyah theory and *The Muqaddimah* is justice because without it, civilisations are ruined (Khaldun, 1958, Chapter 3, Section 44). Khaldun asserts that injustice leads to social breakdown, regime change and the ruin of civilisation which, at its worst, could end with the eradication of the human species. Moreover, maqasid al-shariah, with its five necessities, prevents injustice, thereby avoiding chaos and the breakdown of social order (Khaldun, 1958, Chapter 3, Section 44).

Ibn Khaldun’s asabiyyah theory emerges from the kinship or blood bonds that are formed out of tribal allegiances, a common purpose, and collective sense of injustice. Defining asabiyyah is nuanced and results in multiple interpretations and meanings (Halim, 2014 & Gierer, 2001), some of which are not permissible in Islam and were criticised by the Prophet (Halim, 2014). A negative example is when the asabiyyah of a ruling elite leads to injustice and hardship for those being governed; this was explicitly identified by the Prophet as being haram or not permissible (Halim, 2014, pg. 33). Conversely, a positive example of asabiyyah is for the Muslim ummah, through brotherhood and the bonds of solidarity, to find truth and
justice in the word of God and his revelations in the Quran and Sunnah (Halim, 2014, pg. 42 & Gierer, 2001).

Perhaps the most relevant and prominent application of Ibn Khaldun’s 
*asabiyyah* theory comes from his interpretation of its presence in the rise and fall of empires, ruling groups, families and tribes. The *asabiyyah* theory cycle begins with a common cause rooted in injustice, which brings a solidarity of purpose in challenging powerholders. This leads to families, kinship groups or tribes positioning themselves as champions against the injustice, where they receive sanction from the suffering community and they subsequently rise to ruling positions. However, over time those in power start to replicate the practices of injustice they came into power to address. Ibn Khaldun uses examples of their luxury and acquisition of common property to support their “glory” and “lifestyle”, that eventually distances themselves from the common man (1958, Chapter 3, Section 11). This leads to pressures and unrest, with the response of those in power being to exert injustices, such as tax increases, generational debt burdens and strict rule of law, to maintain their position. This naturally leads to fragmentation of social cohesion, conflict, realignment of allegiances and solidarity, bringing about a new cycle of *asabiyyah*. Ibn Khaldun believed the average dynastic lifespan of the rulers, before they become “senile” and lose their “group feel” (*asabiyyah*) is about three generations (1958, Chapter 3, Section 12).

Ibn Khaldun’s *asabiyyah* theory resonates during the disintegration of the Abbasid Caliphate, its breaking up and the move into an Islamic commonwealth and the development of the Hanbali *madhhab*. The Abbasid Caliphate of the ninth and
tenth century CE was in serious trouble. It was facing internal struggles through a lack of revenue, given a century of military engagement protecting fragile borders and under-payments to soldiers, resulting in a discontented army which led to a lack of performance on the battlefield (Hurvitz, 2003, pg. 988-989). This lack of discipline and loyalty left space for provinces to breakaway and for the boundaries of the Caliphate to be contested by rebels and invaders. By the tenth century CE, with public disorder commonplace and the troubles being faced on the periphery of the Caliphate finding their way into its heart, the Caliph could not control order in the capital of Baghdad (Hurvitz, 2003, pg. 988-989). Ibn Hanbal pushed back against the decadent ways of the Abbasid ruling class who lived a lavish lifestyle that included “wine, women and song” and distanced themselves from their ordinary subjects (Hurvitz, 2003, pg. 996). Ibn Hanbal led a pious, ascetic existence, ate humble food and presented himself as the total opposite of the ruling elite. As his mythology grew to reflect the plight of the common man, followers connected with him and saw themselves. In the spirit of Ibn Khaldun’s asabiyyah theory (1958), the result was a community identifying and mobilising against the corrupting actions of court and the middle-class sycophants who adopted the dress and behaviours of the Abbasid rulers. Piety, morality and a strict observance of ‘forbidding wrong’ became normalized and mythologized (Hurvitz, 2003). While there were other groups that rioted in tenth century Baghdad against the rulers, what differentiated the Hanbalis was they were not making financial demands but were motivated by a religious purpose that brought followers to them and elevated the various madhabib in communities and across the Caliphate (Hurvitz, 2003, pg. 1006).
By the middle of the tenth century CE, the role and power of a Caliph and the Abbasid was disintegrating and negotiable, leading to them being left as figureheads while numerous principalities and dynasties emerged to fill the vacuum and the development of an Islamic “commonwealth” (Hurvitz, 2003, pg. 989). The centrality of power and social development transferred from the capital into the provinces and dynasties, where trade and an ideological contiguity was held together under Islam’s religious doctrine and the Arabic language. However, this fragmentation opened space for doctrinal interpretation and popular movements with followers who held allegiance to leaders such as Ibn Hanbal (Hurvitz, 2003, pg. 989). This marked a shift in power and advancement of the ummah from successional Caliphs, to the Shia and Sunni madhabib.

What started as Shia and Sunni scholarly circles grew into mass movements across the Caliphate and the emerging commonwealth of Islamic nations and communities, adapting and surviving into the present day (Ali, 2014 & Hurvitz, 2003). As global events such as the Crusades, the Mongol conquests, European colonialism and the modern nation state impacted the Muslim ummah, the primary Sunni and Shia madhabib remained present and acted as constants and protectors in connecting al-Shariah to communities and individual Muslims across the globe. The process of interpretation, application and adherence of Shariah varied, and continues to vary, depending on cultures, ethical differences, historical contexts and political regulation (Ali, 2014 & Moaddel, 2002). Just as Islam’s madhabib have survived centuries of geopolitical change, yet continue to be relevant in peoples’ lives, so does Ibn Khaldun’s asabiyyah theory towards human relationships and social order.
2.3 Three Agents of Colonialism: Explorers, Missionaries and Traders

A contentious example of cultural imperialism and belief is the history of colonialism from Britain and continental Europe over Africa, Asia, Oceania and South America. While the results of its destructive doctrinal beliefs still resonate, having caused intergenerational grief and harm, what underpinned the thinking remains of interest, particularly when trying to comprehend systems of truth and meaning in human development. European colonialists were armed militarily and consciously with a truth and belief in their actions, primarily and most disastrously with an inflated sense of racial, intellectual, cultural and moral superiority over those they colonised (de Vattel, 1844; Commonwealth of Australia, 1997; Okon, 2014; Chidester, 2013; Ogunbado, 2012; Pettit, 2015).

Trade between citizens, villages and nations is part of human existence and social development and is well documented, such as trade between Aboriginal Australians and communities to the north in Indonesia and Papua New Guinea, well before colonial settlement of Australia in 1788 (Abdulla, 2016). Empires and nations relied on trade to maintain their reach and to spread and broaden their world view, including religious beliefs. While some empires carried out trade and left, others expanded contiguously, such as the Islamic Empire with its vision of a Caliphate, Caliph and the ummah together in one land (Auda, 2016). The Europeans were different in their views; they held the technological and sea-faring capacities to maintain trade and relationships across the dispersed ‘new world’, but they also possessed a conviction of righteousness in their beliefs and subsequent actions.
2.3.1 Christian Righteousness in Colonialism

An important factor in European colonialization was the organisation and agreements between nations or community leaders to lessen conflict and facilitate smooth import and export relations. An example of this ‘gentlemanly’ reciprocity was the Berlin Conference of 1884-1885 CE. During the three-month meeting, European powers of the day (Britain, France, Germany, Portugal, Italy, Belgium, Netherlands, Russia, Denmark, Sweden, Austria-Hungary, Ottomans and Spain), with the United States as an observer, came to a joint agreement over the division of the African continent into various colonies (Ogunbado, 2012). While this agreement enabled uncontested extraction of resources and trade from the various African colonies, the participating powers also agreed to stop the international slave trade from Africa to their colonies in other parts of the world.

![Map of Africa, post 1884-85 Berlin Conference](New World Encyclopedia, 2008)

Looking back on milestone human development events, such as the Berlin Conference, it is difficult to conceive rational men of faith could take such decisions and not think of the consequences and their impact. Finding meaning in their actions,
and the philosophies of truth that satisfied their consciousness, can be found within the systems of thought that were prevalent and influential at the time. Probably the best recorded example of intent and rationalisation of the European colonialist’s consciousness is through the work of the Swiss philosopher, Emmerich de Vattel (1714–1767 CE) who, in 1758 CE, published *the law of nations; principles of the law of nature, applied to the conduct and affairs of nations and sovereigns*. This 500-page document is regarded as the foundation of Latin-Christian interpretations of international law and established a philosophical and theological purpose and meaning to colonising, forming treatises and, in some circumstances, under an ‘obligation’ to advancing humankind, seizing land. A review of the contents page reveals a comprehensive list of expectations and reverence to the sovereign’s power and his duties to bring civilisation and ‘protection’ to nations. These include a sovereign’s rights towards how a nation is defined, commerce, legal systems, religion, private and crown property, citizens and natives, war and peace (de Vattel, 1844). Contained and revealed within the preface are de Vattel’s worldviews, influences and beliefs in the virtue of the document. De Vattel squarely sits his work on the foundational thinking of Thomas Hobbes, whom he calls the “master” (1844, pg. VII), and the German practical philosopher, Baron Christian Wolff (1679–1754 CE), whom he calls the “great philosopher” (1844, pg. VII). Hobbes and Wolff serve as reassurances to de Vattel; he uses their positions on natural law and the strength of morality under sovereign rule and civil law to articulate his recurring thoughts on the reason and rationality of advancing and using economic and agricultural prosperity of the world as an obligation to mankind to find their perfection (de Vattel, 1844, pg. XIII). De Vattel also declares support of and reinforces Hobbes’ social contract theory, regarding the obligation of the sovereign monarchs to reign with benevolence
under the authority of God and with civil law that is based on a combination of sacred, natural, treatise and customised law (1844, pg. XIII).

Monotheistic truths and a Christian God are central in how natural law and civil society was to be brought to nations:

“Every man is obliged to obtain just ideas of God, to know his laws, his views respect to his creatures...he should honour God in all his actions” but this must not be forced, rather through exposure to God, the conscious man of liberty and rational thought will develop the most profound love and respect of his Creator” (de Vattel, 1844, Book 1, Chapter 12, pg. 55).

In Chapter 11, de Vattel focuses on how to ‘procure true happiness of the nation’; the ‘glory’ of good citizenship will come from governments and sovereigns who create a citizenry that discovers the intention of its rulers and this is best achieved through focusing on virtue, education, arts and science, freedoms of philosophical thought and fostering patriotism (de Vattel, 1844, Book 1, Chapter 11, pg. 47). In highlighting the ways and means of creating this happy citizenry, juxtaposed with his vision against the ‘tyranny of the east’, De Vattel states:

“Let us leave a hatred of the sciences to the despotic tyrants of the east: they are afraid of having their people instructed, because they choose to rule over slaves...A just and wise prince feels no apprehensions from the light of knowledge: he knows that it is ever advantageous to a good government. If men of learning know that liberty is the natural inheritance of mankind; on the other hand, they are more fully sensible than their neighbours” (1844, Book 1, Chapter 11, pg. 47).

De Vattel presents his arguments with the prosaic flourish of an educated man of his time, he is compelling in his views and the reader senses the conviction of his truths in what is right for the advancement of humankind. This text and its conviction
was influential to United States of America nation builders, such as George Washington (Parker, 2010), along with British colonialists who used its interpretation of land use to justify a judgement of terra nullius (empty continent) against Australian Aboriginals, that led to widespread decimation of indigenous communities and nations (Pettit, 2015).

2.3.2 Terra Nullius and Indigenous Australians

The colonial experience was similar across the globe, with a significant difference being the capacity for European colonialists to sign treaties with local authorities or sovereigns and their power in the subsequent relationship. Signing treaties signalled the local people’s relationship with European colonialist police forces, militias, armies and colonial governments’ laws on tax, trade, property and morality (Ogunbado, 2012 & Commonwealth of Australia, 1997). An example of how unequal and incompatible the colonial relationship can be, regardless of its good intentions, convictions and philosophical intellectualism, is represented in the treatment of indigenous nations of the Australian continent by British colonialists. De Vattel, in his Law of Nations, specifically addresses what he titles “another celebrated question”, namely “whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scantly population is incapable of occupying the whole?” (1844, Book 1, Chapter 18, pg. 100). De Vattel responds to this question with the recurring theme of man’s obligation to cultivate the earth and if the “savage” cannot account for a ‘true and legal possession or use’ then the people of Europe, “were lawfully entitled to take possession of it, and settle it with colonies” (1844, Book 1, Chapter 18, pg. 100).
Based on explorer reports and observations of Aboriginal land use, British colonialist settlers declared the land empty (terra nullius) and not being used as defined by European and de Vattel’s (1844) concepts of sedentarily appropriate land usage under common law, titles, ownership rights and agrarian cultivation (Pettit, 2015). Australian indigenous nations were nomadic peoples, whose spiritual connection with the land was through totems, dreamtime stories and narration of land management histories by elders with wisdom. This socio-cultural belief system results in indigenous Australians being ‘custodians’ of land (Pettit, 2015); no-one can own mother earth. This totem relationship with the land is in stark contrast to this day with western concepts of land ownership, rights of use and land’s financial incentives. The outcome of these completely different and incompatible concepts of land relationships was the taking of Aboriginal land by force, by militarily superior settlers and the use of European legal doctrines to ‘legally’ acquire land from illiterate national leaders. Records from an Australian land charter of 1835 CE reveal the Kulin nation as giving up 593,053 acres of land for blankets, knives, tomahawks, flour and similar goods; the leader of the Kulin nations ‘made his mark’ on the legal document of sale (Pettit, 2015). The results of European’s land ownership legal rights were the erection of fences and the demarcation of titles, states and countries that did not respect ancient and existing indigenous national or natural boundaries.

An example of this, from the Berlin Conference, was the European declaration of the new geographical borders of British Nigeria and French Benin; this split the indigenous Yorubas people between two colonial powers and robbed the Yorubas Kings of their authority and made them subordinate and reliant on foreign occupiers, rather than remaining independent and self-determined (Ogunbado, 2012).
Christian missionaries travelled to colonies with European legal doctrines and expectations, they were instrumental to the European colonial project. Using Australian as an example, but with similar experiences recorded in other colonies, missionaries were instrumental in the colonialis\' inculcation of Christian European traditions and culture within indigenous communities (Commonwealth of Australia, 1997; Chidester, 2013; Ogunbado, 2012; Okon, 2014). The result of colonial land laws, armed settler violence and occupation of Aboriginal nations was the systemic and intentional breaking of the nomadic custodial relationship between indigenous Australians and the land (Commonwealth of Australia, 1997). This resulted in sedentary ‘missions and reserves’ being established, where nomadic peoples were to be ‘protected’ and herded into demarcated parcels of land and ‘assimilated’ into European’s customs, religion and legal authority over Australia. Mission homes, reserves and their European Christian religious values were to ‘civilise the aborigine’; bringing to life Thomas Hobbes’ social contact theory of them being ‘protected’ from the brutish natural world and de Vattel’s (1844) faith of them becoming rational conscious men, with liberty, through their exposure to God. Instead, missions and reserves served as locations for alcoholism, disease, violence, labour exploitation, sexual and physical assault, rape (male and female), forced adoptions and ‘disappeared’ children, whose mothers had not known they were being adopted out to white Australians (Commonwealth of Australia, 1997, pg. 99-102). This naturally raises salient questions about the efficacy and harm of imposing truth and believe systems on people from a position of ‘power over’, rather than an equitable ‘power with’.
2.4 Human Rights and Islamic Jurisprudence

The concept of protecting individual’s interests and facilitating active participation in society has been part of Islamic jurisprudence from the beginning of Islamic thought and civilisation building. Maqasid al-Shariah reflects a universal expectation of human rights and obligations not only for Muslims, but all humans (Adil & Ahmad, 2014; Dr. Recep Senturk, as cited in Abdul Rauf, 2015; Dr. Tahir Mahmood, as cited in Abdul Rauf, 2015). Maqasid al-Shariah’s preservation of religion, life, intellect, lineage and property (Auda, 2007 & 2008) is a principled universal concept of human and social development that can be appreciated by all humankind. Underpinning maqasid al-Shariah is the ambition to create a world for all the children of Adam and Eve (Adamiyyah) that achieves peace, justice and equality, under a common brotherhood of humanity (Organisation for Islamic Cooperation, 1990, Article 1; Dr. Tahir Mahmood, as cited in Abdul Rauf, 2015; Adil & Ahmad, 2014). From this universal position, all humans have rights and obligations towards achieving these aims under a commonality of doing good for humanity. The practical application and interpretation of how these universal principles are achieved is often contested and reflected in history, philosophies and ideological positions that impact nations, societies and individuals.

The historical chronology of what are now called ‘human rights’ provides an insight to their presence in human development and how they are consciously conceived and utilised. Up until the internationalism of the 19th century CE, human rights were primarily guided by religious doctrine under a ‘one true belief’ that provided purpose and legitimacy to social structures (Moyn, 2009). During the rise and evolution of internationalism, which was based on trade and Latin-Christian
empire building, the ‘rights of man’ were brought into consciousness and mobilised for construction of states and were bounded to creating sovereignty (Moyn, 2009). The rights of man were seen as the first prerogative of citizens and were used to justify colonialism or bloody revolution to achieve justice, determination and participation within state structures (de Vattel, 1844; Pettit, 2015; Stephens, 2016; Moyn, 2009).

The language of ‘human rights’ came into the lexicon in the 1940s CE, primarily through the establishment of the United Nations in 1945 and upon release of their Universal Declaration of Human Rights (UDHR) in 1947 (Stephens, 2016). While the terminology of rights was being reinterpreted, so was their role and function, adapting to global events and geo-political interests. For example, the UDHR was originally positioned as a foundational document for the post-colonial and post-war world to guide new nations’ constitutions, and not as a universally applicable set of principles as it is seen in the current day (Stephens, 2016 & Moyn, 2009). The UDHR fitted in with a world that was changing dramatically with the decline of the British Empire and the rise of the American welfare state ideology of production and consumption. The needs of the individual were an obligation of the state and less of a universal principle (Stephens, 2016 & Moyn, 2009). Malaysia’s 1957 experience of nation building and transition from British colonial rule reflects this, with the inclusion of ‘fundamental liberties’ in Part II of the Federal Constitution and reference to the UDHR in the Human Rights Commission of Malaysia Act, 1999 (Chevallier-Govers, 2010; Malaysia, 2010; Malaysia, 2011a).
The current formation of ‘human rights’ and their presence in global dialogue grew from the 1970s with the crumbling of the welfare state model and the Western shift towards an economic state model of entrepreneurial individualism (Moyn, 2009). Under this ideology, rights were repositioned as the last chance for humans who cannot or do not achieve their citizenship freedoms and their struggle brought within a doctrine of universal expectation (Moyn, 2009 & Stephens, 2016). This ideological shift reinvigorated the UDHR into being an aspirational set of standards and launched a global human rights industry that is prolific in producing publications, establishing committees, holding conventions and holding nations to a discourse of human rights. Human rights have also been weaponised and used to justify military actions, invasions and occupations.

However, even during the UDHR’s draft review process, questions and concerns were raised on who was involved and how it came about, primarily through the lack of recognition of cultural and religious differences, resulting in some Muslim states refusing to sign it because it contravenes Shariah and therefore Islamic values (Littman, 1999 & Kayaoglu, 2012). In 1947, the American Anthropological Association formally registered their discontent through an open letter declaring the UDHR speaking of ‘privileging’ individuals over groups and how it lacked inclusion of cultural and moral relativity (Brown, 2008). In the current day, friction points remain for Islamic nations regarding the universalism and secular nature of the UDHR, in particular, how its doctrine is non-contestable and how its mantra permeates UN documents, meetings and interactions, often challenging the sovereignty of nations and stifling critical debate (Kayaoglu, 2012; Littman, 1999; Reynaert, et. al., 2009; Nieuwenhuys, 1998; Chase, 2015).
In 1969, the Organisation for Islamic Cooperation (OIC) was formed and currently has 57 member-states (Organisation for Islamic Cooperation, 2016). The remit of the OIC is to be “the collective voice for the Muslim world” through facilitating and working as a coordination and support body on matters pertaining to Islam to promote peace and harmony in the world (Organisation for Islamic Cooperation, 2016). In contestation to the UN human rights industry are the outputs of the OIC on matters pertaining to ‘rights’ such as: Statute of the International Islamic Court of Justice (1987); Declaration of Human Rights in Islam (1990); Covenant on the Rights of the Child in Islam (CRCI) (2005a); Plan of Action for the Advancement of Women (2008) and the establishment of an Independent Permanent Human Rights Commission (IPHRC) (2011). What comes consistently through the documents is the location of Allah as being the ultimate lawgiver and Shariah being the foundation of Islamic societies and their governance. The underlying tensions between the OIC member states and the UN on ‘rights’ and the ability to deliver them is displayed in the preamble to the Rabat Declaration on the CRCI that declares the unfairness of holding poor nations to international standards of ‘rights’ while under ‘colonialism and foreign occupation’, along with other points of frustration (Organisation for Islamic Cooperation, 2005b). Having this on the public record and attached to a document that unambiguously declares the principles of Muslim childhood reveals the interconnectedness of geopolitical power and its influence on the meaning and adoption of global declarations.

The OIC has come under considered scrutiny following the formation of the IPHRC in 2011. Fervent human rights champions feel the OIC and the IPHRC is a
hindrance to human rights work because of the OIC’s conservative member states that impose a strict interpretation of Shariah and how this is incongruent with human rights principles (Chase, 2015 & Peterson, 2012). Moreover, the approach adopted by the IPHRC to support and coach member nations, while respecting their sovereignty, rather than holding them to account to human rights (Kayaoglu & Peterson, 2013) leads human rights defenders to be harsh in their criticisms and low in their expectations. One significant point of divergence between the human rights industry and Islamic nations is who affords these rights and is held accountable to delivering them. Islam declares it to be Allah and Shariah through the sovereignty of the nation state. The human rights industry also declares it to be the nation state but under hawkish international committee or court review. While within the middle ground between champions of either literalist Islam or the human rights doctrine are those who believe in a moderation of language and accept that Shariah and human rights already sit comfortably together, how the engagement and discussion takes place to best meet human needs over personal or political interests requires attention (Auda, 2008; Olowu, 2008; Kamali, 1999, 2008 & 2012; An-Naim, 2000; Nayazee, cited in Habashi, 2015, Rinaldo, 2014; Kirmani, 2011; Sadri, 2001).

There are signs of a positive shift beyond the trench positions by both the OIC and the UN. Under the immediate past OIC President from Turkey, who oversaw the establishment of the IPHRC, the moderation of language choice in public declarations towards Shariah law reveals movement towards finding common ground between human rights principles and Shariah’s importance (Kayaoglu, 2012). Equally, from the UN, which has held a dogmatic principled position on the secular nature of their global work on human rights development, a significant shift in
thinking is being revealed through its active acknowledgement of the role of religion in human development and through engagement with various religions to identify how the two concepts are congruent (Religions for Peace and UNICEF, 2010; Kayaoglu, 2012; UNICEF & Al-Azhar University, 2005 & 2016; UNICEF, 2012; UNICEF, Al-Azhar University and Coptic Orthodox Church, 2016).

2.5 Social Wrongs and Punishment

Morality and law are inextricably linked. Determination of a social wrong is guided by moral rules of social participation and obligation (Bedau & Kelly, 2017). The state declares the expected standards for all citizens, and threatens punishment for noncompliance (Hampton, 1984). The written standards of social participation and obligation are accessible through reading the law of any country. Less clear and preceding words on paper, is the process of determining and moralising what a social wrong is and deciding on the punishment that can be justified against a noncompliant citizen.

Unsurprisingly, this has been a social development discussion for centuries, with the ancient Greek philosopher Plato’s Laws representing a conscious starting point of articulating how societies govern themselves and establish standards of participation or exclusion (Pangle, 2009). For Plato, vice (criminality) is the result of ignorance and a lack of education, whereas virtue is knowledge of what is good, and this knowledge guarantees an efficacy in the noble condition of the soul, which results in a man who acts justly and consistently desires good (Pangle, 2009, pg. 457). Moreover, an educated man of virtue seeks justice and compassion for the man of vice because, through education, he will reach a virtuous state of consciousness.
that corrects his behaviour to do good, rather than evil (Pangle, 2009, pg. 461). Plato extended this compassion for the criminal to how society determines and delivers punishment, arguing that trying to match the pain of the crime is unjust because the criminal has already inflicted havoc on his soul, and no amount of state violence against him would match this (Pangle, 2009, pg. 461). Plato believed in an overarching goodness of man and his desire to be virtuous and honourable. Those who were of vice were to be supported and their families assisted towards doing good. Education and a realisation of the greater good of virtue and man’s conscious obligation to lawfulness, reverence and the horrors of injustice were to be revealed in law and moral conduct of society (Pangle, 2009, pg. 462). An example of Plato’s faith in the innate goodness of the soul is revealed in his belief that death was a better, compassionate option for the non-reformable criminal because imprisonment would not redeem their soul, and this was a fate worse than death (Pangle, 2009, pg. 460).

Plato’s belief in ‘man’ and his construction of meaning through the soul and this being the innate central governor of human behaviour was a dominant truth until the 17th century CE and reflects a clear distinction from the scientifically rationalised ‘cause and effect’ reasoning that has been the compass of human development since (Auda, 2007, Chapter 2; Gottlieb, 2016 & Nassar, 2016). However, Plato’s theme of the compassion and justice a virtuous society gives to its citizenry is a foundational point between a virtuous state-of-being and how these transfers into moral positions and actions, such as written law (Mian, 2016; Searle, 2007; Dennett, 2011). The link is made to how overarching narratives and doctrines of belief, such as religions texts, maqasid al-Shariah, history and hope, shape and guide a collective consciousness.
and therefore establish a moral position. The aspirations of maqasid al-Shariah can be seen in Plato’s convictions towards the virtue of always doing good and how building a society that has compassion and justice as its heart will be fair and merciful to those who break its rules and the belief they can be helped with education and support. It also sets a moral position that justifies punishment against those who do not follow social obligations (Hampton, 1984).

The centrality of a moral position in punishment is important to understand because it allows for personal and social justification of pain against those who break the rules. Morality permits the state to interfere in people’s liberty and declare boundaries and the pain that awaits you if you do not follow the rules (Hampton, 1984). It also clears and settles the individual’s and the collective conscience of society to the guilt of inflicting pain because it is justified and rationalised both theoretically and philosophically (Hampton, 1984; Fassin, 2016a & 2016b; Berman, 2008). Within this framework, where morality justifies punishment, all that is done is just and valid because it has the purpose of moral correction or a righteousness of action. Punishment in this sense is not only about the offender, because of its moral dimension, it affirms a victim, a wrong doer and can be easily extended to identify ethic groups, neighbourhoods or religious devotees to be as deserving of punishment because of their shared identity with the perpetrator (Hampton, 1984 & Fassin, 2016a). Importantly, to act as a deterrent, the punishment delivered must be legitimate, involve pain and be retributive (Fassin, 2016a). Punishment in this sense is not only gaol, restricting freedom or physical strikes to the body, it includes pain that is collective, immersive, psychological or systemic. Didier Fassin (2016a) uses an example of police operations in poor Parisian neighbourhoods where a single
juvenile offender riding a motorcycle dangerously evaded police attempts to stop him for questioning. The youth disappeared into a known neighbourhood where police and community relationships were tense, had a history of violence and there was distrust on both sides. While police tried to find the youth, residents came onto the streets to challenge them, resulting in multiple arrests and an indiscriminate use of force and violence by police. Police believed their actions were morally just and reasonable because the youth came from that neighbourhood and they were harbouring him, therefore punishment to the whole community indirectly punished and caused pain to the youth. What underpins this example is the moral justification of punishment, and state sanctioned pain is not only located to courtrooms or institutions but sits as a justifiable consciousness in acting on behalf of a moral expectation of what is allowed; “fairness is circumvented for the preservation of social and moral order” (Fassin, 2016b). In other words, when the virtuous good of justice, fairness and mercy are replaced with injustice, revenge and harm, who gets punished and what gets punished becomes less about social and moral truths and more about retributive violence and social inequality.

2.5.1 Collective or Individual Interests in Punishment?

The treatment of those who commit social wrongs has not changed much over the centuries with the primary reactions still being shaped by incapacitation, deterrence and rehabilitation (Fassin, 2016b). These recurring responses deliver consequences to committing social wrongs and maintaining order. Incapacitation is the punishment most invested in morally and socially (Fassin, 2016b), and takes shape in responses such as death penalties, incarceration and deprivation of liberty. Deterrence strategies, which include public displays of torture, punishment or
execution, reveal the state’s power and moral license to deal with its citizens through fear and submission. For example, during the Chinese Government’s public campaign against crime gangs in the 1980s, not only were public executions frequent and attracting thousands of spectators, the state also took the opportunity to reveal “edifying stories of repentance” by the condemned before their executions (Bakken, 1993, pg. 57). Repentance reassures the collective conscience, transforming the execution into a moral good because even the condemned have seen the error of their ways and understand they should face the consequences. Strategically, many of the public executions were staged just prior to national holidays (Bakken, 1993), thereby enabling citizens to relax, away from the daily demands of production, and enjoy living in a prosperous nation that is built on social and moral order.

Punishment as a means of retribution, or vengeful painful atonement of moral wrongs, is a primary function of Latin-Christian conceptions of justice that remains prevalent in the western world, however, this was not always the case (Fassin, 2016a). The etymology of the word punishment in ancient Greek and Latin is debt and reparation of exchange, that is to provide compensation for loss (Fassin, 2016a). Roman law for retribution was largely compensatory but was subsequently influenced by the church towards atonement (Fassin, 2016a), rooted in Christ’s agony on the cross. The conception and application of punishment evolved over centuries to include its role in justice and then pain, reflecting the influence of Christian theological truths in defining what punishment means (Fassin, 2016a). In comparison, Islamic law remains loyal to the Quranic guidance of remittance and restoring equality in the relationship, rather than punitive restitution (Fassin, 2016a; Fakhry, 1975; Ismail, 2010; Kassem, 1972; Al-Ramahi, 2008; Othman, 2007; Rusli,
The Islamic juristic principles of qisas (retaliation, equal suffering) and diyya (blood money, compensation) are balanced prospects which are primarily aimed at restoring relationships between conflicting parties, families or communities, rather than individual atonement for a moral wrong (Fassin, 2016a).

The prioritising of an individual’s interest over country, kin, community or family harmony marks a distinct difference between Latin-Christian and Islamic justice principles (Al-Ramahi, 2008; Othman, 2007; Fassin, 2016b). The western world prides itself on championing the rights of an individual, the rule of law and punishing wrong doers with retributive justice. This model recognises a victim, individualises responsibility and identifies who must suffer (Fassin, 2016b & Al-Ramahi, 2008). With suffering and punishment occurring in private places, away from the public glare, thereby liberating the collective responsibility of the community, comfort is gained through knowing social and moral hierarchies have been maintained. Didier Fassin (2016b) calls this a ‘retributive moral economy model’, where the transactions of justice and punishment are rationalised against moral and social hierarchies, which results in a justice response that is less about addressing inequalities and more about maintaining order.

Rooted in tribal law that precedes Islam, Islamic justice is focussed on collective interests, compensation and restoring an equilibrium to relationships (Al-Ramahi, 2008, pg. 3 & Othman, 2007, pg. 65). Rather than focussing on an individual’s victory, the Quran and the Hadith of the Prophet both favour reconciliation between conflicting parties, families or communities away from court rooms, in a neutral space where a process of arbitration (tahkim) or sulh (amicable
settlement) can take place that leads to a return to harmonious relationships which will have a long-term impact (The Nobel Quran, 1998/1419AH, 49:9; Othman, 2007; Al-Ramahi, 2008; Rusli, 2013). The decisions of the *sulh* and arbitration processes result from formal practices of discussion and reconciliation between conflicting parties and have significant judicial weight. The processes can involve the introduction of an independent, wise and trusted community member, whose role is to discuss and formalise an amicable settlement. This process can extend to grave crimes against Islam, such as murder, where diyya (blood money, compensation) to avoid qisas (retaliation, equal suffering) can be a better outcome for community relations than individual retribution (Othman, 2007). Punishment and justice still exist in the *sulh* process and are made visible because the person or family responsible for the crime continues to walk among the community after settlement is reached, rather than their punishment being privatised through removal. They are known and subjects of their conscience to repair relationships within the community and with God (Fakhry, 1975 & Kassem, 1972).

Enabling justice and conflict transformation from a place of truth underpins the *sulh* process, which is established through discussions, ritual, forgiveness and mercy. Rather than separating conflicting parties, who are brought together before an adversarial court, where skilled orators and the acceptance of facts is the primary process of justice. The secular nature of the western experience is to isolate and move social wrongs into a private place for judgement and punishment, thereby removing individual and community obligations from the process. Collective versus individual interests is the central difference between the *sulh* process and western
systems, along with the *sulh*’s conscious inclusion of religious and social codes that provide moral guidance and ancient wisdom to restoring relationships.

2.6 **Malaysian Child Laws Development**

Malaysia’s legal system and laws have been shaped by three significant events over the past 600 years: the founding of Malacca Sultanate, the spread of Islam in southern Asia, and British colonial rule (Dusuki, 2002). Each of these events brought change to how Malaysian society was governed, protected and advanced. Islam came to Malaysia before the Malacca Sultanate’s establishment in the 14th century CE and, as the religion spread, existing customary laws were replaced with those guided by al-Shariah and overseen by the Sultan (Dusuki, 2002; Adil & Ahmad, 2014; Chevallier-Govers, 2010). British Common Law’s application in Malaysia began with the Charters of Justice, that were associated with the Straits Settlements of Penang (1807 CE), Malacca and Singapore (1826 CE) (Dusuki, 2002). The reach of the law at that time was limited to these locations and focused on civil, criminal and ecclesiastic matters. However, there was a caveat that stated if the application of British Common Law led to unfair consequences for the local inhabitants, local courts could modify the rules (Dusuki, 2002).

As trade and relationships with various Sultans developed, British colonial administrators became welcomed advisors to Sultans (Chevallier-Govers, 2010). While keeping an agreed distance from Islamic religious and Malay customary matters, they were welcomed when it came to court administration, criminal law, rules of evidence, contract and land laws (Chevallier-Govers, 2010 & Dusuki, 2002). Over time, the influence of Malay customary law and Islamic law receded, only to be
replaced by British Civil Courts, guided by common law juristic principles and practice (Chevallier-Govers, 2010 & Dusuki, 2002). The power of Britain’s common law precedence in Malaysian legal decisions and considerations was cemented through the passing of the Civil Law Act in 1956 (Dusuki, 2002 & Malaysia, 2006e). The wording of Section Three declares Malaysian Courts will apply the British Common Law and rules of equity, and it will act as the benchmark standard if Malaysian Courts do not develop their own precedence or statutory provisions (Dusuki, 2002 & Malaysia, 2006e). This declaration of Britain’s enduring primacy in Malaysia’s legal precedent and procedures flowed into the constitution and the dual Shariah and civil legal systems that remain in Malaysia today. The subsequent 1957 Malaysian Constitution (Malaysia, 2010) legally enables the concurrent civil and Islamic justice systems through declaring Islam as the religion of the Federation, along with freedom to practice other religions (Article 3(1)), plus the ability of religions to manage their own affairs and establish institutions to do so (Article 11(3)). This results in the Malaysian Shariah and Civil Court systems having clear legal demarcations, remits and judicial authorities, governed by the Malaysian Federal Constitution and State Syariah Codes and Enactments (Malaysia, 1996, 2006b, 2006c, 2006d, 2010).

Laws relating to children in Malaysia followed a similar pattern when it came to British and geopolitical influence and guidance on their development. Geopolitical agreements like the Straits Settlements, and significant events like World War Two, the Japanese occupation, the evolution of the Malay nation from a union into a Federation, and women’s entry into paid work, all impacted on how law related to children evolved to address social development needs (Dusuki, 2002 & Nini Dusuki...
2015b). Figure 2.2 outlines the chronology of laws relating to children, in what is now known as the Federation of Malaysia. Primarily, what this list mirrors is the evolution of laws relating to children in the United Kingdom (Dusuki, 2002). The evolution of children’s protection and treatment by the legal system in the United Kingdom eventually found its way to British Malaya and thence Malaysia, where it was adapted to fit the local context. As British Malaya moved towards independence, British common law legal expectations and the UDHR were in the minds of those involved and can be seen in the resultant Malaysian Constitution and laws that strategically support it, such as the Civil Law Act, 1956 (United Nations, 1948; Dusuki, 2002; Chevallier-Govers, 2010; Tun Abdul Hamid Mohamad, as cited by Abdul Rauf, 2015; Malaysia, 2006e; Malaysia, 2010). A few decades later, following the release of the UNCRC (United Nations, 1989) and Malaysia ratifying it in 1995 (Nini Dusuki, 2015a, chapter 3), domestic legislation towards children’s treatment shifted alignment away from British law towards the United Nations’ child rights expectations and this is where it sits today.

The most significant pieces of law for this research are the 1947 laws relating to the establishment of a dedicated Juvenile Court, and the Children and Young Person Act. These acts linked the newly created Malaysian Department of Welfare (1946) to a dedicated Juvenile Court, protectors (social welfare officers) and the use of ‘approved schools’ and ‘advanced approved schools’ to address delinquency (Dusuki, 2002). These acts were preceded by government appointed committees, who borrowed heavily from the United Kingdom, particularly when it came to the schools, modelled on Borstals Institutions which served as a crime prevention strategy for wayward youth in the United Kingdom and permeated the British
<table>
<thead>
<tr>
<th>Year</th>
<th>Malaysian Law</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1826</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; Charter of Justice (joining of Malacca and Singapore with existing Penang agreement)</td>
<td>British Common Law into all three Straits Settlements</td>
</tr>
<tr>
<td>1922</td>
<td>Children Enactment (Federated Malay States)</td>
<td>Pre-Malayan Union (1946), these acts focused on children’s employment conditions and prevention of cruelty.</td>
</tr>
<tr>
<td>1927</td>
<td>Children Ordinance (Straits Settlements)</td>
<td>They reflected four acts passed in Britain since 1889 explicitly addressing cruelty to children and the establishment of a British Juvenile Court (1908).</td>
</tr>
<tr>
<td>1932</td>
<td>Children Enactment (Johor, Kedah)</td>
<td></td>
</tr>
<tr>
<td>1947</td>
<td>Children and Young Persons Act &amp; Juvenile Court Act</td>
<td>These acts focused on protection of working children and cruelty to children. It also saw the establishment of a dedicated Juvenile Court. This Juvenile Court Act also introduced and empowered approved schools, Probation Officers and the ability of the court to bring ‘child beyond parental control’ under State control.</td>
</tr>
<tr>
<td>1966</td>
<td>Children and Young Persons Employment Act</td>
<td>Employment conditions and protection of children in the workforce.</td>
</tr>
<tr>
<td>1973</td>
<td>Women and Girls Protection Act</td>
<td>Laws relating to sexual and social behaviour</td>
</tr>
<tr>
<td>1984</td>
<td>Child Care Centres Act</td>
<td>Regulation and supervision of the growing number of child care centres through women’s increased workforce participation.</td>
</tr>
<tr>
<td>1991</td>
<td>Child Protection Act</td>
<td>State intervention and services coordination on child abuse and neglect.</td>
</tr>
<tr>
<td>2015</td>
<td>Child Act Amendments</td>
<td>A series of amendments to better reflect the expectations of the UNCRC and Malaysia’s social and legal development.</td>
</tr>
</tbody>
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Figure 2.2: Chronology of Child Related Malaysian Law (Adapted from Dusuki, 2002).
2.7 Theoretical Framework

The theoretical framework of this research is maqasid al-Shariah. The stratified framework provided by Islamic scholars from the fifth to the eighth Islamic centuries and finalised by Abu Ishaq al-Shatibi (d. 1388 CE) defines and prioritises Islamic values, drawn from the Quran and Sunnah, that ensure a balanced and functional Islamic society (Auda, 2007 & 2008; Kamali, 1999, chapter 13 & 2008; see Figure 1.1). While using the Islamic juristic deductive process of *usul al-fiqh*, Islamic scholars are guided by the maqasid al-Shariah framework in defining values that are essential (*daruiyyat*), complementary (*hajiyyat*) and embellishments (*tahsiniyyat*) in their considerations (Auda, 2007 & 2008; Kamali, 1999, chapter 13 & 2008). Most important are the ‘essential’ values, namely decisions and laws that hierarchically preserve religion, life, intellect, lineage and property (Auda, 2007 & 2008; Qadir & Sultan, 2013; Kamali, 1999). Importantly, according to Kamali (1999), Abu Ishaq al-Shabtibi also promoted reflection upon these values to ensure decisions taken under their authority were what the Lawgiver intended and met an overarching philosophical desire to create and maintain Islamic society with justice (*qist*), mercy/compassion (*rahmah*) and education of the individual (*tahdhib al-fard*), primarily to achieve the virtue of God’s consciousness (*taqwa*) as its reason for being (pg. 396).

Contemporary leading Islamic scholars of the maqasid al-Shariah doctrine, such as Jasser Auda, Mohammad Hashim Kamali and Imam Feisal Abdul Rauf, not only speak of the philosophical consciousness of maqasid al-Shariah, but also locate it into deductive decision-making, which is important to this research. Reflecting on wisdom of the attributed architects of the maqasid al-Shariah, they encourage it to be
kept alive in contemporary decision-making and not to be considered a distant lofty philosophy that is disconnected from the current world (Abdul Rauf, 2015; Auda 2007 & 2008; Kamali, 1999, 2008, 2016a, 2016b & 2017). Moreover, its meaning and purpose goes beyond legal scripts and into a state of consciousness of God’s will to be constantly striving for knowledge and bringing good to humanity, human development and well-being (Auda, 2007 & 2008). According to Imam Feisal Abdul Rauf (2015), the early Islamic scholars developed the maqasid to act as positive corollaries to the Hudud crimes in Islam (pg. 27). The essential maqasid serves as tangible positive objectives drawn from the Quran and Hadith that stand in direct opposition the *Hudud Allah* (limits of God), which are the worst of human behaviours before God (pg. 27).

<table>
<thead>
<tr>
<th>Maqasid al-Shariah (Objectives of Shariah)</th>
<th>Hudud Allah (Limits of God)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protection of life</td>
<td>Murder</td>
</tr>
<tr>
<td>Protection of religion</td>
<td>Taking up arms against the community of Muslims (treason)</td>
</tr>
<tr>
<td>Protection of mind</td>
<td>Drunkenness</td>
</tr>
<tr>
<td>Protection of family</td>
<td>Adultery</td>
</tr>
<tr>
<td>Protection of property</td>
<td>Theft</td>
</tr>
<tr>
<td>Protection of honour</td>
<td>Slander</td>
</tr>
</tbody>
</table>

Figure 2.3: Maqasid al-Shariah and Hudud Allah Compared (Abdul Rauf, 2015, pg. 27)

The addition of honour in the essentials is considered as something that only “a minority of opinion” include (Kamali, 2017) and is not agreed upon, as universally as the top five essentials, which are most frequently represented in publications on maqasid al-Shariah, reflecting the work of eminent Islamic scholars such as Al-Juwayni, Al-Ghazali and Al-Shatibi (Auda 2007 & 2008; Kamali, 1999, 2008,
The addition of honour (ird or karamah) is attributed to Al-Qarafi, the 13th century CE Berber jurist, a few centuries after the establishment of the first five essentials and reflects thinking around a maqasid to address the hadd of slander (Abdul Rauf, 2015, pg. 27). In modern debates about the essential five or six, it is contended they need to be expanded to be more reflective of wider values, including rights, virtues and science (Abdul Rauf, 2015). Notwithstanding the debates, the top five are universally established as the essential maqasid al-Shariah and are present to promote and achieve justice for Muslims (Abdul Rauf, 2015, pg. 28 & Kamali, 2016a).

A fundamental part of making maqasid al-Shariah accessible is the use of rational logical deduction, in the tradition of Aristotelian thought and the Islamic juristic principle of ijtihad (independent reasoning). Mohammad Kamali (2017) provides good examples of how science and maqasid al-Shariah can combine and reach a conclusion that is of benefit to the Islamic ummah. Using the modern science of DNA analysis as an example, this process can resolve issues around paternity and identification of deceased persons, which supports the maqasid al-Shariah objective of lineage. Another example is the use of scientific breath analysis machines to definitively prove the consumption of alcohol, which relates to the maqasid al-Shariah’s objective of mind (Kamali, 2017). These examples use a logical deductive process, supported by scientific evidence, to reach a conclusion that effects individual decision-making to achieve maqasid al-Shariah. While this process and the decisions appear logical and understandable, there are assumptions of a universal rationality and epistemological positioning. Universal expectations can be tested
within contexts or nations that are influenced by customs and traditions (urf) and social and legal interests (maslahah), which are incongruent with the acceptance of scientific evidence or have a strict interpretation of Shariah.

Jasser Auda (2007) makes suggestions towards enabling a better compliance with the maqasid al-Shariah and resolving the problem of literalist interpretation of the Quran and its subsequent impact on nations and individuals. Auda (2007) applies systems theory to unpacking and reconceptualising the Islamic jurist practice of usul a-fiqh, which he believes needs to be modernised to meet 21st century CE concerns. He believes the effectiveness of any system is measured by the fulfilment of its purpose, and maqasid al-Shariah is the purpose of usul al-fiqh (Auda, 2007 & 2008). This focus on purpose is important because it constructs meaning and functionality of the system’s application, which is described as including cognition, wholeness, openness, interrelated hierarchy and multidimensionality (Auda, 2007, pg. 54-55). These, when led and defined by maqasid al-Shariah, give the usul al-fiqh methodology and analytical framework operative truth and meaning. The central tenet of Auda’s systems thinking is the acknowledgement of the cognitive nature of human systems, specifically the relocation of fiqh from the authority of ‘revealed knowledge’ to ‘human cognition of that revealed knowledge’ (2007, pg. 195). This would then allow for a clear demarcation of shariah from fiqh, and naturally contribute to shifts in ontological, epistemological and hermetic positions effecting urf (customs/community knowledge) and the Canons of Islam. This is Auda’s central pivot point on his system theory application, namely removal of fiqh and urf from the literal world of revealed shariah into the cognitive space of human experience which, in turn, will lead to human development and the application of law and social
expectations based on the ontological space of now, rather than of ancient expectations. Notably, Auda (2007) relocates the conceptual *usul al-fiqh* juristic principle of *urf* to a worldview, rather than on the nation state or community level, which is in line with al-Shariah’s positioning (pg. 196). One functional and systemic tension point, perhaps even an entropy factor, is Auda’s reliance and assumption of rational human cognition, which naturally brings in ethnocentrism, epistemological and ontological positions in decision making. Auda (2007) locates himself in the modernist tradition of structure and function of the state and the greater good of human kind under the authority of universal truths and grand narratives (chapter 2). Auda’s systems thinking is a natural fit for modernism but can be problematic because of the assumptions of reliable human interpretations and the confidence it implies on getting it right. Mariya Ali’s (2014) reflections on child sexual abuse and honour ideology are a relevant example of where work remains to be done. However, Islamic scholars would argue this is where a consciousness of faith and trust in Islam’s truths, merged with the maqasid al-Shariah objectives of justice, compassion, and education of the individual to realised God’s message resonate and philosophically underpin engagement with stakeholders and individual’s decision-making. Moreover, the Islamic juristic principle of the presumption of continuity (*istishab*) supports this by giving a consistency to what is presumed and assumed within Islamic law and society.

The suitability of maqasid al-Shariah to guide and frame this research was based on the interpretive clarity the framework provides to understanding the expectations and governance of Islam and Muslims, particularly in logical deductive decision-making processes. An essential fact is that the source of maqasid al-Shariah
is the Quran and Sunnah, and these set the values and expectations of Islamic society (Auda, 2007 & Kamali, 1999). The presence of Allah, Islamic truths and meaning are fundamental to how Muslim decision-making is shaped and how societies function and regulate. This can be appropriately acknowledged within a civil law process to achieve the best interest of a Muslim beyond control child because principally both the Malaysian civil and Syariah legal systems want children to have healthy and productive childhoods to become participatory citizens.

2.8 Conceptual and Operational Framework

The integration of maqasid al-Shariah into the research’s case study method worked well. The maqasid provided an understandable framework to establish knowledge bases, test during field research and filter findings to establish discoveries and recommendations. The clear objectives of justice, compassion/mercy, education and a consciousness of God’s virtues (Kamali, 1999) were used during literature reviews, data collection, interview questions and data analysis. Importantly the use of maqasid al-Shariah as a theoretical base enabled the researcher to take several perspectives during the research process. It enabled an objective holistic view of the research and helped with literature reviews, because maqasid al-Shariah sit above nations and national law and serves equally as a philosophical principle and a practical objective. Discovering, reading and critiquing relevant material from this principled and practical perspective brought consistent clarity to the process. Furthermore, it was a natural fit to historically, politically and socially contextualise the research, which is a discipline requirement within the case study method (Yin 2009 & 2011; Stake 1995 & 2005).
The use of the maqasid during the field research was helpful in shaping tools and setting interview objectives. The objective of justice and compassion are fundamental to research ethics and protection of respondents, particularly vulnerable children and families in conflict. While not explicitly defined as achieving maqasid al-Shariah, implicitly the principles were embedded into research tools, ethical considerations, protection of respondents and choice of language with vulnerable respondents. In more clearly represented terms, the maqasid were present in interview themes and purposeful questions put to respondents and informants. The subsequent coding of the data collected from the field work was filtered and analysed with a consciousness towards maqasid al-Shariah.

Finally, the discussions and recommendations generated by the research were practically linked to achievable actions through the capacity and functionality of maqasid al-Shariah’s aspirations in logical deductive decision-making (Kamali, 2017, 2016a & 2016b). A purpose of the research was to explore the viability of connecting ancient wisdom with current and practical examples. This research confirms maqasid al-Shariah as a theoretical perspective that can be conceptualised and utilised to address a contemporary phenomenon, such as the treatment of Malaysia beyond control children.

The conceptual framework of the research is illustrated in Figure 2.4.
Figure 2.4: Conceptual Framework Diagram
2.9 Conclusion

Beyond control children are subjects of a historical journey that is heavily influenced by Latin-Christian philosophy and British colonial law that was pervasive across their colonies. Malaysia remains firmly linked to this environment through the passing of law that cemented British common law precedence into legal process (Dusuki, 2002 & Malaysia 2006e), just prior the 1957 Malaysian Constitution (Malaysia, 2010). This decision has kept Malaysia’s treatment of recalcitrant children within the scope of colonial Britain’s practices and expectations as reflected in the continuance of section 46 of the Child Act (Malaysia, 2001 & 2015), regardless of the pivot towards the UNCRC in 1995 (United Nations, 1989 & Nini Dusuki, 2015a, chapter 3). However, Britain has moved away from incarcerating youth in Borstal Institutions (Warder & Wilson, 1973) and amended its law and practices to better reflect the aspiration of the UNCRC (United Nations, 1989), whereas Malaysia has not. Malaysia remains faithful to the incapacitation and recalibration of children through removing their liberty and placing them into probation homes and approved schools to correct their behaviour (Malaysia, 2015 & Nini Dusuki, Nazeri & Ahmed, 2013).

Maqasid al-Shariah and Islamic justice practices offer an alternative to the current treatment of beyond control children. Ancient Islamic wisdom guides the inclusion of mediation-based conflict resolution practices (sulh), which are aimed at keeping families and communities together, rather than isolating them and using incapacitation as a punishment (Al-Ramahi, 2008; Othman, 2007; Fassin, 2016b). Human rights aspirations and Islamic jurisprudence are compatible when it comes to wanting the best for children who are in conflict with their family or social propriety
The emphasis is placed on respecting community standards and expectations that are present in a harmonious and peaceful Islamic society, reflected in maqasid al-Shariah’s prioritisation of the essential values, namely the preservation of religion, life, intellect, linage (family) and property (Auda, 2008; Qadir & Sultan, 2013; Kamali, 1999; Ibn Khaldun, 1958).

Maqasid al-Shariah’s is a useful framework when examining and researching the treatment of beyond control children because of the clarity it brings to a phenomenological concern that is equally nested in history and the aspirations of modern Malaysia. Maqasid al-Shariah’s guidance transcends these and provides a philosophical interpretive lens and a practical objective, thereby bringing it into the lived experiences of DSW stakeholders and beyond control children’s lives and circumstances.
CHAPTER 3 – METHODOLOGY

3.1 Introduction

This research was typical of most scientific inquiries, where the researcher was interested in a topical concern and wanted to know more about it (Stake, 2005, pg. 448). For this research, it was a concern about children in custody in Malaysia and what was in place, or being developed, towards keeping them in families. The researcher brought to this concern a history of working on this type of phenomenon in various settings globally and was familiar with international standards and expectations towards children’s treatment within UNCRC (United Nations, 1989) and post-colonial nation state frameworks. Furthermore, the researcher was familiar with the challenges and points of convergence and divergence with UNCRC (United Nations, 1989) aspirations and their expectations within post-colonial sovereign states, where Islam is the dominant or minority religion (O’Leary & Squire, 2012; Squire & Hope, 2013; Hutchinson, et. al., 2014).

Contextualising any research is important and needed to locate any initiatives (Yin, 2011). Building and contextualising the researcher’s knowledge base of Malaysia, her legal processes and the treatment of children was the starting point of funnelling down to a research design that would inquire on a specific phenomenon. This took the form of a literature review of previous research and publications about children in custody in Malaysia, the status of Malaysia’s compliance with UNCRC (United Nations, 1989) expectations and Malaysia’s social, legal and political history. Emerging from this process was beyond control children and their entry into and out of the Malaysian child protection system and the current desire to find

Beyond control children’s treatment presented as a specific phenomenon that was not clouded by a guilt or innocence determination following a criminal charge, instead, childhood behavioural concerns were being addressed with custodial corrective practise (Malaysia, 2001 & 2015). Parents and guardians are the motivators for the state to act, and the state responds with policies and practices that are historically contextual and within social expectations that surround the parent child relationship in Malaysia. The potential for other solutions within these contextual and expectant frameworks formed a foundational epistemological position of the research.

The field work for this research was conducted between January and July 2017. Preparation of this phase was shaped through literature reviews, research clearance by the USM Centre for Islamic Development Management Studies (ISDEV), securing access to the DSWP with DSWKL authorisation and USM Human Research Ethic Committee (HREC) approval. The research tools, data base frameworks and a primary respondent contact list were also prepared. Over the course of the research, once understanding of respondents’ willingness and access to custody sites was clarified, the case study model expanded to include interviewing beyond control children in custody as a unit of analysis. Capturing data from the DSWP and their associates, and a single in-depth case review were the two original units of analysis. The exact number of beyond control children in custody was not
known at the beginning and ethical considerations were in the researcher’s mind. However, after gaining a clearer understanding of the DSWP and establishing a solid research rapport, access was facilitated, possibilities realised, and beyond control children’s inclusion represented a significant contribution to the findings. This also reinforced the benefit of flexibility, which is inherently present in case study models, that can accommodate iteration and creativity to achieve research objectives (Yin 2009 & 2011; Stake 1995 & 2005).

3.2 Research Design

The purpose of this research was to investigate and analyse the treatment of Muslim beyond control children in Penang, with a focus on determining possible actions to prevent their entry into the existing justice and protection system, and to promote their early release from custody or surveillance orders by the state. During the development of the research idea, maqasid al-Shariah’s theoretical concepts of fairness, justice and consciousness of God’s revelations in decision-making resonated with the research’s objective, especially for Muslim beyond control children and their families. The research’s design needed to best demonstrate and articulate beyond control children’s treatment and traversal of the system, while concurrently elucidating interpretation and meaning for those who are subjects of it and those interested in this phenomenon. Guided by the qualitative case study scholarship of Robert Yin (2009 & 2011) and Robert Stake (1995 & 2005) it was decided that the most appropriate research design was a deductive qualitative research model, using a single case study design, with three embedded units of analysis (Yin, 2009).
Considering the objective of this study was to analyse an existing phenomenon as it is happening in the real-world, the suitability of a qualitative discipline using a case study design primarily defined by Robert Yin (2009 & 2011) was considered appropriate. Yin (2011) promotes the use of the qualitative research discipline because it focuses on perspectives and decision-making, which are localised and contextualised, and require explanation beyond statistical analytic inquiry (pg. 8). The number of beyond control children is routinely captured by DSWKL and

Beyond control children’s treatment and related decision-making is nested within Malaysian historical, social and political expectations and operationalised by humans with individual values, interpretations and meanings. Yin (2009) states this is the ‘main topic’ or ‘context’ of the contribution made by a case study to deepen understanding of (pg. 46). Drawing out these hermeneutic applications and interpreting them in the context of the best interests of beyond control children was an epistemological position of this research. This position is supported by the Malaysian Government and DSWKL who are seeking alternatives to custody and place the best interests of children as the highest objective of actions (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a; Child Rights Coalition Malaysia, 2012; Malaysia, 2001 & Department of Social Welfare, 2016).

Phenomenological studies inquire into human events as they are experienced in live settings, and case studies analyse the phenomenon using the context in which they occur (Yin, 2011, pg. 17). Both Robert Yin (2009 & 2011) and Robert Stake (1995 & 2005) believe a case study approach to a phenomenological event, such as beyond control children, is suitable when the aim of the research is to learn from a single case (Stake, 2005, pg. 443 & 451) and something that is ‘real’ and not abstract or hypothetical (Yin, 2009, pg. 32). In this sense, Yin (2009 & 2011) and Stake
(1995 & 2005) promote a case study that has the capacity to build knowledge and can provide an understandable example to contextualise meaning in a broader situational application. R. Johansson (2003) takes this further and believes case studies, through their historical location, act not only as mechanisms to shine light on a current phenomenon, but also serve as a historic reference point in the future, like an artefact (pgs. 5 & 11). The choice of Penang as the case study for this research met Yin and Stake’s criterion; it is “representative or typical” (Yin, 2009, pg. 48) of beyond control children’s treatment and decision-making in Malaysia and therefore can contribute to a broader contextual understanding. Beyond control children are processed by DSWP and children’s courts in Penang, complete with DSWP managed custodial sites at Asrama Akhlak, Paya Terubong (probation home) and Sekolah Tunas Bakti, Teluk Air Tawar (approved school). Moreover, the legislative and procedural direction and connection between DSWKL and DSWP is established and functions through application of the Malaysian Child Act (2001 & 2015), training and development plans, standard operating procedures, DSWKL monitoring of DSWP and the EJKM computer system (Respondent 7). Beyond control children’s treatment is made uniform across Malaysia through these systemic and procedural frameworks (Respondent 7; Dr. Nini Dusuki, personal communication, June 14, 2017; S. Sekaran, personal communication, June 14, 2017), resulting in the ability of Department of Social Welfare personnel to transfer between Malaysian States (Respondents 2, 8 & 9).

Within the case study site of Penang, three data collection units were identified and used; Yin (2009) calls these “embedded units of analysis” (pg. 46). The three embedded units were: 1) purposefully identified and selected DSWP employees and
associates who operate the existing national system; 2) beyond control children who were in custody; 3) review of a single Muslim beyond control child’s case. The role of these units was to bring to the research the contemporary events and considerations that are taking place daily for beyond control children and those responsible to the system. Each of the respondents in these units brought their own perspective and interpretation of events and contributed to understanding the context in which they were located. Whenever possible, their contribution to the research was triangulated and cross-checked with other information sources, literature and personal interviews with key informants.

While Robert Yin (2009 & 2011) and Robert Stake (1995 & 2005) are both recognised as proponents of the qualitative case study research model, they differ in their philosophical positioning towards constructing meaning from the process. Stake self-identifies as a constructivist, believing knowledge is socially constructed (Stake, 2005, pg. 454). Yin is regarded as a post-positivist; reality is objective and predictable through causal relationships (Boblin, Ireland, Kirkpatrick & Robertson, 2013). Boblin and colleagues (2013) examined Stake’s and Yin’s publications on case studies, and analysed their assumptions from ontological, epistemological, axiological and methodological principles (pg. 1269). They assert that Stake is willing to accept the subjectivity of reality and promotes a close connection with research respondents to achieve a deep understanding of their experiences and to acknowledge their value-laden bias in analysis (pg. 1269). Conversely for Yin, Boblin and colleagues (2013) assert his case study paradigm is focused on the causal relationship of reality, that it is better the researcher maintains an objective independent distance because researcher bias needs to be recognised and contested,
and the logic of a theory’s validation, reorientation or dismissal are central to analysis (pg. 1269). Both philosophical positions have merit and enter the space of developing and deciding upon whether an inductive or deductive theoretical model is best suited to elucidate meaning from the research being undertaken (Walter, 2006a, pg. 13). Focusing on a qualitative case study research model, Stake’s approach is shaped to accommodate a high degree of flexibility and iteration in collecting and interpreting data without the constraints of theory building or conceptual frameworks, favouring an inductive model (Stake, 2005; Boblin, et. al., 2013; Baxter & Jack, 2008). Yin’s approach of setting an epistemological location while recognising and addressing the reliability and validity of interpretive findings in scientific disciplines favours a deductive model (Yin, 2009 & 2011; Johansson, 2003). Stake (2005) believes in not restricting the researcher and letting them be guided and informed by the process through continual reflection and reinterpretation of meaning (pg. 450). Furthermore, Stake (2005) believes that some qualitative researchers restrict themselves from searching for causal explanation of events rather than perceiving them because focusing on causes is simplistic (pg. 449). Case studies should be a focused description of a sequence of coincidences and the interrelated and contextually bound patterns of behaviour for those connected with it (Stake, 2005, pg. 449). In the case of beyond control children in Malaysia, Stake would argue that a tight focus on cause and effect does not elaborate the nuances of the operators of the system and their interpretation of their role and how they reach decisions. Conversely, Yin would argue that cause and effect is integral to the operation of an imposed system and interpretive meaning comes from being in the system and that decision-making is relational. The researcher is best served to have an epistemological location to act as a frame of examination and to allow for
transparency for those associated with the research process (Yin, 2011, pg. 18). Even with these philosophical differences, there are many areas where Yin (2009 & 2011) and Stake (1995 & 2005) agree, overlap and reiterate the required discipline of qualitative case study methods to establish their reliability, such as in research design, triangulation, sampling methods, data analysis, and the phenomenon being researched to be an active real-life example.

The study of a phenomenon, using a qualitative case study method, is also known as a ‘descriptive case study’, broadly defined as a study that describes an intervention in its current context (Baxter & Jack, 2008; Yin, 2011; Gabb, 2009). Achieving a description of events normally involves a process of practice inquiry, which means connecting with people who operate or are subject to an established system designed to address a phenomenon. This is the case for the DSWP, beyond control children and their families or guardians. An example of a descriptive case study and its multiple challenges was research conducted on understanding how women with Parkinson’s disease deal with menstruation and gynaecological issues (Tolson, Fleming & Schartau, 2002). The research used cross-case comparisons and explorations with 20 women recruited from four outpatient clinics and 218 general practices in Scotland, United Kingdom. The research was challenged by the degenerative cognitive capacities of respondents, who were all at various positions on the Parkinson’s disease continuum. To overcome this, Tolson and colleagues (2002) needed to be creative, remain flexible, and empower respondents to tell their story in their own way. The result was the use of respondent diaries and creative writing means, such as poetry and personal interviews, to elucidate meaning of each respondent’s experience to articulate their contribution to the research’s aim (pg.
The use of a qualitative descriptive case study method achieved reliable outcomes when matched with a triangulation discipline and, importantly, let respondents contribute meaningfully within their own capacities (Tolson, et. al., 2002). Researcher-respondent rapport and a perceived equality of power was an important part of the process and is a significant factor in research directed at finding meaning in people’s interpretation of events or practices (Gaglio, Nelson & King, 2006; Richardson, 1994).

Prior to settling on the suitability of a descriptive case study model, consideration was given to a participatory action research (PAR) model because of its foundational similarities to qualitative phenomenological case study models. Development of PAR is attributed to Kurt Lewin (1890–1947 CE), a Prussian psychologist who believed the participation of employees in workplace operations would improve results (MacDonald, 2012, pg. 37). A central function of PAR is the meaningful participation and equalisation of power between researcher and research respondents in the design, operation, reflection and interpretation of research to meet jointly-agreed objectives (Fassinger & Morrow, 2013 & MacDonald, 2012). PAR is rooted in bringing power to those who are subjects of research and to make them active in the process of change or system review. The researcher in this process acts as a coaching ally of established momentum and brings in skills and expertise to refine energies, elucidate meaning and to bring a research discipline to establish reliable evidence-bases as proof. PAR is a popular method in community development to address social injustices and power imbalances, primarily through relocating the researcher from being a critical external cause and effect observer, to being embedded in the change process and acting as critical contributor (Fassinger &
Morrow, 2013 & MacDonald, 2012). PAR and case study methods are both qualitative research methods that aim to interpret and bring meaning to the subjective experiences of research participants on a current phenomenon. The main challenge for this research and the final choice of a case study method, lay in time constraints, objectives and the capacity of a single researcher to bring together all stakeholders and secure their active participation in the PAR process. The PAR method is better suited to a research team than an individual researcher and can take years to formulate, operationalise, measure and report upon.

Criticisms of qualitative case study models are typically identified as allowing the risk of researcher bias and lacking systematic procedures application, resulting in data overload, leading to a limited capacity to provide a basis of scientific generalisation in findings (Yin, 2009, pgs. 14 & 15). Both Yin (2009) and Stake (2005) respond to these criticisms through positing that the reliability of case study findings is achieved by adherence to a disciplined research design, triangulation and an obligation of the researcher to display dedication to analytic query during the process and in the reporting of their findings. Properly accomplished, the research can achieve the capacity to make “analytic generalisations” (Yin, 2011, pg. 101 & Gabb, 2009, pg. 49) that are supported by evidence-based constructed arguments which are sound and “resistant to logical challenge” (Yin, 2011, pg. 101). This research adopted the discipline described by Yin (2009) through having a research protocol and design that declared maqasid al-Shariah as the theoretical lens and a conceptual framework that supported a case study method. This declaration was made and shared with all research respondents in research documentation and formed part of the interviews structure. The research adopted a disciplined process of
analytic query using ‘constant comparisons, negative instances and rival thinking’ (Yin, 2011) during the process of data ‘compilation, disassembling and reassembling’ (Yin, 2011). These all served to bound the research and declare a clear purpose, to avoid data overload and enable a clear strategy of knowledge building and analysis, which is often noted as being needed to not only address typical criticisms but to also support validation of findings (Yin, 2009 & 2011; Stake, 2005; Brown, 2008; Baxter & Jack, 2008; Johansson, 2003; Boblin, et. al., 2013; Gaglio, Nelson & King, 2006).

3.3 Research Scope

Bounding research is an important element of providing focus and enhancing the reliability of findings, particularly in qualitative case study models (Yin, 2009 & 2011; Stake, 2005; Brown, 2008; Baxter & Jack, 2008; Johansson, 2003; Boblin, et. al., 2013; Gaglio, Nelson & King, 2006). Bounding not only provides a declaration of a specific phenomenon to be inquired upon, it also includes setting an epistemological position, primarily reflected in the research’s objectives and questions, whether the research will be inductive or deductive, and being explicit about who, what and how research data will be collected, analysed and presented. The combination of these elements reveals a clear discipline to the process and helps to build reliability in the findings (Yin, 2009 & 2011; Stake, 2005 & 1995). Setting boundaries also prevents researchers from being overloaded with data and gives them appropriately-sized lenses through which to focus and to be purposeful in what they seek to better understand (Baxter & Jack, 2008).
The use and application of maqasid al-Shariah’s philosophical framework provided by ancient Islamic scholars, as articulated by leading contemporary Islamic scholars (Kamali, 1999 & 2012; Auda 2007 & 2008; Abdul Rauf, 2015), was critical to this research’s scope and boundaries. The clear interpretation and articulation by Kamali (1999, pg. 396, 2008, 2016a, 2016b & 2017) and Auda (2007 & 2008) provided the research with a moral lens and practical guide to its conceptual design, methodological application, data analysis and findings interpretation. Fundamental to this research was for the DSW’s response to Muslim beyond control children to be with justice, compassion and education to achieve the virtue of God’s consciousness, which is the overarching philosophy of maqasid al-Shariah (Kamali, 1999, pg. 396).

This research’s scope was focused on Muslim beyond control children who are subject to the existing DSWP and court for children process in Penang, under the authority of DSWKL and Ministry of Justice legal and policy procedures (Malaysia, 2001 & 2015). More specifically, the research focussed on the existing strategies to prevent their entry to the system and promote their early release from it. Beyond control children are brought into contact with the five district DSWP offices and the courts for children by their parent(s) or guardian(s). Male beyond control children are placed into custody at the DSWP managed probation home (Asrama Akhlak, Paya Terubong) or approved school (Sekolah Tunas Bakti, Teluk Air Tawar). Dedicated Malaysian government staff at the DSWP, courts for children, probation home and approved school play a significant role in the decision-making towards beyond control children and fall within the scope of the research.
Beyond control children’s participation in the research was achieved through interviewing those in custody and conducting a single in-depth case review. The inclusion of children’s voices in a phenomenon that affects them is powerful and consistently brings an alternative perspective and a deeper sense of meaning (Mackenzie, 2015 & Berry, 2009). The research was not designed with a gendered lens. Female beyond control children identified and processed in Penang are not in custody in Penang and were not part of the research, due to the geographical limitation of Penang State boundaries. However, female children are represented in statistical records (see Table 1.4), and their treatment is consistent with established Malaysian and DSWKL law, policies and procedures towards beyond control children (Malaysia, 2001 & 2015).

3.4 **Study Population**

The study population was bounded by the scope and focus of this research, namely the treatment of beyond control children in the Malaysian State of Penang. The government institutions that are legally empowered and responsible under the Child Act (Malaysia, 2001 & 2015) are the Department of Social Welfare and the court for children.

The primary Malaysian Government department responsible for beyond control children is the Department of Social Welfare Penang (DSWP). Their state administration is located at level 30 of the Komtar Complex in Georgetown, Penang. They have five district offices: Timur Laut (Georgetown); Barat Daya; Seberang Perai Utara; Seberang Perai Selatan; Seberang Perai Tengah. The DSWP is responsible for a range of child and family social welfare concerns, including beyond control children. The DSWP is responsible to staff development and maintaining
established DSWKL standards. The central Komtar office does not hold direct case management responsibilities (Respondent 7). Located within the management structure are section chiefs and specialist resources to support relative roles and responsibilities in the five district offices. Beyond control children come under the responsibility of the Chief of Children’s Division.

Courts for children are in each of the five districts of Penang. Magistrates deal with beyond control children applications among other matters such as criminal charges against children and child protection legalities (excluding child removal, fostering and adoption). They are supported directly by the DSWP representatives from the five district offices, particularly the probation officers regarding beyond control children. DSWP Probation Officers are legally responsible under the Child Act (Malaysia, 2001 & 2015) to make recommendations to the court for children during the assessment phase and to monitor court-imposed orders on beyond control children, including post-custody. Under the Child Act (Malaysia, 2001 & 2015), the magistrate is assisted by a roster of court advisors, who are drawn from civil society and act as independent persons the court can call upon to support decision-making in the best interests of the child (Respondents 1 & 6).

The DSWP manages and is responsible for two custodial facilities for children, which accommodate both children convicted of crimes and beyond control children under court for children orders. The two sites are the probation home (Asrama Akhlak) at Paya Terubong, Penang and the approved school (Sekolah Tunas Bakti) at Teluk Air Tawar, Butterworth. Both locations accommodate only male children.
A Board of Visitors sits within the governance structure of the approved school under authority of the Child Act (Malaysia, 2001 & 2015) and the Approved School Regulations (Malaysia, 2017). This board is responsible to review each child’s progress at the approved school and is the final decision-maker on a child’s release from the school (Respondent 18). The 15-member board is made up of individuals drawn from civil society and Malaysian Government Departments, such as police and education (Respondent 18).

3.5 Study Samples

The research adopted a non-probability sampling approach, using purposive and snowballing sampling techniques (Walter, 2006b, pg. 198 & Yin, 2011, pg. 88). The choice of this sampling approach and method was based on the case study design that was adopted to reach the research objectives. Case studies are primarily about elucidating and interpreting meaning from practitioners or those associated with an established process. Consideration was given to the application of a randomised survey, but this would have resulted in generalised findings and would not have suitably revealed practitioner’s interpretive meanings (Yin, 2001, pg. 88), which was fundamental to the research. The research sought to produce the most relevant and meaningful data to reflect beyond control children’s traversal of the DSWKL process in Penang and it was believed that using a non-probability sampling approach with purposive and snowballing sampling techniques was the best option.

After securing written approval for this research from DSWKL, adult respondent recruitment and identification came from respecting hierarchies within DSWP and the court for children through commencing communication at the top of
organigrams. This involved delivering a written letter of introduction which: introduced the researcher; University Sains Malaysia; the purpose of the research; confirmed DSWKL approval; and contained a research participant’s information sheet (Appendix B); sample questioning themes form (Appendix C) and a request for an introductory meeting. This approach proved successful and, following the first meeting, an understanding of the research’s intentions and process led to the DSWP and court for children compiling a primary list of research respondents. As the research evolved and an understanding emerged of where the most fruitful respondents might be located in the organisational structure, the researcher made further requests for contact details, which was accommodated by the DSWP. In the tradition of snowballing, respondents also nominated people who they thought would be of best interest to the research.

While the intention of connecting with child respondents was declared during relevant adult respondent interviews, to allow for research rapport to be built, interviews with children were purposefully left to later in the data collection phase. At the time of the data collection, the total number of beyond control children resident in the Penang probation home and approved school was seven. Only children aged between 12–17 years of age were requested for interview because this is the primary age group represented in both institutions (Malaysia, Department of Social Welfare Report: 2009, 2010a, 2011, 2012, 2013, 2014 & 2015a). Moreover, ethical considerations were given to the cognitive capacity of older children to engage in an interview process and interpret their circumstances and perceptions of their treatment. Depending on their age, children were invited for interview and given either the child assent form (Appendix D) or the research consent form
(Appendix A). It was continually reinforced their participation was not compulsory, and they would not get in trouble if they did not participate. Although the research was focused on Muslim beyond control children, for this unit of analysis it was considered useful to include non-Muslim children in the sample. The inclusion of their perspectives towards understanding and interpreting their processing, which is the same as for Muslim children except for the requirement of daily prayer at the mosque, proved beneficial to the study. The total number of beyond control children captured in this unit of analysis was eight, with one being non-Muslim.

Table 3.1: List of Child Respondents’ Ages and Interview Locations

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Age</th>
<th>Location of Interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>21</td>
<td>16</td>
<td>Approved School</td>
</tr>
<tr>
<td>22</td>
<td>16</td>
<td>Approved School</td>
</tr>
<tr>
<td>23</td>
<td>15</td>
<td>Probation Home</td>
</tr>
<tr>
<td>24</td>
<td>12</td>
<td>Probation Home</td>
</tr>
<tr>
<td>25</td>
<td>16</td>
<td>Respondent’s Home (Batu Ferringhi)</td>
</tr>
<tr>
<td>26</td>
<td>14</td>
<td>Approved School</td>
</tr>
<tr>
<td>27</td>
<td>16</td>
<td>Approved School</td>
</tr>
<tr>
<td>28</td>
<td>16</td>
<td>Approved School</td>
</tr>
</tbody>
</table>

Identification of the single case review respondent came through a combination of researcher experience, respondent rapport and willingness of the child and their guardian. Relevant research respondents were informed that the research was using a case study approach and needed to identify a single case for in-depth review. Three cases were initially identified, however, two were eliminated; one child was pending release and had only spent one month in custody and in the other case, the parents were from another state. The case selected best suited the criterion of the research, namely a late teen male Muslim child, who came from Penang and had been resident in both the probation home and approved school and had just been released by the board of visitors. He had experienced the whole custodial process, not a small part of
it and was of an age to have the capacity to reflect on it. Moreover, his parent or guardian was willing to discuss the circumstances that led to a beyond control child application and the subsequent DSWP response.

The tables below reflect the number of respondents interviewed and either their respective location within the governmental process that is applied to beyond control children or their role in the unit of analysis. In some cases, respondents were interviewed twice to reflect their relevance to the unit of analysis or to cross-check findings, particularly during the case review unit inquiry. The intention was not to capture all people involved in the beyond control process in Penang, because a case study design focuses less on generalised findings than on securing a purposeful sample that best reflects the lived experience of those involved and brings meaning to a process (Yin, 2011). The capacity of a single researcher to enable this within the time and financial constraints was also a factor for consideration. During the respondents’ interviews, particularly at the district offices, probation home and approved school, consistent similarities were frequently present in responses and indicated a saturation point on a specific avenue of inquiry.
Table 3.2: Unit 1 Respondents: Representative Malaysian Government Employees Who Operate the Beyond Control Child System in Penang.

<table>
<thead>
<tr>
<th>Location</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court for Children: Magistrate &amp; Court Advisor</td>
<td>2</td>
</tr>
<tr>
<td>DSWP (Komtar): Section Chiefs of Child Protection &amp; Psychology</td>
<td>2</td>
</tr>
<tr>
<td>DSWP (4 district offices): Probation Officers &amp; Psychologist</td>
<td>5</td>
</tr>
<tr>
<td>Probation Home (Asrama Akhlak): Warden, Deputy Warden &amp; Religious Affairs Officer</td>
<td>3</td>
</tr>
<tr>
<td>Approved School (Sekolah Tunas Bakti): Principal, Chairman Board of Visitors, Resident's Affairs Officer, Counsellor, Case Officer &amp; Religious Affairs Officer</td>
<td>6</td>
</tr>
</tbody>
</table>

Table 3.3: Unit 2 Respondents: Beyond Control Children in Custody.

<table>
<thead>
<tr>
<th>Location</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probation Home (Asrama Akhlak)</td>
<td>2</td>
</tr>
<tr>
<td>Approved School (Sekolah Tunas Bakti)</td>
<td>5</td>
</tr>
</tbody>
</table>

Table 3.4: Unit 3 Respondents: Beyond Control Child’s Case Review.

<table>
<thead>
<tr>
<th>Location</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent/Guardian (DSWP applicant)</td>
<td>1</td>
</tr>
<tr>
<td>Beyond Control Child</td>
<td>1</td>
</tr>
<tr>
<td>Court for Children: Deciding Magistrate</td>
<td>1</td>
</tr>
<tr>
<td>DSWP (Timur Laut): Probation Officer who managed case</td>
<td>1</td>
</tr>
<tr>
<td>Probation Home (Asrama Akhlak): Warden who oversaw custody and reporting</td>
<td>1</td>
</tr>
<tr>
<td>Approved School (Sekolah Tunas Bakti): Principal who oversaw custody and reporting Case Officer of child</td>
<td>2</td>
</tr>
</tbody>
</table>

3.6 Data Collection

Methodologically, the research was underpinned by qualitative traditions of investigating primary and secondary information sources to elucidate meaning from data gathered through stakeholder in-depth interviews and procedural policy and
practice document review (Ezzy, 2006). Considering the three embedded units of analysis for this DSWP case study were purposefully selected employees and associates operating the system, beyond control children in custody, and a single child who was subject to the system, there was a need for flexibility, being age appropriate and to fit in with respondents’ custodial, work, and life patterns.

Cognisant of the need for triangulation and critical analysis, augmenting these respondents’ interviews were independent key informants’ interviews conducted with those identified as having useful knowledge around beyond control children in Malaysia, Islamic law and philosophy or child focused Malaysian legal expertise. In total, the research captured 28 research respondents and six key informants.

3.6.1 Interview Process

In-depth interviews were the primary information source method of this research. In-depth interviews are a cornerstone of qualitative case studies and ensuring they are purposeful, have structure and elucidate meaning of a process is crucial (Travers, 2006 & Stake, 1995). Criticisms of in-depth interviews relate to the number of interviews that took place and the research claims these make, and the interrogative nature of the process which can promote respondents to self-sensor and harbour information in their interests (Travers, 2006, pg. 103). There are no set rules on how many interviews are necessary; it is about what the number of interviews is guided by the information required to answer research questions and bring a reliability of findings to research claims (Travers, 2006, pg. 89; Stake 1995, pg. 54; Yin, 2011, pg. 81). This is largely a judgement of the researcher, who decides when they have enough information on what they seek to answer. Robert Yin (2011)
encourages that in coming to this decision, researchers need to be satisfied their data reflects a discipline of constant comparisons, negative instances/cases and rival thinking (pg. 198). Having this framework of scepticism to what is being received puts the researcher in a structured state of consciousness to acknowledge and challenge bias and to promote a triangulation process to strengthen findings (Yin, 2011, pg. 80). This state of mind and disciplined approach will inherently impact on the frequency of interviews and encourage researchers to keep an open mind to their findings, or as Robert Stake (1995) states, “be ready to have their position challenged and to be prepared to receive alternative information” (pg. 54). Throughout the data collection process, a consciousness towards reliability and triangulation of findings was present and reflected in continually contesting the researcher’s assumptions and clarifying topics through secondary interviews or external sources. Additionally, opportunities existed to test findings with respondents during feedback sessions. Not all respondents took up the offer of a feedback session.

Table 3.4 reflects the number of respondent and informant interviews conducted, as well as the numbers of secondary interviews and feedback session participants.

Table 3.5: Interview Frequency, Type and Translator usage.

<table>
<thead>
<tr>
<th></th>
<th>Total Interviewed</th>
<th>Second Interview</th>
<th>Feedback Meeting</th>
<th>Translator usage in interview/feedback session</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respondents</td>
<td>28</td>
<td>8</td>
<td>16</td>
<td>24</td>
</tr>
<tr>
<td>Informants</td>
<td>6</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>
In response to the often-cited criticism of qualitative interviewing, namely that the nature of the process to be interrogative and can result in respondents self-censoring and harbouring knowledge in their interests (Travers, 2006, pg. 103), this research attempted to overcome respondent apprehension through total transparency, fully informed consent, relocating power to respondents to not answer questions if they wished, anonymity and building trusted rapport between researcher and respondent. A review of all appendices will confirm the constant reinforcement of these principles.

3.6.2 Interview Pattern

Prior to commencing a respondent interview, all respondents were given the age appropriate research consent tool which outlined all elements of the research, their rights as participants, their anonymity and what would happen with the information. No respondents refused to sign the consent form, and all were willing to share their information. Information sharing differed from person to person and question to question, ranging from short and defined responses to expansive discourses. No respondent declined to answer any question.

Researcher and respondent rapport are important elements of case studies (Tolson, et. al., 2002; Gaglio, et. al., 2006; Richardson, 1994). It was an important element of this research to overcome the risk of respondents feeling intimidated by the interview process and restricted in what they could say. The first stage of overcoming these apprehensions was a telephone call to introduce the researcher and the research or a hand-delivered letter with accompanying documents. For those not comfortable with English, the telephone call was made by the researcher’s
interpreter, with prior coaching from the researcher. The telephone calls offered an opportunity to have a preliminary informal discussion about the research and were followed up with relevant documentation. In some instances, respondent research tools were emailed in advance for review, on other occasions they were hand-delivered, and a subsequent date set for interview, and some were delivered on the day of the interview and were read and explained before starting. Consent forms were signed before each interview took place. This process of connecting, being transparent and providing documents to explain the research served well for building trust and setting the tone of the interview as being conducted in a professional and focused manner.

Prior to the commencement of each interview, the researcher would privately prepare itemised structured topics that needed to be covered and any specific issues that needed to be clarified or cross-checked with the respondent. This latter process became more pronounced as more interviews were completed and data trends began emerging. The researcher made contemporaneous handwritten notes of the interview in a note book. The choice of making notes, rather than tape recording, was based on researcher experience and guidance from scholars who suggested tape recording interviews intimidates respondents, leading to self-censorship. Furthermore, case studies depend on meaning, rather than direct quotations (Stake, 1995, pg. 56 & Boblin, et. al., 2013, Pg. 1274), plus the cost of transcribing the interviews could not be justified or met.

The use of a Bahasa Melayu interpreter was dependent on the respondent’s comfort with speaking English. The process adopted with the translator was for the
researcher to form a question, relay this to the translator who then conveyed it to the respondent. The reverse occurred with respondent’s responses. The researcher noted the response and then move to the next question. The process was slow, and the conversation did not flow freely, but this served to give pauses for the researcher to construct purposeful questions and respondents to answer with a freedom of meaning, without the confusion of talking over each other. When a direct quote was identified by the researcher, it was first checked for accuracy with the interpreter, who then double-checked it for clarity with the respondent.

The approximate average time for each interview was one and a half hours. The shortest was 15 minutes and the longest three hours and six minutes (see Annex E). Timing of each interview was dependent on the information being gleaned and the purpose of the interview, whether it was an initial interview or a secondary interview that was cross-checking information and drilling down into a specific topic. The case review interviews were all between one and two hours in length and reflected a considered attention to detail by the respondents and researcher.

Interviews were prepared and contextualised to the respondent’s role while still being focused on the research objective and questions. A common pattern quickly emerged, which laid a good foundation for the structured questions. This pattern of rapport and trust building involved an introduction of the researcher and his background, covering why he chose USM to do this doctorate research and why it focused on beyond control children and Islamic philosophy. Responding to these understandable questions served to bring the researcher closer to respondents and locate the research to a practice focus rather than theory. The researcher was very
careful not to be suggestive to respondents through sharing opinion or ideas, particularly when addressing the questions around beyond control children and Islamic philosophy.

The respondent’s interview was structured in the following way and consistently applied for the first round. The second-round interviews were topic-based and more specific but remained purposeful and focused. The primary interviews were broken up into sections:

1. Section one (settling): this started with respondent’s educational, training and employment history. The purpose of this was to settle the respondent and get them sharing about themselves and their history to being in the position they occupied.

2. Section two (role and function): this focused on the role the respondent played in dealing with beyond control children or the system. Questions related to what their daily practice looked like, who they collaborated with, what and who guided them, challenges and successes they experienced, and their experience with beyond control children.

3. Section three (beyond control children’s treatment and theory testing): this focused on bring out the respondent’s interpretation of beyond control children’s treatment and their role in it. Questions related to whether the treatment of beyond control children was fair, just and proportionate, possible alternatives to the process, how their entry into the system might be prevented, possibilities for earlier release and what they thought about beyond control children.
4. Section four (wrap-up and reflections): this section focused on finishing the interview off positively and empowering the respondent. Questions related to how they felt the interview went? Was there anything they felt misunderstood about and wanted to clarify? Did they want to add anything further? Who else the researcher should interview? Would you like to hear feedback of the research’s preliminary findings later?

Within 24 hours of each interview, the handwritten notes were transferred into individual Microsoft Word® document notes and initial analysis of the responses made. Respondents details were transferred into a Microsoft Excel® matrix and notes made of key topics that emerged, to guide further identification of information sources needed.

Secondary interviews were carried out with some respondents to follow up emerging trends identified from respondents’ notes and the first round of coding data. Arranging these interviews was simpler than the first round due to the rapport that already developed and access to private telephone numbers and email addresses. The general nature of the interviews was to dive deeper into specific elements of beyond control children’s treatment and the respondents’ interpretation of it.

Preliminary findings feedback sessions were offered to all respondents and primarily occurred in the final month of the field work. They were useful sessions to validate or contest the researcher’s preliminary reflections and, as promoted by Yin (2009 & 2011) and Stake (1995 & 2005), acted as a considered step in bringing another layer of credibility to the findings. Individual meetings took place with 11
respondents and a single group session was held with five respondents from the DSWP. The DSWP integrated the session into their monthly training programme believing it to be useful for 14 non-respondent attendees to hear about. The feedback sessions were structured to reflect the respondent’s role in the process and connect them with the findings. Time was taken to provide a general assessment of the process, however, considering the respondents were practitioners, they were mostly interested in practical findings that reflected process and practice, rather than theoretical positions. The opportunity to feedback to child respondents was taken immediately after the interviews, due to their accessibility and the uncertainty of connecting with them post-release. This decision was taken to ensure awareness of the results of the research and to receive their impressions.

During the conduct of interviews with respondents, whenever possible, copies of DSWP policies and procedure documents were requested and secured. The DSWP process applied to beyond control children is heavily guided by an internal practice manual to maintain a uniformity of standards and criterion of assessment. The DSWKL ‘Procedure Manual for Working with Children’ (Prosedur Kerja Utama Bahagian Kanak-Kanak) compliments other manuals or documents, such as the counselling protocol and management standards at the approved school and probation home. The Procedure Manual for Working with Children section relating to beyond control children was supplied to the researcher by DSWP, along with statistics of beyond control children in Penang for the past five years (see Table 1.4). The probation home and approved school also supplied internal assessment documents, in which they rate beyond control children’s general performance and specifically their religiosity while in custody. These internal practice-oriented
documents provided a significant source of information relating to the standards and expectations placed on DSWP employees towards the treatment of beyond control children. When combined with respondents’ interviews, publications, statistics and Malaysian legal standards, they provided the research with a rich data set to formulate findings.

3.7 Research Tools

The research tools listed in Table 3.5 were developed and utilised, where appropriate, to meet the requirements of this research:

Table 3.6: Research Tools Overview

| Attendance and Interview Record | This document was kept by the researcher and records the following details on the respondent: identification number, research significance, personal details, date and location of interview, record of the research documents and consent forms supplied and/or signed, documents received from the respondent and translator’s details. This document was completed after signing the consent form and was approved by USM HREC. This document includes signatures by the respondent and interpreter to corroborate the date and location of each interview. |
| Research Consent Form (Appendix A) | This document was used for children 15-17 years and adults. It was designed to allow for fully informed consent and was approved by USM HREC. It contains an overview of the research, its intentions, respondent’s protection, risks, researcher contact details and publication authority. A space is present for guardian/parent signatures when applied to 15-17-year-old children. This consent form was available in both English and Bahasa Melayu. |
| Child Assent Form (Appendix D) | This document was designed for children 12-14 years only and approved by USM HREC. It is like the research consent form but has less technical language and is aimed at connecting with younger children. A space is present for guardian/parent signature when applied to 12-14-year-old children. This consent form was available in both English and Bahasa Melayu. |
| Research Participant’s Information Sheet (Appendix B) | This document was designed to address common questions or queries a respondent might have towards being requested for interview. It was clear on the voluntary nature of participation, why the invitation had been made, the process, complaint mechanisms, confidentiality, risks, purpose and non-payment of fees. It was a useful tool to include in formal request letters, information packs and to email respondents. This document was approved by USM HREC. This information sheet was available in both English and Bahasa Melayu. |
| Sample Questioning Themes (Appendix C) | This document was designed to give an idea of the themes and questions that would be put to adult and child respondents. It was included in information packs that were either hand delivered or emailed to potential respondents and proved valuable. This document was approved by USM HREC. This document was available in both English and Bahasa Melayu |
| Respondent’s Notes | These documents were dedicated individual records of each respondent’s interview and reflected the transfer of handwritten notes into a Microsoft Word® document within 24 hours of completing the interview. These were subsequently used for data coding and thematic analysis. |
| Research Calendar | The research used the calendar function on the researcher’s laptop computer to keep a record of meetings and actions throughout the research. A handwritten diary was also kept, supporting the electronic version. |
| Note books | Two standard A4 note books were used during the respondent’s interviews. |
| Respondent’s Register | This is a Microsoft Excel® spreadsheet that records the respondent’s research identification number and details. It also includes key points from their interview, further inquiry avenues, frequency of interview, feedback session invitation and attendance records. |
| Data Analysis Sheet | This is a Microsoft Excel® spreadsheet that assists with taking coded data from Microsoft Word® and presenting it for thematic and hierarchical typology. |

All electronic records will be kept indefinitely by the researcher and archived on back-up drives and protected by passwords. Signed consent forms will be scanned
and archived electronically; the original copies will be destroyed two years after completion of this doctorate. This action was approved by the USM HREC and declared in the research consent form (Appendix A). Handwritten note books will be kept indefinitely by the researcher in a secure location.

3.8 Data Analysis and Interpretation

The analysis of the data generated by the interviews and secondary sources was guided by a thematic analysis approach, which is common in qualitative research and case studies because interpretation and meaning are core objectives (Willis, 2006 & Yin, 2011). Yin (2011) explains how “compiling, disassembling and reassembling” of data using a consistent discipline keeps adding layers of reliability (pg. 191). The discipline applied for this research to achieve the overarching objective of data analysis, to create meaning, was guided by Yin (2011) and Willis (2006).

Willis (2006) describes a cognitively combined set of principles that need to be circulating while collecting, analysing and interpreting data, namely reflexivity, reflective memos and immersion and incubation within data (pg. 259-265). Reflexivity is described as researchers having a conscious awareness of their power and position in the research process and how this can cause bias or influence the researcher’s data relationship (Willis, 2006, pg. 260). This echoes Yin (2011), who believes contesting bias and establishing a reliable researcher’s relationship with data comes from a researcher’s persistent search for “constant comparisons, to negative instances or contrary cases and to rival thinking” (pg. 198). Critical analysis of the researcher and data processing is crucial to reliability and this was maintained throughout this research.
Using reflective memos is a purposeful method for maintaining reflexivity and consists of researchers interrogating themselves during the process of post-interview write ups, through including researcher’s perceptions and interpretations, primarily from a theoretical and personal perspective (Willis, 2006, pg. 261). This method was maintained throughout the research process, through the researcher’s completion of a dedicated section at the bottom of each respondent’s interview notes with reflections on the respondent’s participation, contribution and their connection with emerging trends, research questions and maqasid al-Shariah theory. Moreover, they included the researcher’s feelings and points of concern requiring further clarity. When read in their entirety at the competition of the field work, these reflections represented and captured the researcher’s evolving position and relationship with the data being generated and they were included in the coding and thematic analysis process.

The ‘immersion and incubation’ described by Willis (2006), or ‘disassembling and reassembling’ as described by Yin (2011), occurs during the data coding process. During this crucial phase, a heightened sense of reflexivity is required from the researcher while interpreting and analysing the data. This is achieved through repeated line-by-line reading of notes and data reinterrogation to establish patterns and themes (Willis, 2006 & Yin, 2011). Coding is a disciplined process that relies on deconstructing data and reorganising it into relational typologies and themes that are influenced by research theory and questions (Willis, 2006 & Yin, 2011). A combination of priori and inductive codes were applied during the coding process for this research. Priori codes are those developed from literature or predetermined as significant, and inductive codes emerge from the data being analysis (Willis, 2006,
The priori codes that were expected in this research were primarily based on knowledge of the beyond control system before commencing any field work. Examples include: court process, DSWP policy, and the probation home and approved school detention process. Inductive codes were formed from interpreting meaning through processes that were applied. Priori and inductive codes overlapped and combined in some instances. Data codes and themes used in this research are outlined in Table 3.6.

Table 3.7: Data Codes and Themes

<table>
<thead>
<tr>
<th>Codes</th>
<th>Themes</th>
<th>Research Questions</th>
<th>Research Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court process</td>
<td>Presumption of parents</td>
<td>Steps taken to prevent entry of BCC into the system?</td>
<td>Analyse the steps taken and the strategies adopted, to prevent Muslim children from being declared beyond parental control.</td>
</tr>
<tr>
<td>Mediation</td>
<td>Probation Officer’s pivotal decision-making</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Asrama detention</td>
<td>Not enough focus on mediating parent &amp; child conflict</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STB detention</td>
<td>Lack of legal protection for child</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parent/Child conflict</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Beyond control children’s treatment fair, just or proportionate?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prevention</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sulh</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Asrama process</td>
<td>System designed to punish not release</td>
<td>Strategies taken to promote early release?</td>
<td>Analyse the process and efforts made to promote Muslim beyond parental control children’s early release from custodial settings and court for children monitoring orders.</td>
</tr>
<tr>
<td>JKM policies/SOP</td>
<td>Normalisation of surveillance and punishment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Asrama report</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Systems overlap</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>STB report</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Probation Officer’s report</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Counselling</td>
<td></td>
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<tr>
<td>S47 Child Act</td>
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<tr>
<td>Case decision-making</td>
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<td></td>
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<tr>
<td>Post Asrama/STB release</td>
<td>Restoration of morality through Islam</td>
<td>Overlap of civil and Shariah jurisprudence in BCC treatment?</td>
<td>Analyse where Malaysian civil law and Islamic juristic principles and practices accommodate and overlap with each other, in the best interests of Muslim beyond parental control children.</td>
</tr>
<tr>
<td>Release on license</td>
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<tr>
<td>Researcher’s analysis</td>
<td></td>
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<tr>
<td>Beyond control children</td>
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</tbody>
</table>

Coding data occurred on several occasions; letting the coded data sit and then revisiting it proved a valuable strategy because increased reflection led to a deeper
interpretation and elucidation of meaning. New codes appeared, and some were reoriented or deleted. The method for coding was to review each individual respondent’s notes, read them thoroughly and then, using the add comment function of Microsoft Word®, isolate phrases, passages or sentences that reflected a specific topic, meaning or interpretation. These became code names. Within the comment box, the researcher used a combination of the direct words captured and add critical reflections or thematic connections, to provide interpretation and meaning to the coded heading.

Following this first round of coding, the code headings, complete with comments, were extracted and imported into a Microsoft Excel® spreadsheet and analysed for themes. Identified themes were then rearranged into typologies and hierarchies that correlated with the three research questions and theory. This process of coding and themes took approximately three months to finalise because of the researcher’s consistent consciousness towards the data and the process of critical reflection and reliability in the findings required.

This two-stage process was applied to the practice and policy documents secured from DSWP and other respondents. The documents received in Bahasa Melayu were translated into English, to enable the researcher to apply the coding and theming process against the defined research questions and theory.

3.9 Ethics

Given the methodology and purpose of this research was to investigate human relationships and established processes, significant ethical considerations existed for
the researcher, respondents and the Universiti Sains Malaysia. Having an ethical consciousness to the complete research process was an obligation of the researcher (Habibis, 2006). In addition to ethical treatment of data and respondents, this extended to cognisance of ethics in referencing, literature reviews, objectives and questions. Acting ethically brought more layers of credibility and reliability to the data; remaining disciplined, being truthful to findings, remaining honest to interpretations and meanings supplied by respondents, and self-awareness of the power held by the researcher, were all ethical positions, actions and responsibilities (Habibis, 2006; Yin 2011 & 2009; Stake 2005 & 1995). This ethical consciousness was present throughout the research process, beginning during the literature review and continuing when settling on a case study design involving DSWP employees, children in custody and families in conflict. Moreover, it remained while processing the data and presenting the data and other information sources in this thesis.

Transparency and protection of respondents (Habibis, 2006) was a central mechanism of this research and reflected in all communication with USM, respondents and informants. This research and its tools were all reviewed, critiqued and approved by USM HREC. Transparency and protection of respondents was outlined in the Research Consent Form (Appendix A); Research Participant’s Information Sheet (Appendix B); Sample Questioning Themes form (Appendix C) and Child Assent Form (Appendix D). These documents were all designed to establish fully informed consent of research respondents. Respondents were protected with anonymity, freedom to withdraw, clear information about the nature and purpose of the research, its process and what would result from its findings. No fee was paid to any respondent and the research was independent of any research
grant or interest group. These issues were clarified with DSWKL while securing access to DSWP research sites and respondents. Prior to signing consent forms, all respondents were asked if they needed any further information or would like to speak to someone about it. No issues about the consent and information forms were raised by any of the respondents, conveying that they understood the purpose and participated with informed consent. Interviews did not commence before receipt of a signed consent form.

Research that involves children and families in conflict requires careful planning and consideration (Berry, 2009). The vulnerability of children in custody or under court order and the adult power held by the researcher was a serious ethical consideration. Children and families in situations such as this, need to feel empowered and safe in the research process (Berry, 2009). This was achieved through application of the research consent and information forms (Appendices A, B, C & D), but also enhanced through specific needs around not feeling compelled to participate and reinforcing that they would not be punished if they chose not to participate. Children in custody or under court orders were under strict control and their autonomy restricted through routine, state surveillance and the imbalance in power relationships with those operating the system. The researcher accessed children through the powerholders. Prior to commencing all interviews with children, the researcher carefully explained, in age appropriate language, the independence of the research and what it meant in real terms for the child. A forecasted ethical dilemma identified by the researcher was the potential for children to perceive that this research and their participation in it could result in them being released from custody or court order. It was explained to child respondents that although their
participation would not result in them being released from custody or court order, their participation could potentially help other children in their situation through implementation of the research’s findings. All child respondents responded to this information with acceptance and understanding and, with co-signed consent from their guardian, participated fully in the interviews.

Another significant ethical concern was the research investigating the reasons for beyond control children’s custody or surveillance. This was a delicate subject because the parent or guardian was the motivator for the detention, rather than the state. In circumstances such as this, moral judgement of the researcher, emphasis on respondent’s safety and the use of cooperative language was required (Berry, 2009). Although the conflicting child and their parent/guardian was physically connected with this research for one to three hours, if not ethically conducted, its impact could potentially be felt long beyond this because of the nature of the inquiry and perceptions of the respondents to inferences being drawn from questioning lines. The need for a translator in all child and parent/guardian interviews presented an additional layer of difficulty. Prior to the interview, the researcher coached the translator towards using language and words that were not accusatory and less inflictive of blame towards the respondents. Softening word choice while remaining focused on the purpose of the interview was central and achieved. Another element was the protection of children and being aware of triggers for discomfort or distress. The wellbeing of the child took precedence over the research’s objectives. Prior to starting interviews with children and parent/guardians, along with the fully informed consent process, the researcher also clearly outlined the conversation would encompass the reasons for child being considered beyond control. Careful
consideration was given to reinforcing the power of the respondents to not feel obliged to answer questions and to let the researcher know what they were feeling. It was also reinforced the respondent could end the interview at any time without repercussions. The result of this careful and considered approach to vulnerable families and children in conflict was positive. The interviews progressed comfortably and, during wrapping up and checking-in, all respondents stated they were comfortable with the interview process and were not feeling distressed or concerned. A standing offer was made to all respondents that if they felt concerned or needed support after the interview, they should contact the researcher using the contact information contained in the supplied consent forms. No contact has been made with the researcher.

During interviews with child respondents, disclosures emerged about suffering physical assaults perpetrated by other children or DSWP staff in the custodial settings. This presented the researcher with a serious ethical dilemma because these disclosures were made under the confidentiality of the interview process, the personal assurance of the researcher at the commencement of interviews, and the relevant consent forms. Paradoxically, the conversation was ensuring privacy and promoting unrestricted disclosure under a safety blanket of anonymity, yet also showing real concerns for a child at risk. Throughout disclosures, child respondents declared any form of information sharing would result in further or increased levels of violence, and requested the researcher to say nothing, meaning that saying nothing to those in charge was their preferred option. The researcher made the considered decision to agree to the children’s wishes and, in all cases, drew attention to the researcher’s contact details if the children needed further support. No communication
has been received by the researcher. The researcher also prompted the children to speak up to trusted senior authorities in the custodial settings to register their discontent or to make a formal complaint.

3.10 Limitations

The limited Bahasa Melayu language capacities of the researcher presented a language limitation during this research. The researcher passed the USM LKM100 language course and this was useful when it came to the pleasantries of connecting with research respondents. However, there was a need for fluency in Bahasa Melayu to best capture the meaning and interpretation of respondents. To overcome this limitation, two Malaysian master’s degree students fluent in both Bahasa Melayu and English were recruited and contracted on an hourly basis by the researcher from the USM School of Languages, Literacies and Translation. The translators became an integral part of the research’s success and assisted with arranging interviews and making respondents feel comfortable through shared language and culture. Trust was central to the researcher and translator relationship in being honest to what was being translated. There was no indication this trust was breached, and the recruitment of impartial and independent translators to mitigate risks of compromise during translation was an anticipated strategy of the researcher. The use of a translator did benefit the research in an unexpectedly positive way; it slowed down interviews, resulting in conversation being more considered and structured through allowing for pauses, note-taking and question construction.

The lack of reliable and current data from the DSW was an on-going challenge and limitation for this research. The data made publicly available by the DSWKL
via their website was inconsistently released and a number of years behind. The researcher attempted to overcome this through requesting site-specific data whenever possible, bringing together compatible data gleaned from literature or requesting any data sets that might have been available to research respondents. All attempts were made to ensure the data presented in the research was reliable and complementary to the research’s objectives and scope.

3.11 Conclusion

The adopted case study methodology to investigate the phenomenon of Muslim beyond control children in Penang proved to be suitable and reliable. The guidance provided by Yin (2009 & 2011) and Stake (1995 & 2005) towards ensuring a disciplined research design, a triangulation of findings and maintaining a dedication to analytic query, has resulted in revealing the lived experiences of beyond control children and the DSW system duty bearers. The discipline and rigour of remaining within the scope and conceptual framework was important to data collection and analysis. It has brought the ability for the research to make “analytic generalisations” (Yin, 2011, pg. 101 & Gabb, 2009, pg. 49) which are evidence-based and resistant to “logical challenge” (Yin, 2011, pg. 101). Respondents appreciated the clarity and focus of a research designed to look into their practices, while enabling them to be open and reflective in the process.

The inherent flexibility of the case study method proved to be valuable, particularly for child respondents in custody. Their level of participation and rates of inclusion, as an embedded unit of analysis, was not clear at the beginning of field work, but ultimately, they could be included and expanded on, due to the ability of
the method to respond to the research environment. The researcher was able to maintain a discipline to the case study method while reacting to the research respondents work patterns, incarceration periods and general availability within a custody-oriented workplace. The timings of interviews and the identification of respondents was aided by the researcher being flexible, building rapport within the DSWP worksites and maintaining a bounded professional relationship and engagement with all stakeholders.

An important intention of this research was to highlight and bring evidence-based responses to assist and improve Muslim beyond control children’s treatment in Penang and wider Malaysia. The case study method provided tangible and identifiable points of change or improvement, through its investigation of a phenomenon that was happening in the ‘real time’ of Malaysia DSW stakeholders. The case study’s findings and recommendations support the overarching intention of this research to improve the lives and treatment of beyond control children in Malaysia.
CHAPTER 4 – PREVENTING ENTRY INTO THE SYSTEM

4.1 Introduction

The focus of this chapter is on what was done to prevent children’s entry into the beyond control system. Systemically, this covers research findings that focused on the initial contact with the DSWP and the steps taken, or strategies adopted, to prevent formal beyond parental control applications to the court. The court for children process is the legal authority and final decision-maker regarding control orders that deprive beyond parental control children of their liberty. Early in the research process, primarily during the literature review phase, addressing the catalyst for beyond control applications emerged as a fundamental pivot point for children. Focusing on addressing and resolving conflict triggers between the applicant and child could potentially be beneficial in preventing applications under section 46 of the Child Act (Malaysia, 2001 & 2015). Throughout the interviews with respondents and informants, questions were shaped and raised to explore actions being taken to prevent children’s entry to the system.

The established DSWKL and DSWP system, or process that dealt with beyond control children was made up of a series of inter-relational roles and responsibilities held by government departments and legally empowered individuals within departments. The whole system was surrounded and supported by law, policy and hierarchies of responsibility, which all coalesced into a state’s response to address a private family problem. Under authority of the Child Act (Malaysia, 2001 & 2015) the state was made active and intervened into relationship breakdowns between a child and their parent or guardian. Once a family connected with the system, they were subjected to a series of assessments to determine if the state needed to take
control of the failed relationship through removing the liberty of the child for a period ranging between one month or up to three years. While the child’s liberty was deprived they were subjected to a DSW system of punishment, surveillance and moral correction to which they must show submission to and improvement in, or they would not enjoy a return to full liberty. The threat of return to custody, increased surveillance or a reapplication of the system through a new control order, remained a threat on the child until their 18th birthday.

4.2 Research’s Findings

There is an inherent assumption in the research question of the Malaysian State not wanting children in custody, namely, what is being done to prevent entry into the system? This is supported by the Malaysian Government’s statements and research to this effect (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a & Child Rights Coalition Malaysia, 2012). DSWP and associated respondents who facilitated the beyond control child system constantly stated they operated under the best interest of the child principle of ‘institution as the last resort’ and that all attempts were made to avoid unnecessarily placing a child on orders or in custodial conditions. However, child respondents on control orders contested this narrative and were supported by the in-depth case review’s findings. Child and external subjects of the system highlighted significant points of concern regarding the principle of preventing entry, such as a lack of protection for the child in legal proceedings, the power and influence of a persistent parent or guardian, systemic failures in addressing the root causes of the child and parent conflict, and a lack of pivotal decision-making supervision or review in case work. Not only do the findings challenge the principled perceptions of DSWP staff and their associates,
they also raise serious concerns regarding judicial and human practices of fairness, proportionality and justice before the law.

4.2.1 Department of Social Welfare’s Quality Procedure Number 6

The DSWKL’s *Quality Procedure Number 6* was declared as the national, state and district standard that outlined the procedures which must be followed to manage beyond control children (section 2). A child’s connection with the established DSWP beyond parental control process started with an application from the parent/guardian or a referral from the court for children. Once this application had been received and registered, a defined sequence of actions and activities took place. These included opening a file (section 6.6), carrying out a fully informed interview with the child, parent(s) or guardian (sections 6.7 & 6.7.1/2) and advising them of the implications and stages of the application and subsequent order. The assigned probation officer was responsible for acting as the conduit between the government’s process and the parent/guardian and child. This included attending the court with the child and the parent(s) or guardian (section 6.10), preparing a report for the court (section 6.9), plus informing and transporting the child to the custodial institutions as directed by the court order (section 6.15-17). At this initial stage of the applicant’s and DSW’s interaction, an underlying narrative of the procedures was to have parent(s), guardians and children *fully informed* of the potential impact and repercussions of choosing a beyond parental control application. This was explicitly stated as a ‘note’ at section 6.7.2 where the probation officer was directed “To explain to the child and mother or father or guardian the implication of the application” (Quality Procedure Number 6). Furthermore, following the court’s decision, probation officers were required to clarify the court’s decision with the applicant and child, recording it in
case notes (section 6.13). The DSWKL understood the impact on the parent and child’s relationship a control order had, along with the importance of locating decision-making to the parent/guardian, keeping them responsible to the process. Respondent 7 shared that before 2002 the DSWP would make the application to the court on behalf of the parent, but this led to parents blaming the DSWP when the child was detained, or they did not get the expected positive change in the child’s behaviour or the relationship. The DSWKL changed the procedure to the parent making the application, with assistance by the probation officer, who is responsible to fully inform the parties and promote alternatives to custody.

When read in conjunction with the Child Act (Malaysia, 2001 & 2015), these procedures formed a series of legally empowered, accountable steps and objectives that set the obligations of the state towards responding to a breakdown of adult and child relations. It formalised and acted as a safety net in the government and citizen relationship for up to three years, depending on the custodial and monitoring orders issued by the court. Both the Child Act (Malaysia, 2001 & 2015) and the DSWKL’s Quality Procedure Number 6 represented the declared principles of how the Malaysian State wanted children beyond parental control identified and processed. The DSWKL had been actively trying to improve and professionalise their practice over the past decade to meet these expectations (Respondent 7). This had included recruiting and training more staff, increased education and training standards, introducing computer systems, better monitoring of staff and formalising their processes with standards and practice manuals, not only for beyond control children but all children they hold obligations towards (Respondent 7). For example, in 2015 DSWKL released and implemented the following: Quality Procedure and
Management System (*Prosedur Kualiti Sistem Pengurusan Kualiti*); Child Services Institution Manual (*Perkhidmatan Institusi Kanak-Kanak*); Guide to Counselling and Psychological Service and Structure Manual (*Panduan Kaunseling dan Perkhidmatan Psikologi dan Struktur Manual*) (Respondents 7, 4 & 12). However, concerns remained about staff’s capacities towards meeting the specialised demands of the multiple child protection risks and assessment they were making, considering they could move from a beyond control child case, to an adoption assessment and respond to sexual abuse allegations, all in one day (S. Sekaran, personal communication, June 14, 2017). Respondent 7, a senior and experienced DSWP employee, saw the policy and practice manuals primarily as risk mitigation strategies that focused mostly on protection and rehabilitation of the child rather than the breakdown in family and community relationships that led to the child being in contact with the DSWP in the first place.

Figure 4.1 is a visual aid to describe the stages and strategies that existed in the DSWP system to take place before the child appeared in court to answer to the claims made in the formal beyond parental control application. This diagram was constructed from what DSWP employees described as their applied process and practice for dealing with beyond control children (Respondents 13, 14, 15, 17 & 20). DSWKL’s quality procedures and manuals guided the process and movement of the applicant through the system. According to those operating it, to avoid unnecessary institutionalisation, the primary objective was trying to resolve and mediate the problems taking place in the applicant and child’s relationship (Respondents 13, 14, 15, 17 & 20). If this was unsuccessful, then the formal application under section 46 of the Child Act (Malaysia, 2001 & 2015) was made to the court for children. Once
the application was received, the matter was listed, and the child and the applicant appeared in the court for children before a magistrate.

Figure 4.1: Stages and Strategies Adopted, Before a Formal Beyond Parental Control Application to the Court for Children.

4.2.2 Pivotal Power of the Probation Officer

The Child Act (Malaysia, 2001 & 2015) and the DSWKL procedures establish and centre the probation officer (*Pegawai Akhlak*) as the most pivotal decision-maker in the beyond control child’s experience with the DSWP. They are the primary case managers who decided on referral to the psychology officer, make suggestions to the parent or guardian on resolution strategies or assisting applicants to complete the necessary paperwork to send the child straight to court, without attempting resolution or mediation (Respondents 13, 14, 15, 17 & 20). This power
extended throughout the child’s connection with the DSWP and was present from the first contact with DSWP offices until the child’s monitoring order expires, which could be up to three years later (Respondents 2, 7, 8, 13-17, 20 & 21-28). It was often shared by research respondents that the probation officer was the most appropriate and legally responsible person for dealing with beyond control children and their families. At all points, within and along the beyond control child process, the probation officer was the ‘go-to’ DSWP official to manage it on behalf of the Malaysian State.

The trust placed in probation officer’s decision-making and judgements emerged from the research as a factor that if left unchecked or not reviewed could have serious consequences for the child. Four of the five probation officers in the five DSWP offices were interviewed during the research. Their experience in the role varied from under six months to over six years. During interviews, they all articulated the principle of ‘institution as a last resort’ for beyond parental control children, sharing examples of where they had prevented ‘many’ parents from making applications through the mediation and resolution strategies described in Figure 4.1. Parents/guardians who had approached the DSWP offices to apply for a parental control order but did not make the formal application were colloquially known as ‘walk-ins’ by DSWP staff. Unfortunately, none of the five DSWP offices or the probation officers interviewed kept records of walk-ins or parents/guardians inquiring about a parental control order. This revealed a gap in promising practice, because if it was as successful as relayed by the probation officers, it needed to be better captured and included in DSWKL policy. However, the researcher could not produce any reliable statistical proof to this effect. All the probation officers, and
those responsible at the central Komtar office, spoke of the significant efforts that were made in this area and how successful they were, but there was a lack of evidence to support this positive reflection and consistent assertion.

An attempt was made to triangulate available data to analyse and support the probation officers’ claims. Available data sourced from the Timur Laut DSWP office and court for children is collated in Table 4.1. Over a four-year period, it reflects the recorded number of beyond control children who received counselling, against the number of applications made to the court and their withdrawal rate at the first and second court appearances.

Table 4.1: Counselling and Court Appearance Withdrawal Rates of Beyond Control Applications for Timur Laut DSWP and Court for Children 2013-2016
(Supplied by the Timur Laut Court for Children, 23/2/17 & Department of Social Welfare, Timur Laut Office, 31/3/17)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total beyond control children who received counselling at DSWP Timur Laut Office</th>
<th>Total S46CA applications to Timur Laut Court for Children</th>
<th>Application withdrawn at 1st Court appearance</th>
<th>Application withdrawn at 2nd Court appearance (after 1 month at Probation Home)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>2</td>
<td>17</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>2014</td>
<td>1</td>
<td>12</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>2015</td>
<td>8</td>
<td>8</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>2016</td>
<td>6</td>
<td>14</td>
<td>3</td>
<td>10</td>
</tr>
</tbody>
</table>

The table reveals that the court experience and a month in the probation home did impact on the applicant and child relationship, because requests were made to withdraw applications. However, the data is not reliable to support the probation officers’ claims due to the lack of recording the total number of parents or guardians considering making an application, and those who received counselling and changed their decision. Furthermore, whether the probation officer chose not to send the child
to be counselled and decided to send the application directly to the court or the child refused to participate in counselling. However, the table does reveal the rate of counselling to applications registered in the court, and the number of applications withdrawn at the first and second appearances.

The lived experience of the eight beyond control child respondents interviewed provided another perception of how powerful the probation officers were in the process and revealed a counter narrative of them consistently following procedures and working towards ‘institution as a last resort’. All eight (Respondents 21-28) stated they were not contacted by the probation officer prior to attending court and had very limited understanding of the beyond control order, court or detention process. No mediation or resolution strategies as described in Figure 4.1 had been experienced by any of the eight children. Most of them stated they were not aware their parent or guardian had made a beyond parental control application, they were deceived about going ‘somewhere’ and ended up in court, where they were so intimidated by the environment they remained silent or only said a few words in response to questions put to them. Respondent 25’s control order journey reflected a common account by the eight child respondents regarding their initial contact with the DSWP system. Respondent 25 shared that his Aunt (Respondent 16) told him he was going to see his mother, whom he had not seen for many years, only to be taken to the Timur Laut Court for Children and put in the probation home (Asrama Akhlak) for a month. He was not contacted by the probation officer and saw him only once at the probation home. Respondent 16, the applicant for Respondent 25’s control order, shared that she had become aware of the beyond control child process from a workplace friend and went to the DSWP office, completed a form and left it at the
counter, without speaking to a probation officer. About one month later, Respondent 16 received a telephone call directing her to bring Respondent 25 to the court and was “baffled” when he got put in the probation home. No one met with Respondent 16 before the court appearance, she did not know what the process really meant, and no attempt was made to mediate the conflict between her and Respondent 25. No contact was made before the court appearance by the probation officer with only limited contact happened after the court appearance. Respondent 25 subsequently spent 13 months in custody at the probation home; the first month on remand while the probation officer prepared a report for the court and 12 months following the court’s decision to place Respondent 25 on a three-year custody and monitoring order. The reasons recorded in the DSWP case file on Respondent 25’s beyond control behaviour were: he was allegedly involved in petty stealing from the local shop, stealing sweets, potato chips and ice creams; swearing; running away from home; and having an unhealthy peer group (Respondent 13).

While Respondents 16 and 25’s experience could be rationalised as an isolated example of systems faults, regardless of this being a clear breach of DSWP procedures and being validated by other child respondent’s experiences, the lack of systemic decision-making accountability had impacted Respondent 25 and his family significantly. As a result of this problematic first contact with the DSWP and the beyond control process, Respondent 25 felt a considerable injustice had been perpetrated against him, with poor custodial performance assessments, and unresolved and simmering family tensions opening a revolving door relationship with the DSWP. The overall outcome for Respondent 25 was consecutive beyond control orders, meaning four years and seven months of custody and state
surveillance within his short 18 years of life. Problematically, throughout his many years of connection with the DSWP, nothing was done to address the original conflict that sparked Respondent 16 seeking help in her relationship with Respondent 25.

4.2.3 Applicant and Child Conflict

A common pattern among the child respondents on beyond parental control orders was a combination of either the parent’s or child’s circumstances and a pivotal conflict event that triggered an application under section 46 of the Child Act (Malaysia, 2001 & 2015). Prior to a child’s connection with the DSWP, a dispute had occurred in the child and applicant’s relationship, or the child found themselves in circumstances that resulted in the creative usage of section 46 as an attempt to mitigate or eliminate the circumstances. Another common pattern was the lack of compliance with established DSWKL procedures or the provision of independent legal safeguards, leading to unresolved family tensions and potentially unnecessary custodial orders.

Figure 4.2 provides a synopsis of the eight beyond control child respondents’ circumstances and the triggers that brought an application before the court for children for review and decision-making.
<table>
<thead>
<tr>
<th>Respondent</th>
<th>Circumstances</th>
<th>Application Trigger</th>
</tr>
</thead>
<tbody>
<tr>
<td>21</td>
<td>R21's parents divorced, and he could not accept it. His parents would often fight and leave him at home without food or money.</td>
<td>R21 adopted negative attention seeking behaviours to try and get his parents back together. This included drinking alcohol, taking illegal drugs and fighting. R21's mother made the application.</td>
</tr>
<tr>
<td>22</td>
<td>R22 has been in state run institutional care since being abandoned as a baby. He is illiterate, has hepatitis C and has no friends.</td>
<td>R22 was caught sodomising another orphanage resident, fighting, biting orphanage staff, truancy and breaking into houses. R22 doesn't know who made the application.</td>
</tr>
<tr>
<td>23</td>
<td>R23 lives with his grandparents. His parents are divorced. His mother has remarried and moved to Kuala Lumpur for work. R23 does not know where his father is.</td>
<td>R23 was racing his grandparent's motorbike and damaged it. R23's mother came from Kuala Lumpur and made the application.</td>
</tr>
<tr>
<td>24</td>
<td>R24 lives in a flat with his parents, 6 siblings and a nephew. He likes school, has plenty of friends and likes sport.</td>
<td>R24's father complained he was disturbing other students at school, cheating on exams, engaging in petty theft and disobeying directions. R24's father had applied and got him detained in the probation home, for 1 month, on 2 previous occasions, for the same behavioural concerns. R24 is now on his 3rd order and in the probation home for 12 months.</td>
</tr>
<tr>
<td>25</td>
<td>R25's mother is suspected of having mental health concerns. His father was a migrant worker who returned to his home country when R25 was a baby. R25 lived with his grandmother until her death, when he started to live with his Aunt, her husband, 1 sibling and 2 cousins in a small flat.</td>
<td>1st order: R25's Aunt complained he was engaging in petty theft, swearing, keeping company with unhealthy peers and staying out late. 2nd order: R25's Aunt complained he attempted to rape his 5-year-old cousin.</td>
</tr>
<tr>
<td>26</td>
<td>R26 lives with his parents.</td>
<td>R26 went to court accused of breaking into a house. This charge was “closed” by the court. The judge spoke to R26's father about him not going to school and staying out late at night. Judge suggested application. Father agreed. R26 was placed on a 3-year order.</td>
</tr>
<tr>
<td>27</td>
<td>R27's parents divorced, and he was sent to live with his grandparents. His mother went to work in Kuala Lumpur and he hasn't seen his father.</td>
<td>R27 was upset by the divorce and adopted negative behaviours such as smoking, staying out late, arguing with his mother and petty stealing. R27's mother made the application.</td>
</tr>
<tr>
<td>28</td>
<td>R28 has been in state run institutional care since being abandoned as a baby. His history in orphanages is good and he liked school and the people who ran the orphanage, whom he called his parents.</td>
<td>R28 was sent to the approved school to get a trade. Probation officer asked if R28 wanted to get a trade qualification in mechanics. He said yes and then he was processed by DSW and court where he entered the approved school. He thought he was going to Giatmara (non-residential vocational training centre). There are no behavioural issues.</td>
</tr>
</tbody>
</table>

Figure 4.2: Beyond Control Child Respondent’s Circumstances and Application Triggers
Table 4.2 reveals the complexity of the children’s lives, the circumstances they found themselves in and the decisions that were made for them. Problematically, it also reveals the conflation of behavioural concerns, which are the primary remit of section 46 of the Child Act (Malaysia, 2001 & 2015), and criminal allegations. Criminal allegations where there were victims, witnesses and inherent legal rights and protections towards a presumption of innocence and a need for a fairness of justice towards the testing of evidence before an impartial court to determine guilt or innocence. Moreover, according to respondent 28, there were not any claims about his behaviour, rather he was shifted from one government residential facility to another, under the authority of the Malaysian Child Act (Malaysia, 2001 & 2015), to accommodate his request to gain vocational skills. Section 46 of the Child Act (Malaysia, 2001 & 2015) was creatively used to facilitate this. This remains a serious and consequential injustice to him and highlights a lack of independent legal representation to advocate on behalf of the child before the court. Courts made legally binding and liberty-depriving determination for all of these children, primarily following representation by the DSW probation officer, through the report supplied to the court for consideration.

All the child respondents (Respondents 21-28) shared that no work had been done by the probation officer or the psychological counsellors to deal with the conflict that led them to being either in the probation home or the approved school. Respondent 21 reflected a common feeling about personalised help as a preventative strategy, when he explicitly declared that if someone had helped him understand and better accept his parent’s divorce, he would not have acted the way he did. DSWP stakeholders recognised and appreciated this declaration through consistently making
the connection between the conflict and the circumstances of the child being a trigger factor that needed to be better addressed (Respondents 1, 2 & 4-17). Probing on this salient point elicited transferal of responsibility to the probation officers and trust that following the existing procedures in the DSWKL manual had already addressed this, inferring that those in custody could not be helped. These two points are significant guides to how beyond control children were culturally seen by the DSWP stakeholders and those responsible for making decisions about them, namely they were in custody because they had not followed parental or DSWKL directions, therefore they needed correction.

Respondent 7, a senior DSWP manager, acknowledged there were problems with the existing response and saw it as a work in progress to professionalise employees, through employing university graduates, introducing comprehensive practice standard manuals, holding regular training sessions and upgrading computer systems. Respondent 7 outlined how DSWP’s case management practices were poor and needed improvement through technical capacity building, supervisor development and monitored compliance with the system. Systemically, the current DSWKL system was about ‘protection and rehabilitation’ of children and not ‘preventing’ their entry into the system. Respondent 7 spoke hopefully about a ‘social work bill’ that received its first reading in the Federal Malaysian Parliament in 2015 but did not pass and had been returned for review. According to Respondent 7, this bill promotes an organisational shift within the DSWKL to focus on preventing entry of vulnerable families and children into the system.
While it was positive to hear DSWP respondents acknowledging the need for better employee practice development and system reform, critically these initiatives were not flowing down into decision-making or accountability for decisions made. This is clear from Table 4.2 and the child respondent’s accounts of their contact with DSWP stakeholders, particularly probation officers.

4.2.4 Beyond Control Children and the Court for Children Experience

Following the initial contact with the DSWP and the decision taken to make a formal application to the court for children, the next decision-making pivot point for beyond control children was the court process. In the preamble of the Child Act (Malaysia, 2001), clear recognition is given to children’s vulnerabilities and the need to act fairly and justly in the application of the law, “where social justice and moral, ethical and spiritual developments are just as important as economic development” (Malaysia, 2001, pg. 11). The Child Act (Malaysia, 2001 & 2015) locates decision-making power to the “supervising” court for children, in the district where the child under order must reside, perform community service or be detained under the act (Malaysia, 2015, Amendment Section 2, XII). Under the Act, a court for children consists of a sitting magistrate who is assisted in their determination by two court advisers, who are “appointed by the Minister from a panel of persons resident in the State” (Malaysia, 2001, Chapter 1, Part IV, Section 11(2)). One of the advisers must be female and their function is to advise the court of any considerations that might affect the findings of guilt or influence an order that might be brought against the child, and to advise the parent, guardian or child (Malaysia, 2001, Chapter 1, Part IV, Section 11 (3) & (4)). The sitting magistrate is not bound by the advisers’ opinions, but must consult them, record their opinions and, if they differ, outline reasons for
the diversion during their summation in determination proceedings (Malaysia, 2001, Chapter 2, Section 90 (17) & (18)).

The process of hearing an application under section 46 of the Child Act (Malaysia 2001 & 2015) is similar to hearing a criminal charge under the Act. According to a lawyer who has defended criminally accused children, while beyond control children are not seen as ‘accused’ persons by the court or in legal principle, their experience “looks and feels” the same (S. Sekaran, personal communication, June 14, 2017). The child and applicant are brought into the courtroom, where they appear before the sitting magistrate, whose role is to independently access the grounds for application against the criterion established in the Child Act (Malaysia 2001 & 2015) of a child being beyond parental control. This is defined as the following by section:

“The application in writing may be made to the Court For Children to detain a child in a probation hostel or centre

(a) by a parent or guardian of a child, on the ground that the parent or guardian is unable to exercise proper supervision and control over the child and the child is falling into bad association; or

(b) by a Protector in the case of a child who has no parent or guardian or has been abandoned by his parent or guardian and after reasonable inquiries the parent or guardian cannot be found, on the ground that the child is not under proper supervision and control and the child is falling into bad association.”

(Malaysia, 2015, Amendment 43, Section 46(1), pg. 34)

Section 90 of the Child Act (Malaysia, 2001 & 2015, amendment 66, pg. 45) focuses on the court’s procedural obligations that must be applied and were built off the legal Canons of rights, fairness and justice within an adversarial process of
presenting evidence in the pursuit of determining the guilt or innocence of an accused child. Inherent in these procedures are legal principles and protections for the child, who is obliged to present before an impartial, legally sanctioned and empowered decision-making chamber that can equally remove liberty and impose penalties, as acquit or dismiss. Furthermore, section 90 (Malaysia, 2001 & 2015) covers legal rights such as the child understanding what is happening to them and the court using age appropriate language (Chapter 2, Section 90 (1) & (2)), legal protections during admissions of guilt (Chapter 2, Section 90, (3) & (4)), and the obligation of the court to support a fair hearing of evidence if the child declares their innocence against the charges brought against them (Chapter 2, Section 90, (5-9)). During penalty considerations, the court is obliged to seek input from advisers, review the probation officer’s report and hear from parent(s), guardians or the child if presenting extenuating circumstance or mitigating factors that could influence the deciding magistrate (Malaysia, 2001, Chapter 2, Section 90, (11-18)).

When read holistically, the Child Act (Malaysia 2001 & 2015) is a principled legal document that aims, within the presumption of fairness in justice, to fully exhaust all options and avenues before placing an order or sentence on a child that will deprive their liberty or impact their adulthood. Moreover, it reflects many of the international child rights expectations contained in the UNCRC (United Nations, 1989) towards the treatment of children before the law. However, its practical application and the ‘natural justice’ principles of judicial fairness and impartiality before the law (The Malaysian Bar, 2004) were brought into question, given the research’s findings. This was particularly relevant to children who found themselves in the indeterminate territory of joint accusations of being, behaviourally, beyond
parental control and also of perpetrating criminal acts under Malaysian law. The separation of these streams of judicial determination under the Child Act (2001 & 2015) was problematic for children being processed under section 46 of the Act, because criminal allegations before the law must be proven beyond reasonable doubt, and the child is afforded a presumption of innocence (The Malaysian Bar, 2004). Moreover, behavioural allegations under section 46 of the Act could result in state-sanctioned control orders depriving a child of their liberty for up to three years. Considering the gravity of considerations by the court for children, potentially removing a child’s liberty, the principles of justice and fairness of an accused person were fundamental and acute in their protection before the law, under the presumption of due process in natural justice.

Child respondents’ experience of the court for children process described how the inbuilt protective agents of the Act, such as the court advisors and probation officers, fell short in their roles and responsibilities. A critical foundation of any legal process is for those appearing before a court to understand why they are there and the section of law to which they are answering. This foundation is explicitly recognised in the Child Act (Malaysia, 2001, Chapter 2, Section 90 (1) & (2) & 2015, amendment 66, pg. 45). During interviews with the child respondents, questions were put to them on their understanding of the court process and of the support offered during the process of bringing the application to court. All eight (Respondents 21-28) stated they were not contacted by the probation officer prior to attending court and had very limited understanding of the beyond control order and/or court process. Respondent 27 shared that the warden of the probation home in which he was incarcerated explained the meaning of section 46 of the Child Act
and the order he was under, meaning that he received these explanations only after he had been processed by the DSWP and court. During the interview with Respondent 22, the researcher explained section 46 (Malaysia, 2001 & 2015) to him because during the six months he had been at the approved school no-one had explained the order keeping him there. The probation officer did not meet with him before the court appearance and the respondent had only met him once after arriving at the approved school. Respondent 22’s stated that his journey into the approved school was through being informed he was being taken to the doctor; instead he was taken to the Butterworth Court for Children, where he appeared in the court and then was sent directly to the approved school. Respondent 22 said he felt “tricked” and was afraid of leaving the school because he does not know what to do or what will happen to him and has no parents or friends to help him.

Respondent 28’s experience is particularly troubling due to there being no claims of behavioural concerns made against him, rather section 46 (Malaysia, 2001 & 2015) was creatively used to enable him to obtain a vocational trade. Respondent 28 stated he was told that the lightest punishment to enter the approved school was “under section 46”, if it was a drug charge punishment would be worse. Respondent 28 heard the term “section 46” used in his court appearance when the court police said it out loud. Respondent 28 met a DSW probation officer at the Selangor Court, who did not explain the process but asked him if he wanted to go to school or have skills. Respondent 28 said he wanted skills. A probation officer had previously monitored him at the orphanage and noticed he had failed the form 2 test. Respondent 28 thought he would go to Giatmara (vocational training centre) because he wanted to learn mechanics, but Giatmara is a non-residential facility. Respondent
28 construed that he was put under section 46 (Malaysia, 2001 & 2015) so DSW could send him to an approved residential school where the Giatmara teachers also teach. According to Respondent 28, the probation officer told him that it was better to be under section 46 (Malaysia, 2001 & 2015) because if they placed him under the crime act, he will have a record and sentence.

Respondent 26’s experience of the court for children and the impact of his parent’s not being fully informed of section 46 (Malaysia, 2001 & 2015) was revealed when a criminal offence for housebreaking was “closed” against him. The reason for the charge being “closed” was not made clear by Respondent 26. The magistrate and Respondent 26’s father discussed Respondent 26’s lack of school attendance. The magistrate suggested the approved school as a potential solution and his father agreed. Respondent 26 was put on a three-year order and placed in custody at the approved school. According to Respondent 26, his father regretted his decision. This regret was based on his father not fully understanding what the order meant, how the approved school functioned, the lack of freedom he had placed on his son and his father’s general feelings of guilt. An indication of this guilt was through the frequency of visits from Respondent 26’s father or mother; 15 visits during the seven months he was in custody. This is considerable given that Respondent 26’s family travelled from Kajang, Selangor to Butterworth, Penang to visit him. Respondent 26 succinctly declared that his father “thought this was a normal school, if he knew it was like this, he wouldn’t have sent me here”, suggesting fully informed consent was not present when he agreed to the magistrate’s suggestion.
Respondent 1, an experienced court for children judicial officer, shared that children often appeared before the court without clear understanding of the beyond control and court processes and a lack of communication with their parent. The general court environment is intimidating to children and they often remained silent or only uttered two or three short sentences in response to questions put to them (Respondent 1). Moreover, some parents used the experience to scare their children into submission or to try to get the state to punish their child, rather than using other methods (Respondent 1). A strategy employed by Respondent 1 to get the parent and child talking to prevent unnecessary detention, was to send the parent and child to a room off the court to talk, with the option of withdrawing the application upon their return. Table 4.2 reflects through the number of applications being withdrawn that this action had some success, particularly after one month’s remand in the Asrama Akhlak (probation home). Over the five-year period covered, an average of 22% of the total beyond control applications heard at the Timur Laut Court for Children have been withdrawn by the applicant at the first appearance in the court, rising to 38% after one month in the probation home.

Respondent 1 spoke positively and hopefully of the amendment to the Act where the court for children can now place a child determined to be beyond parental control in the care of a ‘fit and proper person’, rather than custodial conditions (Malaysia, 2015, amendment 43(5), pg. 35). However, Respondent 1 had not exercised this alternative to the detention option at the time of being interviewed and was seeking guidance and referral options from DSWP before making any determinations.
Table 4.2: Timur Laut Court for Children’s Total Beyond Parental Control Applications, Withdrawals at 1st or 2nd Appearances and Top Five Most Common Parent/Guardian Behaviour Complaints 2012-16.

(Supplied by the Timur Laut Court for Children, 23/2/17)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total S.46CA applications</th>
<th>Application withdrawn at 1st court appearance</th>
<th>Application withdrawn at 2nd court appearance</th>
<th>Top 5 most common beyond control behaviours complaints cited by parent/guardian applicants:</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>12</td>
<td>3</td>
<td>3</td>
<td>Truancy/Absenteeism; Physically hurting parents; Stealing money at school and home; Lying to parents; Fights at school</td>
</tr>
<tr>
<td>2013</td>
<td>17</td>
<td>4</td>
<td>2</td>
<td>Truancy/Absenteeism; Physically hurting parents; Stealing money at school and home; Lying to parents; Fights at school</td>
</tr>
<tr>
<td>2014</td>
<td>12</td>
<td>3</td>
<td>6</td>
<td>Truancy/Absenteeism; Physically hurting parents; Stealing money at school and home; Lying to parents; Fights at school</td>
</tr>
<tr>
<td>2015</td>
<td>8</td>
<td>1</td>
<td>3</td>
<td>Gangsterism; Running away from home; Watching pornographic movies/pictures; Involved in sexual activities; Fights at school</td>
</tr>
<tr>
<td>2016</td>
<td>14</td>
<td>3</td>
<td>10</td>
<td>Gangsterism; Running away from home; Watching pornographic movies/pictures; Involved in sexual activities; Fights at school</td>
</tr>
<tr>
<td>Totals</td>
<td>63</td>
<td>14 (22%)</td>
<td>24 (38%)</td>
<td></td>
</tr>
</tbody>
</table>

Seeking and keeping alternatives to custody options within the considerations of the court was a central function of court advisors. They are legally empowered by the Child Act (Malaysia, 2001 & 2015) to assist in decision-making and to provide their reflections on the child’s circumstances to the presiding magistrate. Respondent 1’s experience was finding consensus is important and generally achieved 80% of the time, with 20% of disagreement coming from interpretation of reports, the next steps available and responses to questions. Respondent 6, an experienced court advisor of six years, showed some concerns about the practice of the role, outlining that she had received only one training session throughout her time as an advisor, a two-hour session on the 2015 amendments to the Child Act (Malaysia, 2001 & 2015). No job description or induction training was delivered to her, rather it was a matter of being
placed in the court and following the lead of the magistrate or other senior advisors. Advisors were paid 150 Malaysian Ringgits per day and provided advice on both criminal cases and beyond parental control applications (Respondent 6). The process described by Respondent 6 was a child appeared in the court and their court file was shared with the advisors. There was no time to pre-read the file, they had to quickly review it, hear the evidence or information being presented to the court, and then respond to the magistrate’s request for their opinion before making their decision. There was no compulsion by the court for advisors to connect or communicate with child or parent(s), this was left to the choice or individual style of each advisor.

According to respondent 6, certain advisors were very hard on children and had limited understanding of the Child Act (Malaysia, 2001 & 2015) or of child rights under the UNCRC (United Nations, 1989). Moreover, during the training session she attended with 50 other advisors, the session quickly dissolved into a complaint raising opportunity, where the list of complaints included the lack of training, the lack of time to prepare for cases, the lack of detail on the child’s circumstances in DSWP reports and how this was leading to incorrect decisions in the court and magistrates being too harsh on children. Principally, Respondent 6 believed the advisor’s role is important to achieving fairness and justice for children in the court system, however, the daily practice required significant improvement with regular training, performance monitoring and more energy being put into prevention strategies to keep beyond control children applications out of court.

An important factor in improving the court for children’s process is the development of the magistrate’s capacities and interest in children’s cases. Children’s experience of the law or the court environment is heavily influenced by...
the presiding magistrate, and their compassion is a significant factor of a child’s treatment by the justice system (Respondent 6 & S. Sekaran, personal communication, June 14, 2017). While there were dedicated courts for children, these were not exclusive or consistent courts with specialist child prosecutors, magistrates or court staff, rather the general adult magistrate’s court switched to be a court for children twice per month (Respondents 1 & 6). Efforts were made to train magistrates on the different needs and considerations of children within law and its process, but it required constant reinforcement and monitoring (Respondent 6 & S. Sekaran, personal communication, June 14, 2017).

4.2.5 Conflation of Criminal Allegations and Behavioural Events

The conflation of criminal allegations with behavioural events that laid the foundation of parents’ or guardians’ applications for a control order was something that emerged from child respondents’ journey into custody. In Table 4.2, all children (Respondents 21-27), except for respondent 28, nominated criminal allegations as one of the triggers that led their parents or guardians to making an application to the court for children. Moreover, Table 4.3 reveals that “stealing money at school and home” was one of the five top reasons for parents seeking control orders in 2012, 2013 and 2014. In all the years, physical violence at school or assaulting their parents was represented in the top five reasons. Holistically, the allegations listed in tables 4.2 and 4.3, formed part of the child’s ‘beyond parental control’ behaviour and satisfied the court to impose their control orders. The experience of Respondent 28 and the probation officer’s creative use of section 46 of the Child Act (Malaysia, 2001 & 2015) to get him into the approved school, rather than using a manufactured drugs charge which would attract a criminal sentence and record, suggested it was
possible for section 46 to provide a result requiring less procedural review and testing of evidence to prove allegations. Less work was required for the same result, namely the child was in a custodial setting, being punished and under state surveillance for up to three years. Moral positions that questioned fairness and the presumption of innocence of an accused person could be accommodated and reconciled because it was ‘petty’ criminal behaviour that no-one wanted to see a child unnecessarily labelled with into adulthood. Problematically for the child, decision-makers could justify any of their actions as acting in the best interest of the child.

During the detailed case review of Respondent 25’s connection with the court for children and the beyond parental control process, some troubling DSWP practices and Timur Laut Court for Children decisions were discovered. Respondent 25’s connection with beyond parental control orders had two phases. The initial order related to behavioural concerns that included petty criminal behaviour, such as stealing sweets and ice-creams from a local shop (Respondent 2, 13 & 16). This resulted in him being placed on a three-year order that included incarceration at the probation home for 13 months and upon release, two years of DSWP monitoring. The second phase occurred about 10 months after being released from the probation home in December 2014, when the applicant (Respondent 16) made new allegations against Respondent 25, namely he attempted to rape his 5-year-old female cousin (Respondent 1, 8 & 13).

Respondent 13 was one of the probation officers who worked on the second application. During a review of Respondent 25’s DSWP case file it was revealed that
the applicant went directly to the Timur Laut Court for Children and made an
application for Respondent 25 to be put back into custody. The behavioural claim
recorded in the case notes was Respondent 25 approached his sleeping “6-year-old”
cousin and asked her to hold his penis. Respondent 13 conducted an investigation,
during which he went to the applicant’s home and spoke with Respondent 16 and
Respondent 25’s 18-year-old elder sister (Respondent 16). The probation officer’s
subsequent report was presented to the Timur Laut Court for Children for judicial
review. A review of the court file revealed the claims made for the new order had
expanded, declaring there was oral sex between Respondent 25 and his five-year-old
cousin, he tried to get the cousin to touch his penis and he was not going to school
(Respondent 1). During the judicial process, Respondent 1 and the court advisors
attempted to validate the claims made against Respondent 25; he remained silent, did
not deny them and he appeared without legal counsel (Respondent 1). The alleged
sexual behaviour was the main reason for the probation officer’s recommendation for
Respondent 25 to be put on another three-year order and kept in custody at the
approved school (Respondent 1). Respondent 25 was placed on a new control order
from 15 February 2016 until 14 February 2019, which included incarceration in the
approved school for 15 months and DSWP surveillance after being released. He was
17 years and 10 months old when it expired. (Respondent 1, 8, 13, 16 & 25).

Attempted rape, rape and sexual assault were serious criminal allegations
raised against Respondent 25. These are not parental behavioural concerns that are
within the remit of section 46 of Child Act (Malaysia, 2001 & 2015). Unequivocally,
these allegations were the catalyst for him being on a second control order and
having his liberty deprived by the Malaysian State. Under the principles of natural
justice, the criminal allegations raised against Respondent 25 were not tested under the presumption of innocence (The Malaysian Bar, 2004 & Malaysia, 2010, Part II, Section 5(1)). His silence in court did not signify guilt, rather, under the traditions of English and Malaysian law, Respondent 25 had the right to silence (The Malaysian Bar, 2004, pg. 3). The allegations were not reported to the police for investigation (Respondent 1 & 13), instead a process of a probation officer interviewing two people, writing a report, making a recommendation and the child being placed on a three-year order was implemented. If the allegations were true, there is a 5-year-old victim to be taken into consideration, plus potential witnesses and physical evidence to build an evidentiary case against Respondent 25. In fact, the care and vulnerability of a potential child victim has been disregarded and crucial evidence to fairly and independently test allegations made against Respondent 25 in the pursuit of justice for all concerned, was lost.

Another significant issue for Respondent 25 was his reputation and how these allegations were potentially prejudicial to him. Respondent 25 has been unfairly labelled a rapist or child sex offender by the DSWP process. An interesting observation during the different stages of the case review was how the nature of the alleged sexual act expanded and then retracted under probing by the researcher. Initially, it was reported as attempting to rape his 5-year-old cousin (Respondent 13). In the court, this increased to attempting oral sex with his cousin and trying to get her to touch his penis (Respondent 1 & 13). Finally, on his case file at the approved school, it was recorded, “child has conducted oral sex with cousins” and “child asked cousin to hold his penis” (Respondent 8). This case file was accessible to four staff at the approved school who had direct responsibilities for Respondent 25’s supervision.
The researcher queried respondents 1, 8 and 13 on their interpretations of the alleged sexual behaviour. Respondent 8 said, “it’s true” because the probation officer interviews everyone, every decision involves the child and institution is the last resort; the probation officer and court had made the right decision. Respondent 1 echoed this trust in the DSWP process through placing emphasis on the probation officer’s responsibility to investigate properly, validate claims and present a truthful report to the court. Problematically, Respondent 1 also declared the allegations made against Respondent 25 had no evidentiary weight because they were untested and largely relied on hearsay. Respondent 13 considered it was not rape, more an allegation of molestation, given the request to touch his penis only. Moreover, his decision not to report the allegations to the police for investigation was because “it’s a family matter”. This decision was discussed and agreed with his supervisor. When asked for his personal reflections on Respondent 25, Respondent 13 said he was beyond parental control and remained so after 12 months in the probation home. The probation home was not suitable for him and the approved school presented as the best opportunity because of its vocational training opportunities and this was in his report to the court. Respondent 25 declared his strong sense of injustice and dissatisfaction regarding his treatment by the applicant, those running the custodial settings and the DSWP system in general. He did not feel trusted, understood or heard, particularly in his relationship with the applicant.

4.2.6 Probation Officer’s Report

Child respondents’ (Respondents 21-28) problematic experiences with the probation officers’ role in preventing their entry to the DSWKL system and the impact of their reports on them has been revealed throughout the sub-sections above.
Respondent 25’s experience is a striking example. During data gathering the pivotal nature of the probation officer’s report emerged as an important inquiry point because of the systemic reliance on it within the DSWKL and court for children processes. It was regarded as a fundamental tool in validating decisions made by both the DSWP stakeholders and the applicants for beyond control children. The probation officer’s report to the court for children was the primary piece of documented evidence that empowered legislated decision-making to deprive the liberty of beyond control children (Malaysia, 2015, Amendment 43, Section 46(3)(b), pg. 35 & Malaysia, 2001, Chapter 2, Part VII, Section 46(1)(b), pg. 57).

The power of the report on children’s entry or diversion from the DSWP system was pivotal, if not life changing. The report was considered an exhibit by the court, even though it is not delivered under sworn oath (Respondent 1). Implicit in the evidentiary weight of the document were expectations of an ‘officer of the court’ namely, that all claims declared were truthful and had been investigated and validated by the probation officer (Respondent 1). These expectations and the trust placed in the report’s evidentiary base again reinforced how instrumental probation officers were in the beyond parental control determination process and how important supervision and monitoring of their decisions was.

The DSWKL’s Quality Procedure Number 6 defined what must be in the probation officer’s report in section 8, appendix 2. Guided by the Child Act (Malaysia, 2015, Amendment 43, Section 46(4), pg. 35 & Malaysia, 2001, Chapter 2, Part VII, Section 46(1)(c), pg. 57), the report must be presented to the court after the child has spent a maximum of one month in the probation home. The first section covered the personal details of the child including their name, address, date of birth,
identity card number, gender, race, religion and age at the time of the event and order. The second section covered the name, address and occupation of the child’s father, mother, step-parents and guardian or foster parent. The third section provides for a review of the child’s schooling, occupation, attitude, relationship with family members, criminal record and the probation officer’s recommendations. The final section contained the name, signature, date and official stamp of the probation officer. While on remand in the first month, the child’s performance at the probation home was fed into the probation officer’s report and subsequent recommendations to the court (Respondents 2, 13, 14, 15, 17 & 20), along with inputs from the DSW psychology officer, who might have had some contact with the child and the parent during attempts to discourage a formal beyond parental control application to the court (Respondent 12, 13 & 14). Under the DSWKL Quality Procedure Number 6 the probation officer was obliged to investigate and interview the child, parents/guardian and related persons in the course of preparing the report for the court (Section 6(9)).

Critiques of the report highlighted its lack of detail into the investigation carried out by probation officers, the child’s performance at the probation home and detailed analysis to underpin the recommendations made (Respondent 6 & S. Sekaran, personal communication, June 14, 2017). Respondent 6 once raised a concern in the Timur Laut Court for Children when it was discovered a probation officer had ‘cut and pasted’ information from another report. Anecdotal reports and lived experiences revealed that probation officers had not visited children or their families to gather evidence to present to the court (S. Sekaran, personal communication, June 14, 2017 & Respondents 16, 21-28). This lack of adherence to
legislated expectations or basic fairness to an accused person was exacerbated when respondents operating the court system declared they followed the recommendations in the probation officer’s report most of the time, with little questioning or few changes (Respondents 1, 6 & 20).

The probation officers interviewed supported this through openly stating the courts listen to them and normally followed their recommendations (Respondents 13, 15, 17 & 20). When interviewed on the level of case management supervision or decision-making review they receive, the probation officers with limited experience received more, and those with more experience received less and mostly made a choice to seek it out or not. For example, Respondent 15 had only been a probation officer for six months and had dealt with six beyond control child cases; five had been resolved and only one child went into the probation home. Respondent 15 followed the DSWKL’s procedures and spoke to senior DSWP staff to seek reassurance during his decision-making. Likewise, Respondent 17 had been a probation officer for less than two years and outlined that he discussed all cases with his supervisor, “because it’s important for the child’s future and involves the court”. Conversely, Respondents 13 and 20 were both seasoned DSW employees with over 21 years of combined experience between them. Both had been probation officers for a number of years, with Respondent 20 being the most senior, with six years’ experience. Respondent 13 said the recommendations he made for beyond control children were not formally reviewed by his supervisor. If he chose to raise it amongst the team, it was usually through an informal ‘office discussion’ involving two or three people. It was not mandatory; his recommendations were not reviewed, and Respondent 13 presented them to the court without any cross-checking. Respondent
20 reiterated this, stating because most cases were similar, only if there was a complicated case would she speak with her supervisor, otherwise she made case decisions and recommendations based on her experiences, that were not cross-checked or reviewed. Respondent 20 went on to say, the court accepted the probation officer’s recommendations 90% of the time and did not disagree, resentfully declaring, there was “no reason to say no”, the case files were complete!

Respondent 7, who held managerial responsibility to DSWP systems, shared that DSWKL performed case and service reviews once or twice per year. This involved DSWKL staff travelling to Penang and carrying out a system and procedure audit. The case management system had been identified as being “poor”, according to Respondent 7, and had been included in training sessions for DSWP staff and improvement was attempted through the introduction of procedural manuals and the “EJKM” computer file system in 2010. Staff capacities and system compliance remained issues, as well as reluctance towards change and a preference for hand-written case files (Respondent 7). Probation officers received between one to three days training, three to five times per year, according to Respondent 7. The curriculum mostly focused on law, process and changes in standard operating procedures. Case management practice and supervision of decision-making was something that DSWP wanted to improve (Respondent 7).

4.2.7 Presumption of Parents
An issue that was shared by DSWP and court for children respondents was the role of parents in the process and how they frequently put considerable pressure on staff members to put children in custody. A common reflection made by DSWP and
court for children respondents was the presence of persistent parents in the beyond control process. Respondents shared their resolution and mediation efforts were often futile because parents or guardians wanted the child to be in custody, to give them a lesson or distance their responsibilities toward them. Moreover, saying ‘no’ to parents was not an option because the law supports their application and there were concerns about complaints being made against DSWP and court staff (Respondents 1, 7 & 20).

Respondent 1 shared that parents put pressure on the court and had requested private meetings to share their frustrations and the problems they had with their children. Respondent 1 felt most applicants were irresponsible and did not want to work on correcting the child’s behaviour, they wanted to shift the burden to another party and allow the state to do it. Sometimes they just wanted to give a lesson to the child and scare them (Respondent 1, 2 & 4). Respondent 1 had rejected applications to place children on beyond control orders for trivial complaints such as smoking, but equally found it difficult to say no to parents. Other probation officers supported this view through outlining how they attempted reasoning with parents to think of alternatives to custody but often the parents refused as they wanted their child in custody and DSWP staff eventually acceded to their requests (Respondent 15, 17 & 20).

Some child respondents felt the system and court only listened to their parents and did not give them a chance to be heard (Respondent 23 & 25). Respondent 23 felt the magistrate wanted to send him home, but his mother insisted he was sent to the probation home. Ultimately, Respondent 23 felt powerless and unheard when the
magistrate heeded his mother’s requests and placed him in the probation home for 12 months, for racing and damaging his grandparents’ motorcycle.

When discussing the issue of persistent parents with a research informant, a Malaysian cultural perspective was offered regarding how complaining parents were perceived in the beyond control process, namely because of a presumption that parents ‘naturally’ or ‘always’ tried their best for their children, a ‘presumption of guilt’ frames children (S. Sekaran, personal communication, June 14, 2017). Meaning, the public shame parents faced through bringing private family matters into a public court implied parents must be serious, they had tried everything, and the child is truly beyond control therefore decision-making would be weighted in their favour (S. Sekaran, personal communication, June 14, 2017). Furthermore, systemically this presumption is sympathetic to parents because the statutory requirements of section 46 of the Child Act (Malaysia, 2001 & 2015) is the state intervenes and takes control of the child only if a parent or guardian is “unable to exercise proper supervision and control of the child” (Malaysia, 2015, Amendment 43, Section 46(1)(a), pg. 34).

Research findings do not completely support this reflection, given the related statements listed in preceding paragraphs. However, indications from DSWP and court respondents gave the ‘presumption of parents’ impression some support. These respondents’ reflections on how they felt about beyond control children when questioned on whether the process was fair, just or proportionate to the behavioural claims made against the child are outlined in Figures 4.3 and 4.4. The respondents are separated into two cohorts: DSWP and court respondents who dealt with
applications (Figure 4.3) and DSWP respondents who dealt with beyond control children in custodial settings (Figure 4.4).

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Reflection</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Yes, “if everything has been done to prevent the child being in an institution”, more needs to be done to mediate the conflict between the child and parents</td>
</tr>
<tr>
<td>6</td>
<td>No. Some children have real problems and they can’t be in the same room as their parents. There need to be some correction place for the last resort children who are a danger to themselves or others, but not for the length of time current beyond control children face. There is a lack of community support to address root causes of beyond control children’s behaviour.</td>
</tr>
<tr>
<td>7</td>
<td>Yes, it’s fair, they deserve it. Parents have tried many ways, they failed, it’s the last resort for parents</td>
</tr>
<tr>
<td>12</td>
<td>Counselling is fair. Institutionalisation isn’t fair. Parents are using the government.</td>
</tr>
<tr>
<td>13</td>
<td>It’s unfair, but DSW will not take action if it’s the first time without criminality. DSW will not put them in institutions. The criminality and their confession/contrition is significant in the decision-making process. Some have long histories, even rape.</td>
</tr>
<tr>
<td>14</td>
<td>The Malaysian law is ok, the institution is good for the child because they have modules and programs to correct behaviour. Families blame the child 100% and parents have lost their responsibilities.</td>
</tr>
<tr>
<td>15</td>
<td>Can't solve problems. Parents want changes in their child.</td>
</tr>
<tr>
<td>17</td>
<td>Difficult to say, it depends on the probation officer. Families really push and want their child in an institution.</td>
</tr>
<tr>
<td>20</td>
<td>Depends on the case. If the child is wild, then it’s appropriate; if less wild then not.</td>
</tr>
</tbody>
</table>

Figure 4.3: DSWP and Court Respondents’ Reflections on Beyond Control Children in the Application Process.

This cohort is made up of DSWP managers, psychologists, probation officers and a court for children magistrate and advisor. These reflections were gathered near the end of interviews, after 30-45 minutes of conversation, meaning a level of comfort and ease was present. Responses all represent and were received as honest, unfettered personal opinions from people making the system function on a daily basis. Throughout, there are pronunciations and inflections of trust in the DSWKL
system to deliver change in the child, as well as support for parents who have tried their best and a resignation that they are being used to deal with problems inside families that really is not the role of government. Overall, the respondents are either overtly or reluctantly supporting the parent’s decision.

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Reflection</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>They are sent for a reason and in the lock-up to follow our rules. We create discipline in them. They need to feel being in the lock-up; “if he can follow our rules, we won’t be strict”. I see changes in them. Parents are surprised; they request them to be in here for 1 year. This system helps them, it's the last resort.</td>
</tr>
<tr>
<td>4</td>
<td>It’s not fair for the child. They should be separated from the criminals because their behaviour is not too bad, being with sentenced children they will get influenced. The approved school is not good for their development.</td>
</tr>
<tr>
<td>5</td>
<td>Yes, they can be put inside here because they don’t listen to their parents, run away from home for 3 days and hang around with criminals. Counselling is good for them and we don’t abuse them 24/7, they are let out of the lock-up for meals, programs and religious classes.</td>
</tr>
<tr>
<td>8</td>
<td>Beyond control children can be worse because they have not been caught or arrested. The approved school is the last resort. They are criminals who haven’t been caught yet.</td>
</tr>
<tr>
<td>9</td>
<td>Yes, as an effort to teach them. It’s a good time for the family to get a clearer understanding.</td>
</tr>
<tr>
<td>10</td>
<td>Not that fair to me. Parents need counselling, fault is with parents not the child</td>
</tr>
<tr>
<td>18</td>
<td>System is fair. The Child Act and its power over beyond control children gives the child a good experience, they can be creative and have support in the approved school. The approved school is a “remedial process not a punishment to them”.</td>
</tr>
<tr>
<td>19</td>
<td>Not fair for them. The approved school is not a good place for them, they are not criminals. The approved school can teach them, or they learn, bad things. The probation home is better for them.</td>
</tr>
</tbody>
</table>

Figure 4.4: DSWP Respondents’ Reflections on Beyond Control Children from Custodial Sites.

The cohort reflected in Figure 4.4 is made up of probation home and approved school senior management and staff who were responsible to children placed in their institutions under court for children orders. As with the cohort in Figure 4.3, these
reflections were shared in the latter part of interviews and were presented with free will, with the exception of Respondent 10, responses share an implicit narrative of the beneficial nature of custody to improve the beyond control child. The institutions’ role is to correct their behaviour and bring discipline to their development. The strong statements in favour of parents made by respondents are unsurprising because the institutions’ remit was to address children who have been determined to be beyond parental control. This cohort’s responses made a better link with the presumption of parents’ hypothesis of them always trying their best and being almost the ‘victims’ of unappreciative children.

4.3 Discussion

The research findings in this chapter reveal the failure of the DSWP mantra of ‘institution is the last resort’. The DSW system was designed to ‘protect and rehabilitate’ children, not to ‘prevent’ their entry through systemic application of mechanisms to ensure accountable procedural and judicial fairness. Unchecked decision-making was considerably impacting children’s lives and their relationships with parents/applicant. Inadequate effort was being put into mediating the parent/applicant and child conflict, rather decisions were being made by legally empowered and responsible individuals, with little or no supervision, to ensure compliance with the Child Act (Malaysia, 2001 & 2015) or DSW procedures. In the process, serious injustices were committed against children, with the treatment of Respondents 25 and 28 being problematic cases-in-point.

Culturally, DSWP and justice stakeholders held faith in the reliability of the processes to be only producing beyond control children who could not be helped,
primarily based on the presumption that parents/applicants had tried their best and DSWP decision-makers had exhausted all options. Comfort was found in the frequently quoted DSWP mantra of ‘institution as the last resort’. This idiom acted as an echoing protective reassurance that the system was working, comforting and reconciling custodial outcomes for the DSWP respondents, but provided little to interrogate and keep DSWP staff accountable to existing standards or poor decisions they had made. The result was a sense of sanctioned moral responsibility by DSWP system operators to correct and rehabilitate a recalcitrant child, thereby returning their behaviour to societal expectations and obligations.

Malaysia’s treatment of beyond control children is inconsistent with international expectations of how children in conflict with the law should be treated, particularly those being processed under status offences, meaning without criminal charges. Internationally and regionally, momentum is being affected towards early intervention practices and an accommodation of systemic diversion of children in conflict with the law from formal criminal systems into alternative processes to avoid children going into custodial settings and suffering potential harm to their development (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a; Mohammad & Azman, 2014; UNICEF, 2017; McGrath, 2013; Foussard & Melotti, 2016; Raoul Wallenberg Institute, 2015). The underlying premise of these diversion models are the principled positions of early intervention and community-based programmes being the most effective strategies to avoid formal justice processes and to enable positive child development (UNCRC, 1989; Meisels, 1985; UNICEF, 2017; Mohammad & Azman, 2014; Raoul Wallenberg Institute, 2015). Malaysian duty bearers are aware of these standards and
international trends (UNCRC, 1989; Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a & Child Rights Coalition Malaysia, 2012), reflected in the 2015 amendments to the Child Act (Malaysia, 2015), however, to the detriment of beyond control children’s futures, systemic change has not been realised.

4.3.1 Early Intervention as a Prevention Strategy

Early intervention, as a social policy practice, is designed to identify and address vulnerable individuals or families in crisis to prevent or reduce their length of contact with government institutions or systems. In the case of Malaysian beyond control children, an early intervention strategy would be to actively engage the child and family in their home, using creative community resources to prevent a formal application to the court for children and thereby avoiding a custodial period or state monitoring order. The intervention is designed around an active, equal partnership between government service agencies and the child/family in crisis to find appropriate and suitable strategies and resources to move them through to resolving crises. The relationship is time bound, human contact centred, inclusive, and monitored for compliance with legal and policy obligations. Philosophically, the process embraces and facilitates the client’s agency in finding creative and culturally appropriate solutions to their crises, based on a diversity of options within their environment, rather than hierarchical powerholding government agencies directing citizens choices and outcomes (Ungar, 2002, pg. 491).

A foundational theoretical model that underpins early intervention strategies in human service models, and human and social development in general, is the Russian
developmental psychologist, Urie Bronfenbrenner’s (1917–2005 CE) seminal work on the bio-ecology of human development (1977, 1981 & 1994; Ungar, 2002; Sunar, Nakamura & Caufield, 2003; Rosa & Tudge, 2013; Tudge, Mokrova, Hatfield & Karnik, 2009; Swick & Williams, 2006). Bronfenbrenner’s bio-ecology theory was originally designed and developed to prompt his developmental psychology colleagues to better acknowledge the environment children found themselves in as a causal factor in psychopathology (Bronfenbrenner, 1977, pg. 514 & Ungar, 2002, pg. 482). The essence of Bronfenbrenner’s bio-ecology of development model, illustrated in Figure 4.5, is that a child and their childhood are spatially and chronologically located within their environment and the systems surrounding them (micro, meso, exo and maco), which are continually interacting and evolving, while influencing and developing the child.

Figure 4.5: Bronfenbrenner’s Bio-Ecology of Human and Social Development (Adapted from Bronfenbrenner, 1977 & 1994; National Academies of Sciences, Engineering, and Medicine, 2016, pg. 73.)
The impact of Bronfenbrenner’s work in actively acknowledging and navigating the child’s environment during decision-making cannot be understated, primarily in its capacity to address nature versus nurture debates, or what development experiences are universal or differ across social, historical or cultural contexts (Sigelman, 1999). This bio-ecological model has been applied to a range of phenomena and systems, including social work practice, exploring how systems and clients interact (Ungar, 2002); intervention models with families suffering from violence, drug dependency and homelessness (Swick & William, 2006); responding to unplanned teenage pregnancy (Suner, et. al., 2003) and the efficacy of early intervention by government child protection agencies (Meisels, 1985).

The development and evolution of Bronfenbrenner’s model started in the late 1970s and went into the early 2000s (Rosa & Tudge, 2013). Through peer review and with evolving iterations, Bronfenbrenner adjusted the model to better accommodate the biological and genetic impacts on child development, and the chronology of development, particularly how significant events impact the systems and thereby the child, or the child and thereby their proximity and interaction with the systems (Bronfenbrenner, 1994; Rosa & Tudge, 2013). As Sigelman (1999) evocatively positions it, “We cannot study development by taking still photos; we must use a video camera and understand how one event leads to another and how societal changes intertwine with changes in people's lives.” (pg. 10). Critiques of Bronfenbrenner’s bio-ecological model argue it lacks sufficient detail to explain why things happen, it is not prescriptive enough to inform practice and it is overly inclusive and speaks in broad, general terms (Ungar, 2002, pg. 484). Bronfenbrenner anticipated and addressed these concerns through promoting the model as a tool to
stimulate questions, rather than answers “for the primary scientific aim of the ecological approach is not to claim answers, but to provide a theoretical framework that, through its application, will lead to further progress in discovering the processes and conditions that shape the course of human development.” (1994, pg. 41).

Bronfenbrenner's bio-ecological model speaks to and connects well with the maqasid al-Shariah framework and systems approach articulated by Jasser Auda (2007 & 2008, see figure 1.1, pg. 12) through the various stratified layers and interconnectedness of purpose in human and social development. Both promote the increased recognition of how environments and actions, directly and indirectly impact societal relational structures and individuals, and how we are all responsible to these interconnected transactions and to defining what purpose and impact they have in human and social development. The primary differences between the two theories is that Bronfenbrenner is primarily concerned with an individual’s adaptive and adoptive experiences as they connect with or are impacted by the various systems along a transversal chronology, framed in the sentient space of now. Whereas maqasid al-Shariah focuses on the centralisation of a worldview that has a consciousness of God’s will to be continually doing good and acting with justice and fairness, which governs an individual’s actions and social relations that transfers beyond the sentient space of now and onto Judgement Day and the afterlife.

Regardless, the principles of acknowledging and accommodating a Muslim beyond control child’s environment and having a consciousness of acting fairly and compassionately to keep them in their family and within their community, rather than in custodial settings, is the logical aim of both the bio-ecological model and the aims and objectives of maqasid al-Shariah.
A piece of Malaysian research that highlights the interconnectedness of environment and children’s behaviour is a structured questionnaire study of 1,434 secondary school children from the eight districts of Johor, which explored “the influential factors of parents’ attachment for at-risk children’s antisocial behaviour, and to know the types of children’s antisocial behaviour caused by being a single-parent family” (Hajar, Wahab & Islam, 2015, pg. 1). The findings revealed that parental employment affected a child’s involvement in antisocial behaviour through the amount of time parents spent at work and the subsequent lack of presence by one or both parents in the home (Hajar, et. al., 2015, pg. 9-10). Moreover, children with 4–7 siblings accounted for 48.7% of those involved in anti-social behaviours (Hajar, et. al., 2015, pg. 10). Interestingly, the research also highlighted that children from single-parent households were not automatically at risk of anti-social behaviour; rather, it was the way the family had become single-parented. Children were at higher risk of engaging in anti-social behaviour if their parents divorced or if one had died, because these events brought problems, conflicts and family tensions (Hajar, et. al., 2015, pg. 10). Drawing parallels and overlaps with how beyond control children’s behaviour is defined, examples of what constituted anti-social behaviour included smoking, alcohol use, gangsterism, quarrelling, fist fighting, premarital sex, using pornography, running away and vandalism (Hajar, et. al., 2015, pg. 10). The research highlights the demands that are on Malaysian families through parents working long hours, while juggling financial demands with being physically at home and having positive child contact. The findings also spoke about how families are poorly navigating milestone events such as divorce or death, which is impacting children and is cited as a causal factor of some children’s anti-social behaviour.
There is a clear link made between Hajar and colleagues’ (2015) research and the findings of this research, particularly the environmental factors that led to children being determined beyond parental control and how their behaviour was defined by parents, the DSWP and courts for children. Child respondents shared that had their milestone events been better negotiated and addressed within their families, their behaviour would have been different, and they would not be in custody or on monitoring orders. In terms of the DSWP’s response to Muslim beyond control children, the messages taken from Bronfenbrenner’s bio-ecological model and research using it as a guide, is that early intervention works, and the family unit is the central change site to focus upon because of its ecological impact on early child rearing and subsequent childhood behaviours (Meisel, 1985, pg. 9; Suner, et. al., 2003; Ungar, 2002).

Another fundamental of an early intervention, preventative response is the relocation of power from bureau-centric state agencies into actively acknowledging the client’s agency, which is enabled through valuing the client’s unique diversity and seeing their environment as a resource site to provide solutions, rather than a hindrance to uniformed preformed responses (Ungar, 2002). Adopting this approach involves a shift in historically rooted power dynamics, primarily through acknowledging the implicit power and privilege that is present in transactional processes between state and citizen (Ungar, 2002, pg. 483). Malaysia’s Ministry of Women, Family and Community Development has recognised the need to move towards a preventative early intervention model to address child welfare needs, and more specifically children in conflict with the law (Malaysia’s Ministry of Women,
Family and Community Development & UNICEF, 2013 & 2013a). These recommendations are consistent with global trends and regional initiatives towards moving state responses towards vulnerable, at-risk children and families out of a paradigm of imposed remedial and rehabilitative responses, into a more inclusive and creative environment, where communities are better recognised as resource sites and children’s agency and participation is centralised (UNICEF, 2017; Clark & Stephens, 2011; Reynart, et. al., 2009).

Contextualising this to beyond control children’s treatment, preventative early intervention approaches are promoting DSWP powerholders to adopt a mentoring and coaching role while they engage with conflicting or at-risk families. DSWP probation officers acknowledge their power and direct it towards enabling the agency of both the conflicting parent/applicant and child to seek sustained solutions within their communities, not short-term custodial remedies. Creative and diverse community support connections are made and monitored by the DSWP probation officer, reflecting the uniqueness of the family and their environment. Custodial power strategies are held back and exercised sparingly, only at times of acute crises or immediate protective incidents. However, with creative freedom comes a responsibility to ensure compliance with policies and the law, meaning the DSWP probation officers and associated staffs’ decisions are systemically reviewed and evaluated to ensure fairness and accountability both to the clients and their obligations under law. Furthermore, successful innovative approaches that can be captured are highlighted, evaluated and fed into training and development opportunities to strengthen the system.
4.3.2 Systemic Diversion of Beyond Control Children

The concept of ‘system diversion’ is a conditional channelling of children in conflict with the law away from formal judicial proceedings into alternative programmes or support structures to address their behaviour, thereby avoiding the negative effects of formal proceedings, including custodial setting or elongated monitoring orders (Foussard & Melotti, 2016). As illustrated in Figure 4.6, diversion practices are designed to keep children out of custody and allow them to be supported and assisted back onto a positive development trajectory through community-based initiatives. Importantly, the ability to divert a child is systemically enabled by a process which holds decision-makers, the child and their families accountable to the option through regular review and outcome monitoring.

Figure 4.6: Beyond Control Children’s Systemic Diversion in Practice
(Author, 27/03/2018)
Research findings revealed some uncoordinated diversion initiatives were taking place as beyond control children traversed the DSWP system. These included informal discussions between parent/applicant and the DSWP probation officers before a formal application to the court; prevention options articulated in Figure 4.1; and a magistrate sending the applicant and child into a room to talk, with 22% of applications being withdrawn at the first appearance (Table 4.2). These were positive examples of creative and compassion-driven initiatives that had been taken by system operators to prevent Muslim beyond control children from being in custody or on monitoring orders. However, these initiatives were unregulated and not assessed for fairness, efficiency or unbiased application. The decision on whether a child received this positive treatment remained within the feelings and emotional judgements of individuals, not an automatic obligation for all children to receive these alternatives to custody strategies. Moreover, this research highlighted serious process flaws through the lack of adherence to standards and legal obligations of fairness before the law by system duty bearers. These research results reveal the risks present for vulnerable families and children when life changing decisions are based on emotions and unsupervised decision-making, rather than by applying a disciplined system with multiple points of scrutiny and accountability.

Systemic diversion reflects a fundamental shift in focus and relationships that is consistent with preventative, early intervention strategies to remove a breakdown in family relationships from courtrooms and into obligatory mediation. Looking towards the law to resolve the complexity of family disputes is problematic because the law depends on authority and process, not compassion and reconciliation (Goldstein, Freud & Solnit, 1973). Legal processes are often attributed with a
“magical power” to address inequality in relationships and the law is largely a crude and abrasive instrument with which to address conflicting families or individuals (Goldstein, et. al., 1973, pg. 49-50 & Bryant, 2017). In this sense, wisdom and compassion are equally important elements in the pursuit of justice (Bryant, 2017). If justice and compassion are the central aims of recovering the relationship breakdown between parent and beyond control child in conflicting Malaysian families, shifting emphasis from law, policies and personalities to provide answers, to a process of skilled mediated discussion, monitored strategies and accountable outcomes makes sense.

A regional example of successful compulsory mediation in family breakdown comes from the Australian Capital Territory’s Magistrates Courts while addressing family violence orders. Mandatory conferencing is part of the court’s systemic diversion process when it comes to settling family violence orders, resulting in a 95% success rate and 20% breach rate which is “much lower than other jurisdictions” (Spence, 2018). Success means the matter is resolved or settled without the parties going into a courtroom. The overarching authority of the court is present in the process through any breaches, revocations or amendments being adjudicated and monitored by the court (Spence, 2018). However, the process is primarily based on a series of face-to-face conversations with a skilled mediator who negotiates outcomes between the parties with the intention of reaching an agreement that is suitable to them and the law (Spence, 2018). The process focuses on sharing power between all stakeholders, with the aim of securing the active participation of those in conflict towards settling the dispute without expensive lawyers, while remaining flexible and considerate of the time legal processes can take and their
impact on already fragile relationships (Walker, 2018 & Spence, 2018). Furthermore, the process acknowledges how public and intimidating courtrooms can be, along with the feeling participants can have towards their credibility and morality being questioned (Walker, 2018). The central premise of the mandated diversion process is to foster conversations and reconciliation between parties to avoid outcomes or decisions being “foisted on them, which may not be what they’re wanting or expecting” (Walker, 2018).

Ms. Lorraine Walker (2018), the Chief Magistrate of the Australian Capital Territory, feels the process is far better to achieve justice in dispute resolution because formal court proceedings are law-centred and unlikely to hear the whole story, whereas each party being able to put their stories forward through a mediator in a relaxed environment will allow people to be heard more clearly. However, important safeguarding structures need to be present to ensure accountability and monitoring. These structures include: the process being linked to and monitored by a formal legal system; on-going, time-bound monitoring of the relationship in crises; and the capacity for swift re-entry of the formal system if needed at times of immediate protection of either party. The result is a legally empowered and monitored process which enables conflicting individuals to be actively heard and considered, promoting less contact with the justice system and more reconciliation and compassion in decision-making.

There has been a considerable amount of work done in the Asia Pacific Region on recognising and achieving a better inclusion of community-based justice and reconciliation systems, that either challenge the orthodoxy of Latin-Christian rooted,
post-colonial legal systems, or seek to better accommodate them with constitutional legal systems (McGrath, 2013; UNICEF, 2017; Foussard & Melotti, 2016; Mohammad & Azman, 2014; Clark & Stephens, 2011; Raoul Wallenberg Institute, 2015). This shift in emphasis from a formal state response to families in crises to a reconciliation and discussion-oriented model of dispute settlement is consistent with Islamic justice principles and maqasid al-Shariah’s aim of achieving justice and compassion to preserve families (Auda, 2007 & 2008; Kamali, 1999, pg. 396). Moreover, it is explicitly mentioned in the Quran (The Nobel Quran, 1998/1419AH, 49:9) and was favoured by the Prophet to reconcile conflict and bring harmony back to relationships and communities (Othman, 2007; Al-Ramahi, 2008; Rusli, 2013).

In Malaysia, the Ministry of Women, Family and Community Development and UNICEF (2013 & 2013a) have jointly promoted the better adoption of international standards and practices to prevent unnecessary custody orders, child protection system strengthening and improvement in the responses to children in conflict with the law. One research’s findings support the preference for mediation and negotiation to solve conflicts, rather than courtrooms, however, more awareness of what it constitutes is required at the community level (Mohammad & Azman, 2014). Amendments to the Child Act (Malaysia, 2015) include some diversion mechanisms that encourage beyond control children to be kept in “family-based care”, promoting that a child be placed with a “fit and proper person” (Amendment 43, Section 46(5)(a), pg. 35). However, although decision-making respondents in the court system were aware of the amendments and the desire of the Act, they were waiting for guidance and direction from the DSWP to facilitate them (Respondents 1 & 6). With the result that these provisions were not being utilised to keep beyond
control children out of custodial settings or off monitoring orders. If mandatory
diversion for beyond control children was to be considered by Malaysian courts for
children, the Child Act (Malaysia, 2001 & 2015) requires further amendments to
make it compliant with international expectations and to protect families and
children as they engaged in formal mediation. Importantly, the process would need
monitoring and evaluation by the formal justice system to ensure compliance, best
practice development and better supervision of DSWP decision-makers. Moreover,
to achieve consistence with international best practice, serious consideration needs to
be given to exploring culturally-appropriate customary or traditional justice practices
that focus less on formal impersonal processes, and more on discussion and
reconciliation of relationships with wisdom and compassion.

4.4 Conclusion

Findings in this chapter revealed significant human errors within a system that
was attempting to remain relevant and consistent with international expectations of
appropriate treatment for children in conflict with the law, predominantly reflected in
the 2015 amendments to the Child Act (Malaysia, 2001 & 2015; Malaysia, Ministry
of Women, Family and Community Development and UNICEF, 2013a). In some
cases, DSWP and associated agencies were not meeting legal or procedural
expectations of fairness and justice, resulting in children being in avoidable custody
or on monitoring orders. Little effort was being put into addressing the circumstances
and triggers that children experienced, and which contributed to application orders to
the court for children. Probation officers’ actions, decision-making and report
constructions were insufficiently reviewed or monitored, leading to mostly
unsupervised and uncross-checked recommendations being trusted and fulfilled by
the courts. Courts imbued with an inherent responsibility to fairness and due process, that have the legal power to deprive a child of their liberty for up to three years.

Individual system operators were trusting the system was only producing children who were not helped by it and found reassurance in the organisational mantra of ‘institution as a last resort’. The lack of case management supervision and senior DSWP leadership to ensure a constantly reviewed and disciplined compliance with existing legal and policy expectations allowed a culture of self-regulated decision-making to permeate.

DSWP system duty bearers are surrounded by examples and momentum in the Asia Pacific Region, including Indonesia (Clark & Stephens, 2011), where there is serious reflection on the role of customary community-based justice practices to avoid formal justice systems in matters involving children (Mohammad & Azman, 2014; UNICEF, 2017; McGrath, 2013; Foussard & Melotti, 2016; Raoul Wallenberg Institute, 2015). These are predicated on the principle that early intervention and prevention programming within the family unit has the best results for vulnerable children and their families (Meisel, 1985, pg. 9; Suner, et. al., 2003; Ungar, 2002). The state acknowledges and utilises the strength and resiliency that is present in communities, kinship groups, family units and individual relationships to assist families in crises with a long-term view, rather than relying on state interventions that favour short-sighted custodial remedies.
Importantly, these systems augment and are regulated by the authority of the state but accommodate and include systemic diversion into culturally appropriate practices that focus on repairing and reconciling families in crises through community resources, dialogue and compassion (Bryant 2018 & Walker, 2018). This is consistent with the guidance given by the Quran (The Nobel Quran, 1998/1419AH, 49:9) and the Prophet for Muslim families or communities in conflict (Othman, 2007; Al-Ramahi, 2008; Rusli, 2013). If families remain together and in harmony, then the aims of maqasid al-Shariah have been met (Auda, 2007 & 2008; Kamali, 1999, pg. 396). Moreover, it meets expectations of acting in the best interest of the child and ensuring compassion and justice in the process.
CHAPTER 5 – PROMOTING RELEASE FROM CUSTODY AND SYSTEM

5.1 Introduction

The focus of this chapter is to explore what happened to Muslim beyond control children in custody at the DSWP probation home and approved school. These were locations where the child’s liberty was deprived under court for children orders empowered by the Child Act (Malaysia, 2001 & 2015). Both locations were staffed by DSWP employees whose remit was to provide personal development opportunities and to bring order to beyond control children’s lives through routine, discipline and religious awareness. DSWP probation officers remained pivotal decision-makers for beyond parental control children’s connection or release from the system. Another pivotal decision-maker who emerged in the findings was the principal of the approved school, through the favourability of his release from custody recommendations being crucial to decisions made by the board of visitors.

Systemically, in both custodial settings, beyond control children were seen and treated the same as children sentenced for criminality through being mixed with the facilities’ general populations. The probation home and approved school had established monitoring and performance assessments that evaluated a beyond control child’s likelihood of successful release from custody and return to their family and community under DSWP surveillance. The threat of return to the home or school remained with the child until expiration of the court for children order. While Section 47 of the Child Act (Malaysia, 2001 & 2015) provides for removing or amending control orders before their expiration, this legislative option was not exercised by the DSWP.
Life for children inside the probation home and approved school was difficult. Children complained about violence from staff and other children, boredom, a lack of effort to address the conflict with their parents, and a system that processed them, rather than acknowledged them as individuals with needs. Although some children spoke positively about the vocational workshops, counselling and religious classes, seeing these as interesting and motivating, a consistent cause of dissatisfaction for the beyond control children was being mixed in with children sentenced for criminal acts. The children felt this was not right.

5.2 Research’s Findings

Once beyond parental control children entered the DSWKL system, they were not released before the expiry of the court order. DSWP staff continued the verbalisation of the organisational mantra of ‘institution as a last resort’ but differed from their system ‘pre-entry’ colleagues, predominantly through being responsible to children who ‘needed’ correction because they were in ‘their’ custody. Children entering the probation home and approved school presented to DSWP staff as those who ‘couldn’t be helped’ and therefore needed the strict discipline, routine and moral correction being delivered by the institution, as a last chance. They trusted the DSWP beyond parental control determination process had the required checkpoints and supervision to prevent unnecessary institutionalisation.

The implication for children was an assured presence throughout interviews with DSWP staff who carried a moral authority to assist parents to correct their children and a strong sense of doing good, in the best interest of the child. This feeling of purpose saw children not being released early from custody or the system,
despite meeting, or in some cases exceeding, performance expectations. Once in the system, keeping them under surveillance and punishment was normalised because they could not be trusted not to return to bad behaviour. Children’s sense of injustice was made particularly acute and compounded when their entry to the system was predicated on tricks, lies or a lack of fair process to assess the claims made against them. Reparation for this injustice was not accommodated by the custodial settings whose remit was to bring order and discipline to beyond control children through routine, religious consciousness and acquiescence to established standards and practices.

5.2.1 Probation Home Detention

Beyond parental control children were sent to the probation home (Asrama Akhlak) at Paya Terubong, Ayer Itam, Penang, under court for children order, either for a period not exceeding one month (Malaysia, 2015, Amendment 43, Section 46(3)(c), pg. 35) while the probation officer carried out an investigation to test the validity of the claims made against the child, or the location where they could be detained during the custodial period of a court order, not exceeding three years (Malaysia, 2015, Amendment 43, Section 46(6), pg. 35). The DSWP’s relationship with the probation home was limited to monitoring and developing the administration of the home and its staff, who were employees of the DSW. The DSWP did not have influence on the programmes that were run in the probation home. The design and frequency of these were the responsibility of the warden (Respondents 2 & 7). In 2015, across Malaysia, they received the following practice and standards manuals: Quality Procedure and Management System (Prosedur Kualiti Sistem Pengurusan Kualiti) and Child Services Institution (Perkhidmatan
Institusi Kanak-Kanak) (Respondent 7). While these were designed to standardise practice and expectations of institution management towards children, they also formed a foundation for staff training and development programmes (Respondent 7).

Documents supplied by senior management at the probation home defined the goals and means adopted to achieve a transformation in children, including beyond parental control residents. The following is a synopsis of the “Hala Tuju Asrama Akhlak” or “Direction of the Probation Home” supplied (Respondent 2):

<table>
<thead>
<tr>
<th>Goals</th>
<th>Transformation of residents through academic, religious, moral and skills development to produce excellent and knowledgeable residents after release to the public.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Optimise residents’ participation in community programmes.</td>
</tr>
<tr>
<td></td>
<td>Apply a healthy lifestyle to residents regarding hygiene, diet, physical and mental health, plus an awareness to 'go green' for the environment.</td>
</tr>
</tbody>
</table>

**Methods**

- **Discipline:** personality, punctual, courage and self-confidence, respects workers and friends. 
  *Achieved through:* marching, fines, appreciation, programs and activities.

- **Religion and Morality:**  
  Improve knowledge of correct ablutions method, prayer reading, reading Quran, religious teaching and training to call prayers. 
  *Achieved through:* a 'face-to-face' approach, elders sharing knowledge and appreciation of values.

- **Education/Academic:**  
  Prepare them to return to school. Illiteracy and tuition classes. 
  *Achieved through:* links with universities and colleges create courses that motivate residents to excellence.

- **Skills:**  
  Vocational training skills development: cooking, carpentry, mechanical repairs, etc. 
  *Achieved through:* forming links with training institutes, community colleges and enterprising relatives.

Figure 5.1: Goals and Methods of the Probation Home.

At the time of interviewing staff and beyond parental control children at the probation home there were around 30 inmates, which included two beyond parental control children. Probation home staff’s attitudes towards beyond control children was ‘institution is the last resort’ and trusted that DSWP staff and parents would
have tried all other options before placing the child in the home (Respondents 2, 5 & 9). Their role was to provide “care, protection and rehabilitation” (Respondent 2) and to bring morality and religion into relationships with their parents, teachers and society because when they arrived at the probation home, they did not care about their community or parents (Respondent 5).

Children were demarcated by different coloured shirts; red shirts indicated a beyond parental control child or a child who was on remand, waiting for a criminal charge to be judged and determined by the court for children. Blue shirts indicated children who had already been found guilty and sentenced. When the researcher visited, there was only one blue-shirted child (on a 12-month sentence) in the probation home, the remainder were red shirts.
<table>
<thead>
<tr>
<th>Time</th>
<th>Duties</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.30am</td>
<td>Wake, tidy bed, bath and prayer.</td>
</tr>
<tr>
<td>6.50am</td>
<td>Morning exercise to promote circulation and stretching</td>
</tr>
<tr>
<td>7.30am</td>
<td>Breakfast</td>
</tr>
<tr>
<td>8.00am</td>
<td>Assembly: remind residents of the rules, health, cleanliness, day's activities and arrange court transport.</td>
</tr>
</tbody>
</table>
| 9.00am - 12.00pm | Programme “Gema Kasih” (Echoes of Love)  
|             | Wk1: hygiene, cleanliness, planting trees, painting buildings         |
|             | Wk2: religion, spirituality classes (teachers from outside)            |
|             | Wk3: sports, recreation                                               |
|             | Wk4: community connection (support from outside NGOs)                 |
| 12.00pm    | Bath                                                                   |
| 1.30pm     | Lunch and prayers                                                     |
| 3.00 - 4.30pm | Religious class with probation home's Religious Affairs Officer;  
|             | Monday to Thursday. Every Tuesday evening is Quran class.             |
| 5.00pm     | Prayers                                                                |
| 5.00pm - 6.30pm | Recreation                                                           |
| 6.30pm - 7.30pm | Bath and dinner                                                      |
| 7.30pm     | Prayer, religious discussion and guest speakers                        |
| 8.30pm     | Prayers                                                                |
| 9.00pm - 10.30pm | Television                                                          |
| 10.30pm    | Lock down and bed                                                     |

Figure 5.2: Daily Routine for Residents of the Probation Home

The schedule shown in Figure 5 represented a ‘normal’ day for those residents who had passed their first month of residency at the home. All movements were monitored and there were multiple ‘roll-calls’ daily. All children sent to the probation home spent their first month in the “lock-up” (Respondents 2 & 9). This first month was a period of potential drug withdrawal, calming family tensions and/or learning to follow the rules of the home (Respondents 2 & 9). Fear was part of this process, putting children in the lock-up taught them they had no control and were required to follow the rules and be disciplined (Respondents 2 & 9).
Children remained in the lock-up for the month and were let out only for meals, programmes, religious classes or to pray (Respondent 2 & 5). Inside the lock-up were communal toilets, showers and mats on the floor for sleeping. The risk of escape was high in the first few weeks (Respondent 2) and gaining dominance of the children was an important first step to establishing control and setting the expectations of their time at the probation home. DSWP staff had tried unsuccessfully to shorten the time in the lock-up to two weeks but found this was not enough time to address drug withdrawal (Respondent 9). However, children not on drugs, whether beyond parental control or ‘on remand’ children, were all treated and processed in the same way, meaning they all went into the lock-up upon arrival, suggesting the lock-up was primarily used for initiating children to the institution and
establishing who was in control. Routine, discipline and following directions were the expectations of children at the home, “if he can follow our rules, we won’t be strict” (Respondent 2). Family visits were not encouraged in the first month, due it being a “calming period” for families in conflict; if they did come, it was restricted to one visit (Respondent 2).

Figure 5.4: “Roll Call” before Zuhr (Midday) Prayers at the Probation Home (Photograph taken by the author 21/03/2017)

Beyond parental control children’s performance at the probation home was closely monitored by the home’s staff who prepared a report for the probation officer, the findings of which were included in their reports and recommendations to the court for children. The protocol was the deputy warden compiled the various elements into one report which was reviewed and signed off by the warden (Respondents 2 & 9). The criterion reported were attitude, programme compliance, relationships (staff/friends/family), health, education, work history and warden’s
recommendations (Respondents 2 & 9). The most common warden’s recommendation was to return the child to their family but the DSWP probation officer was the final decision maker (Respondent 9). The probation officer usually visited the probation home once in the first month of a beyond parental control child’s incarceration, typically to collect the warden’s report and to talk to the child (Respondent 2 & 9). Beyond control children could remain longer at the home if directed by the court to serve the custodial element of their order there. The most common period was 12 months (Respondent 2, 13, 23, 24 & 25).

A significant part of a Muslim beyond control child’s experience at the probation home was religious education and prayers. The probation home had a mosque within the complex and a dedicated religious affairs officer who was supplied by the Malaysian Islamic Development Department (JAKIM) but paid by DSWP to teach basic knowledge of Islam’s rituals, customs and traditions (Respondent 5). The five main modules of the programme were rituals, faith, attitude, traditions, and Quran. The modules were drawn for the curriculum of Islamic teaching (Sukatan Pembelajaran Agama Islam) supplied by DSWKL’s ‘potential development division’ (Respondent 5). The performance assessment form, supplied to the researcher by probation home staff, was determined to be suitable for children above 12 years of age and measured their “individual duty and spirituality”. The five modules listed above were separated into component parts, for which scores from an ‘achievement scale’ of one to five were recorded against each part. Achievement one was ‘very weak’ and achievement five was ‘very good’. Numerical values for achievements were calculated into percentile ratings for each module. These were combined into a final achievement, which was augmented by the
religious affairs officer’s recommendations and reflections on each child. This form was signed off and sent to the warden for review and inclusion in the probation home’s report on the beyond control child for the probation officer and court proceedings (Respondents 2, 5 & 9).

The aim of the religious programme was to inspire the children to feel God and learn about Islam because, according to Respondent 5, most of the residents were “Muslims by name only” and had limited knowledge of their religion. DSWKL wanted the children to be “perfect” in their religion, which was defined as having the right actions, recitations and intentions (Respondent 5). The probation home had set the pass mark at 85%; less than this mark was interpreted as “they don’t understand their religion and we must train them” (Respondent 5). When probed on the success and failure rate of this high expectation, Respondent 5 could not supply records, but claimed from four years of experience 28 out of 30 per month did not pass, and after 12 months, only 15 out of 30 would reach the mark. The assessment was applied within one week of a beyond control child’s arrival at the home, and on a quarterly basis if the child was ordered to 12 months of custody (Respondent 2 & 5).

Considering the pivotal power of the probation officer’s recommendations, the weight ascribed to this report and the child’s religious performance in influencing decision-making was explored with probation home management and probation officers. Senior management at the home were not explicitly concerned with a child’s performance in the religious programme, mostly seeing the holistic progress of a child as being more important, adding there is “no compulsion in Islam” (Respondent 9). Conversely, a probation officer interviewed gave significant interest to a beyond control child’s religious programme performance, stating it was “very
heavy” in his decision-making and recommendations to the court, suggesting it gives an indication of the likelihood of the child correcting their behaviour upon release (Respondent 13). Respondent 13 went on to say that he also considered the parents of the beyond control child and their religiosity in his decision-making because he had found only one child who had remained religiously committed after release from the home. Other probation officers were less focused on the religious programmes’ outcomes and more interested in a child’s overall performance in the probation home. One probation officer reflected on becoming suspicious of a child he had dealt with being deceptive and “acting to get sympathy” at the probation home, suggesting that one month is not long enough for “big changes”, the child must be in an institution for a longer period than one month to see real change in their behaviour (Respondent 15).

The beyond parental control children interviewed brought another perspective to the probation home as a caring, protective or rehabilitative location. Two children were serving a 12-month order at the home and Respondent 25, the detailed case reviewed, also served 12 months at the approved home on his first court order. The two children serving their orders complained about a lack of facilities in the lock-up, leading to boredom and the need for more interesting activities in general. They liked the group counselling sessions and being able to play football and volleyball. They had not received individual counselling. During the interview, they were asked what they did not like about the probation home and both spoke of receiving beatings from the religious affairs officer. Both boys independently described being beaten on the soles of their feet with a two-foot-long cane of one-inch circumference, up to 80 times. The reasons for the beatings were they could not recite memorized texts from
the Quran or had handed in an incorrect paper. Both boys were unhappy with this experience and the performance of the religious affairs officer when he shouted and began beating them. All boys received this punishment, however, according to respondent 23, the sentenced boys received heavier punishment than those on remand. Respondent 24 was particularly vulnerable at 12 years of age and complained that he was not beaten at home and did not feel it was fair to be beaten at the probation home. Respondent 23 felt very disappointed about his treatment and the lack of effort being made to connect and repair the relationship with his mother, who had made the application to place him in the probation home. He was able to speak with his grandparents once per month on the telephone, but his mother had rarely visited him. Respondent 23 was particularly angry and bitter during the interview while sharing about being beaten and linking the reason he was in the home to racing and damaging his grandparents’ motorcycle, stating that he felt “irritated and can’t accept it. I’m not interfering with other people’s daughters!”.

The detailed case review child’s experience in the home replicated these accounts. Respondent 25 spoke positively about the sport but was negative about the bullying he received from other residents and his aversion to being there, through being tricked by the control order applicant. Respondent 16 complained that after 12 months at the probation home, Respondent 25 came out worse, explaining that he had ‘dirty’ manners and spoke rudely to her and her family. A review of Respondent 25’s case file during the 12-months he stayed at the home suggested he remained angry about how he was treated by Respondent 16 and the DSWP system. Briefly from the file, Respondent 25 was good with DSWP probation home staff but had a bad attitude with fellow residents, pushed back against the home’s rules, he was
suspended and then dropped out of school after six months and Respondent 16 visited him only four times in 12 months (Respondent 2). The probation officer’s report on his performance added that he was released in December 2014 and remained under order, meaning two years of DSWP monitoring (Respondent 13).

Emerging from the varying interpretations gleaned from staff and residents was a location and system designed to punish and bring order, rather than repair and reconcile. Rehabilitation was less likely when impossible achievements were set, inflexible rules applied, personal violence made routine, and beyond control children felt a compelling sense of injustice had been perpetrated by relatives or a system, from the beginning of the process. Throughout the interviews, probation home staff projected a self-confident attitude of doing good for the child, taking control on behalf of parents and correcting them with honest intentions. The workplace and grounds were calmly efficient, ordered and precise. This was reflected in the child residents who were quiet, compliant and outwardly resigned to expectations, including kowtowing to the researcher and kissing his hand upon meeting. Kowtowing also extended to the warden and other senior managers. Rules, order and routine were being delivered by the probation home. However, children being assaulted, the impact of pivotal decision-making reports being structured on unlikely achievements, and the lack of justice for children in the determination and entry process suggested the likelihood of a beyond control child extracting himself from the system on his own merit or achievements was minimal, if not impossible.
5.2.2 Approved School Detention

Beyond parental control children were sent to the approved school (Sekolah Tunas Bakti) at Jalan Teluk Air Tawar, Butterworth, Penang under authority of the Child Act (Malaysia, 2001 & 2015). The wording of the amended Child Act (Malaysia, 2015) defines a child determined by the court to be beyond parental control can be detained in a centre or a probation hostel (Malaysia, 2015, Amendment 43, Section 46(5), pg. 35) and be under supervision for a period not exceeding three years (Malaysia, 2015, Amendment 43, Section 46(6), pg. 35). The operation of the approved school was guided by the Approved School Regulations of 1981, which have since been repealed and replaced by the Child (Approved School) Regulations (Malaysia, 2017), which came into operation on the 1st of October 2017 (Malaysia, 2017, Child (Approved School) Regulations 2017, Part VIII, Section 44).

The approved school differed considerably from the probation home, primarily through the number of residents, the size of the institution and the vocational training opportunities available. At the time of the research there were about 80 students, although the school could accommodate up to 120. DSWP employees staffed the school and oversaw the management and set the standards, using the same DSWKL 2015 quality assurance performance manuals as the probation home (Respondent 7). The design of school programmes was the responsibility of the principal (Respondent 7).

The journey into the approved school was through being directly sent there by the court for children or via a probation home. The probation officer’s report and recommendations remained pivotally influential in determining where the child was
sent (Respondent 1, 6, 12, 13, 17 & 20). Most of the beyond control children interviewed had spent about one month at a probation home, while the probation officers prepared reports and recommendations for the court for children (Respondents 21, 23-27). Upon return to the court, the decision was made where the children would serve the custodial portion of their orders. The pattern that appeared was children sentenced to 12 months of custody would return to the probation home (Respondents 23, 24 & 25). Children expected to spend longer in custody or seen as needing the vocational training opportunities were sent to the approved school (Respondents 21, 22 & 25-28). The attitudes of school staff interviewed towards beyond parental control children were similar to those staff at the probation home, with staff having a strong sense of moral responsibility for children’s rehabilitation. They were providing the control their parents could not deliver, and this was the beyond control child’s last chance for rehabilitation. Strong opinions such as they were ‘criminals who haven’t been caught yet’ (Respondent 8) were matched with less sanguine views, such as the approved school was not the best place for beyond control children because of the mixing with criminals and the negative influence it could have on them; the probation home was considered a better alternative (Respondent 4 & 19).

Discipline, routine and religious awareness formed the central pillars of the institution. Beyond control children were not treated differently than those children sentenced for criminal offences (Respondent 4 & 8). The first month at the school was taken up with orientation which included one or two days in isolation, a medical assessment, appointment of a case officer and meetings with the principal, deputy principal, counsellor, student affairs officer and board of visitors (Respondent 8). All
movements were monitored and there were multiple ‘roll-calls’ daily. The case officer acted as a school system contact point for each child. Case officers proposed programs for children under their responsibility and provided monthly and quarterly performance reports to the principal for review and recording (Respondent 8 & 19). Breaches of rules or standards were punished with periods of solitary confinement and appearances before a disciplinary tribunal (Respondent 8). The school ran a ‘disciplinary and intervention advisory committee’ which it was required to do under the Child (Approved School) Regulations (Malaysia, 2017, Part VII, Section 34(1) & (2)) that acted like an informal court process where claims were made against a child before the decision-making group, where evidence was presented, and reasons offered to mitigate punishments (Respondents 4 & 8). Punishments included suspending advancement in grades, restricting movement, reducing privileges, school grounds cleaning, warnings and counselling (Respondent 4 & 8).

Routine was a cornerstone of daily life for students. Figure 5.5 provides an overview of the daily schedule at the approved school (Respondent 8).
<table>
<thead>
<tr>
<th>Time</th>
<th>Duties</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.30am</td>
<td>Wake, tidy bed and prayers</td>
</tr>
<tr>
<td>7.00am</td>
<td>Breakfast</td>
</tr>
<tr>
<td>7.30am</td>
<td>Morning prayers</td>
</tr>
<tr>
<td>8.15am</td>
<td>Assembly: national/state/school anthems. Reinforcement of disciplinary</td>
</tr>
<tr>
<td></td>
<td>rules, regulations and program for the week.</td>
</tr>
<tr>
<td>8.40am</td>
<td>Student body check and search by guards</td>
</tr>
<tr>
<td>9.00am</td>
<td>Workshops: mechanics, welding, computer or barber</td>
</tr>
<tr>
<td>12.30am</td>
<td>Lunch</td>
</tr>
<tr>
<td>1.00pm</td>
<td>Prayers</td>
</tr>
<tr>
<td>1.30pm</td>
<td>Rest and bath</td>
</tr>
<tr>
<td>2.30pm</td>
<td>Activities: case officer meetings, counselling, general meetings,</td>
</tr>
<tr>
<td></td>
<td>band practice, etc.</td>
</tr>
<tr>
<td>4.30pm</td>
<td>Prayers</td>
</tr>
<tr>
<td>5.30pm</td>
<td>Football</td>
</tr>
<tr>
<td>7.00pm</td>
<td>Dinner</td>
</tr>
<tr>
<td>7.30pm</td>
<td>Prayers and religious classes</td>
</tr>
<tr>
<td>9.30pm</td>
<td>Supper</td>
</tr>
<tr>
<td>10.00pm</td>
<td>Lock down and bed</td>
</tr>
</tbody>
</table>

Figure 5.5: Daily Routine for Students at the Approved School.

The school ran a grading system which afforded privileges and ultimately an opportunity to be ‘released on licence’ from the school, upon recommendation by the principal and agreement by the board of visitors (Malaysia, 2001 & 2015; Malaysia, 2017, Child (Approved School) Regulations 2017). Students did not jump grades, even if they had excelled in assessments, resulting in the minimum amount of time a beyond control child spent in the school was 13 months because grades were assessed on a quarterly basis. The average time students stayed at the school was 15-16 months, which was considered best for them, because “experience shows if we release them too early, they return to bad behaviour” (Respondent 4). The grades ran from E up to A, with all students starting on E (Respondents 4 & 8). Privileges, such as excursions, were afforded only to grades A to C; grades D and E remained inside the school, to follow the programme and earn the reward (Respondent 8).
A copy of the ‘Grade Promotion Form’ was supplied to the researcher (Respondent 8). The criterion of the report was separated into four components: case worker’s report, spirituality, vocational training performance, and student’s attitude and contribution. Each of these sections were supported by an individual report from responsible officers within the school such as the case officer for the child, religious affairs officer, vocational training instructor and residents’ affairs officer. Each report assessed the child against a set of criterions that attracted a rating from an assessment scale of one to five. One is ‘very weak’ and five is ‘very good’. The ratings were transferred into percentiles and these contributed to a final percentage that transferred into a final mark. This final mark was placed against a percentage range that indicated with the result of the child’s grade rating and future at the school., Grade ratings were: grade demotion (0-29%), grade suspension (30-59%), grade promotion (60-89%) and speed grade (90-100%). Once a child reached grade A, they were eligible to be considered for release from the approved school.

In the reporting system, the ultimate and most influential decision-maker was the principal, whose recommendations were followed by the board of visitors and the assessment process centred around the principal’s reflections of the child (Respondent 11, 18 & 19). During interviews with employees who contributed to the grade promotion form, all respondents referred to the principal as pivotal to decision-making, with this opinion extending to Respondent 11, a line manager of 11 case workers. All approved school case workers provided progress reports on each child to their line manager, who forwarded them to the principal without reviewing the file or individual case worker’s decision-making. Respondent 11 had not received training in case management and saw decision review and making as the
responsibility of the case worker and the principal. This trust in the principal’s decision-making continued to the board of visitors, who are legally empowered by the Child Act (Malaysia, 2001 & 2015) and the Approved School Regulations (Malaysia, 2017) to act as an independent review body, having been appointed by the Minister of Women, Family and Community Development to make the final decision on a beyond control child’s release from the approved school. The board of visitors followed the recommendations of the principal “99%” of the time, within a process of “accountability” and “strong consensus” among the board members (Respondent 18).

Like the probation home, the approved school placed substantial emphasis on religions awareness and spirituality as part of the rehabilitation process. All Muslim children and staff attended the mosque situated within the school complex. The approved school had a dedicated religious affairs officer, who oversaw beyond control children’s progress reports and supplied them to the principal (Respondents 8 & 10). The assessment forms were the same as those used in the probation home and the religious affairs officer was employed by JAKIM but paid by the DSW. The curriculum was designed by JAKIM, with quarterly assessments on children’s knowledge of Islamic faith, traditions, hadith/Quran recitation, morality and attitude (Respondent 10). The focus of the religious affairs officer was to recitation of prayers and to inculcate children with religious knowledge because many students had limited awareness of their religion (Respondent 10). Success or failure was determined through observing children’s behaviour and actions at the mosque, during meals and their general attitude at the school (Respondents 8 & 10). Instilling morality into the children was a cornerstone of the programme and measured through
their compliance with established Islamic rituals regarding ablutions, prayers and fasting, “if they comply with rituals, they have morals”, according to Respondent 10. The importance of religious awareness in beyond control children’s assessments and potential release from custody and post-release monitoring orders was explored with definitive decision-makers. Opinions ranged from religious awareness accounting to about 10% of their decision (Respondent 18) through to it was “number 1” and a priority for their future, without it they fail (Respondent 8). Respondent 8 further elaborated that he would provide a failing grade, meaning either not release from custody or retard the grade progression for a beyond control child, even if they were excelling in all the other assessment criterion. For Respondent 8, religious awareness was the number one priority and without it, positive achievement in other categories did not count. Respondent 8 went on to define that this was his own opinion and way of working and he was not sure if the DSWP or DSWKL saw it the same way.

Beyond control children’s reflections on the approved school were mixed, with various respondents liking the opportunity to gain skills, learning about Islam, and participating in the programmes but disliking the strict rules, grading system, physical violence they suffered, and the lack of effort to repair connections with their families. During interviews with the beyond parental control children they were all asked what they liked and disliked about the approved school. Respondents 25 and 28 both described the tradition of all new students being beaten up by the other students which they had interpreted as reinforcing a hierarchy among the boys. Respondent 25 explained that he had been beaten up when he first arrived at the school, and on another occasion, he was tied to a bed and punched by other students.
Staff did not know about it and Respondent 25 said that if he told them, it would get worse. Respondent 28 also faced assault upon arrival from the other students and was still suffering from it at the time of the interview, after 10 months in custody.

Respondent 28 went on to describe a concerning level of orchestrated violence that was perpetrated by the wardens, who were responsible for the control of students in the six hostels at the approved school. On one occasion Respondent 28 got out of bed late and was punched in the face by a warden, causing his nose to bleed. Moreover, according to Respondent 28, wardens relieved boredom by punishing the boys. They carried out spot-checks and if they found prohibited items, such as money or cigarettes, they punished the group in the hostel with strikes of the rattan, while excluding the boy with the contraband. After the group received the beating, the boy found with the contraband was beaten by the other boys for causing them to be beaten. This happened frequently. Respondent 28 was regularly caned with the rattan, estimating that he had received an average of 30 strikes per week over the ten months he was there, depended on the warden in charge. Respondent 28 reported that nothing would happen when boys complained, and the school for “bad guys” was worse. The wardens told him at the start of his time at the approved school, while reading the rules, that boys who run away or do not follow the rules go to Henry Gurney School, which is worse. Sending a beyond parental control child to the juvenile prison, the Henry Gurney School, is permissible under the Child Act (Malaysia, 2001, Chapter 5, Section 75(b)(i) & (iii)), following the supply of a report by the probation officer to the relevant court for children (Malaysia, 2015, Part VIIIa, Amendment 58, pg. 41). Respondents 25 and 28 had been threatened into silence by the DSWP wardens’ behaviour and the culture of the approved school.
While recalling his treatment at the approved school, Respondent 28 was visibly unsettled and anxious, delivering stories of the violence he had suffered with a polite and shy demeanour. Conversely, when asked about how he felt about his treatment in the approved school, Respondent 28 was blunt and sharp in his language, stating “they put me in a dormitory and place for bad people” and that it was unfair because he was sent to the approved school to learn skills. Respondent 28 was particularly unhappy because the probation officer had used section 46 of the Child Act (Malaysia, 2001 & 2015) to facilitate him gaining a vocation at the approved school. Respondent 28 explained there had not been any behavioural issues at the orphanage he came from and he was not beaten there, in fact, he liked it and referred to the orphanage supervisors as his parents. Respondent 28 found himself in an environment where he was subject to regular assaults by other students and DSWP wardens, some of which were orchestrated by powerholding wardens. He could not complain about wardens because the abuse would have escalated or the ever-present threat of being transferred to the juvenile prison exercised.

5.2.3 Board of Visitors and Release on License

The process to be released from the approved school was based on the beyond parental control child reaching an A grade in the performance assessment, the principal recommending release, and the board of visitors agreeing to it. Colloquially, the process was called “ROL”, meaning released on license (Respondents 8 & 18). Being released on license indicated the child had been released from the approved home but not the court for children monitoring order, which remained in place and could result in a beyond control child being returned to custody upon request by the applicant or the supervising probation officer. Under
authority of the Child Act (Malaysia, 2001, Chapter 4, Section 70(a) & 2015), a DSWP probation officer was responsible to supervise the released-on-license child until the expiration of the order, which could be up to 21 months if the order was originally made for the maximum period of three years and the child had spent the average of 15 months at the approved school.

The board of visitors are an independent regulatory body, with powers under the Child Act (Malaysia, 2001 & 2015) and the Approved School Regulations (Malaysia, 2017), whose remit was to supervise the “overall development and wellbeing of the inmates” at the approved school, as well as the administration, and making appropriate recommendations to the Director General of the Children’s Division of the DSWKL and principal of the approved school (Malaysia, 2017, Part II, Section 3). The board had the power and were required to visit the school once a month to conduct inspections, seek inputs and advice from external authorities or organisations, and work with the principal and their staff to provide the best environment possible for the inmates’ development (Malaysia, 2017, Part II, Section 3 & 4). The board also had the power to extend a child’s stay at the approved school for an additional six months beyond the expiration of the detention period if they believed the child needed more care or training (Malaysia, 2001, Chapter 4, Section 69(a)). A review of the Act and regulations established the board of visitors as the Minister of Women, Families and Community Development’s representatives, whose primary role was to promote a child’s time in the approved school to be safe, constructive and rehabilitative, through constant review of the performance of DSWP staff and their processes. The chairman of the board of visitors at the Penang approved school reflected and elucidated this intention of the Act and regulations,
seeing the treatment of beyond control children in the school as a positive experience for them: they can be creative and have support, it is a “remedial process, not a punishment to them” (Respondent 18).

The board of visitors at the Penang approved school was made up of four USM academics, a USM Doctor of Philosophy candidate, an Assistant Superintendent of Police, business people and representatives of the state education department (Respondent 18). The maximum number of people on the board could be 15 and the minimum seven, with a minimum of three males and three females to promote gender representation (Malaysia, 2017, Part II, Section 5). Members were invited to sit on the board by the minister and were primarily identified by existing board members (Respondent 18). Politics was involved in the selection process, with some of the members seeing their membership as a stepping-stone to a Dato title, through the board representing community service (Respondent 18). No stipend or travel payments were paid to the Penang board members and the tenure was for three years (Respondent 18). The board met every two months to consider release-on-license applications and to discuss the school’s performance (Respondent 18). Respondent 18 shared that changes were expected to the composition of the board through including more government representatives; this was seen as a strategy to raise funds and better link government schemes to support positive initiatives for the residents. Extra curricula programmes and external organisational links were not fully funded by the school and needed to be supported with other funding streams (Respondent 18).
The release-on-licence process primarily focused on the beyond parental control child’s performance at the approved school and the likelihood of the child being successful upon release (Respondent 18). Board members were given the children’s files, which contained the principal’s recommendations and the child’s history at the school, on the day of the meeting. Following a file review, the board came to a majority decision, which routinely followed the principal’s recommendation (Respondent 18).

5.2.4 Section 47 of the Child Act

Written law has a familiar rhythm when reading it; specifically, the act under review will locate itself within a body of law, it will define terminology, throughout sections it will try to be clear on what is permitted or not, it sets penalties and often affords the accused a process or circumstances that aim to mitigate or eliminate the section they are being processed under. This rhythm is fundamental to the principles of fairness and justice in and before law (The Malaysian Bar, 2004). The Child Act (Malaysia, 2001 & 2015) does this for beyond parental control children. Section 46 empowered the court for children to place them in custody and on monitoring orders for up to three years (Malaysia, 2001 & 2015). Section 47 empowered to the court to release children from orders or to amend the conditions (Malaysia, 2001 & 2015). Moreover, the Act empowered the independent review body, the board of visitors, to do the same; the board of visitors could, upon their discretion or with permission of the Minister, dramatically shorten the period of detention for any child to under a year at the approved school, including children beyond parental control (Malaysia, 2001, Chapter 4, Section 67(3) & (4)).
Prior to the 2015 amendments of the Child Act (Malaysia, 2015) the wording was less clear on not wanting children in custodial settings or on orders, however, section 47 of the Child Act (Malaysia, 2001) did enable changing orders and the release of children into the care of a “fit and proper person” (Malaysia, 2001, Chapter 2, Part VII, Section 47(2)(a) & (b)). The current wording of section 47 is unambiguous in permitting amendments to orders and acting in the best interest of the child:

“The Supervising Court before whom a child is brought under paragraph (1)(b) may amend the order made under section 46 –

(a) if the Supervising Court is satisfied that it is in the best interests of the child to do so; and

(b) upon proof that the circumstances under which the order was made have changed after the making of the order”

(Malaysia, 2015, Amendment 44, Section 47(2)(a) & (b), pg. 36)

In all circumstances and amendments, the DSW probation officer, on behalf of the Malaysian State, remained the central figure in the process (Malaysia, 2001 & 2015). The probation officer was required to bring a request to the court for children to facilitate its determination. Procedurally, for the board of visitors to exercise their powers of release or time reduction under the Act, the principal of the approved school was required to bring to their attention a request, supported by a probation officer’s assessment report. Systemically and structurally, the DSW probation officer and approved school principal were firmly centralised and continued to be the pivotal decision-makers in a beyond control child’s connection and journey within the Malaysian State’s response.
Throughout interviews with decision-making DSWP staff and the board of visitors’ representative, the life changing power and intention of section 47 of the Child Act (Malaysia, 2001 & 2015) was put to respondents. Many were not aware of its existence or believed it only appeared in the 2015 amendments. None of these respondents had ever exercised the option or allowed any children, including beyond parental control children, to be released early from custodial settings or state surveillance orders (Respondents 8, 13, 17, 18 & 20). Court for children respondents shared they were aware of the provision but had never received an application from DSWP to amend or remove a beyond parental control order under the power of section 47 of the Child Act (Malaysia, 2001 & 2015; Respondent 1). Respondents 17 and 20 reflected what was relayed and projected by pivotal decision-making respondents, when they outlined how beyond parental control children still needed supervision, even upon release from custody, because being in the institution could have made the children worse, so they needed to follow them.

5.2.5 Parent and Child Conflict

The approved school had a dedicated psychological counsellor, who was guided by the DSWKL’s ‘Guide to Counselling and Psychological Service and Structure Manual’ (Respondents 4 & 12). The manual contained forms, assessments, courses, stress management techniques and support therapies to return a child and their families to a state of rationality after a crisis or event (Respondent 12). The DSWKL rooted their approach in ‘REBT’ therapy models, meaning rational, emotional, behavioural therapy, and ‘ABC’ reality therapy, meaning adversity, belief and consequences (Respondent 12). The process adopted at the approved school was for the counsellor to apply the ‘Tennessee self-concept scale’ and complete a ‘youth-
at-risk’ questionnaire, while creating a case profile which included family, education and criminal behaviour background (Respondent 4). These results combined into a case plan for the child that was managed by the counsellor with frequent meetings with the child and attempting to build a healthy relationship between the child and their parents (Respondent 4). Some of the strategies used at the approved school to forge healthy relationships included encouraging parents to visit their child during the annual Hari Raya Aidilfitri (Eid al-Fitr) holiday period or the child to be permitted to return home for the week (Respondent 4 & 8). Parents were encouraged to have telephone calls with their child and to visit regularly, and although family counselling was an option, it was provided on a need basis only (Respondent 4). The central premise of the psychological counselling was to encourage children to reflect on their behaviour and to work on correcting it, acknowledging their responsibilities, and adopting positive behaviours and attitudes in the future.

Sending a child to the counsellor was not only for psychological support but also used as a punishment strategy by the disciplinary and intervention advisory committee, who would include a month of counselling in their decisions (Respondent 4, 8 & 19). Furthermore, counselling was used as a “control tool” by approved school staff, meaning if children did not follow the rules or direction they would be sent to the counsellor (Respondent 4). Respondent 4 felt that staff at the approved school had a limited appreciation for the positive elements of counselling on a child’s behaviour, rather they saw it as a soft activity and a punishment option available to them.
Mediating the outstanding conflict between a beyond parental control child and their parent or the control order applicant was not considered the role of the counsellor; rather, this responsibility devolved to the child’s approved school case officer (Respondent 4). Case officers saw mediating the conflict as the DSWP probation officer’s role, primarily because families visited their children on weekends and, with case officers not working on weekends, they had little opportunity for contact with the families (Respondent 8 & 19). Case officers were not encouraged to contact the families via email or telephone (Respondent 19). The case officers’ routine was to meet with the child upon arrival at the school, then once every two weeks while they remained at the school. The case officers’ role was to ensure beyond control children complied with the standards and expectations of the approved school (Respondent 19). Children’s progress reports were given to the case officer’s supervisor and ultimately the principal (Respondents 8, 11 & 19).

Children’s experience and reflections on the counselling they received at the approved school was predominately positive. All of the beyond control children interviewed spoke about how the counselling they had received was helpful to survive the school and learn about life. Most of the comments focused on how counselling encouraged the boys to reflect on themselves, to follow the rules of the school or was part of punishment decisions they had received (Respondents 21, 22, 25, 26, 27 & 28). The frequency of counselling varied among the respondents, ranging from one or two sessions, up to 20 or more during their time at the school. Most of the boys stated the counsellor did not attempt to explore the conflict triggers or mediate the conflict with their parents (Respondent 22, 25, 26, 27 & 28). Respondent 21 shared that he had tried to discuss how he felt about the divorce of his
parents and how this triggered his bad behaviour, only to be told that he was blaming his parents for his behaviour. Respondent 21 was unhappy with this response because he felt the counsellor was not interested in hearing how he was affected by his parents and the danger they put him in during their fights.

Children’s accounts were consistent with the intention of the programme to focus on the individual child’s behaviour at the school and, in preparation for their release, to improve their understanding of how to deal with stress and the challenges in life. Mediating and addressing the triggers and circumstances that led to a beyond parental control child being at the school remained unaddressed by the approved school system as they were seen as the DSWP probation officer’s responsibility. The children independently shared the inconsistent contact they had received from their DSWP probation officers during their time at the approved school: Respondent 21 had received three telephone calls, Respondent 25 received two visits and Respondent 22, one visit. Respondents 26, 27 and 28 had not received any visits or any contact from their probation officers. None of the children mentioned their probation officers attempting to address the root causes, triggers or circumstances that led them to be at the approved school or in conflict with their parents or control order applicant during the telephone calls or visits.

5.3 Discussion

The research findings reflect a continuation of punishment and retribution against children who have been informally and formally judged to be at odds with social and moral expectations of behaviour. System operators did not trust them to be rehabilitated until they had felt the full force of the state’s power, regardless of legal
early release options, independent monitoring boards and compliance evaluations (Malaysia, 2011 & 2015; Malaysia, 2017). The injustices committed against the children prior to entering the system, predominantly due to the lack of fairness and compliance with procedural expectations and standards, continued throughout their time in the custodial settings and into their post-release monitoring. No sustained and coordinated attempts were made to reconcile the parent/applicant and child conflict triggers or circumstances. On the rare occasion when counselling turned to the conflict or behavioural triggers, the child was expected to reflect on their behaviour and atone for the social wrongs committed against their parents and the broader societal expectations within the parent and child relationship.

Beyond control children were subjected to a process that is rooted in Latin-Christian justice expectation of rehabilitation and atonement through religiously principled discipline, fear-centred retribution and consequentialism (Warder & Wilson, 1973; Dusuki, 2002; Nini Dusuk, et. al., 2013; Duff & Hoskins, 2017). A cultural moral authority was present in the DSWP stakeholders to be correcting beyond control children for the greater social good (Fassin, 2016a & 2016b; Berman, 2008; Hampton, 1984). This transferral of moral propriety gave them authority and legitimacy to perpetrate systemic physical and psychological violence against the children. This moral authority was not limited to strikes with the rattan and periods in the ‘lock up’, this morally embedded injustice extended into the DSWP’s workplace culture, appearing in how parents/applicants were considered and treated, the labelling of families and the consequences they must suffer, and the lack of trust in the child to ‘rehabilitate’, regardless of their performance results and acquiescence to the state’s authority (Fassin, 2016a & 2016b; Berman, 2008; Duff & Hoskins,
2017; Bedau & Kelly, 2017). Once a child entered the system, their liberty was removed physically, emotionally and morally and replaced with the state’s collectively-sanctioned punishment and correction (Foucault, 1977; Fassin, 2016a & 2016b; Hampton, 1984).

The established DSWP processes were applied uniformly, without consideration of the individual child or making a distinction between those children on criminal charges or being held in custody for behavioural wrongs. Physical and psychological violence from other inmates and some DSWP staff was routine and part of maintaining order and generating holistic compliance. In the tradition of Jeremy Bentham’s panopticon, the orchestrated violence perpetrated against the children in the approved school by the wardens promoted them to adopt a panoptic view of themselves against other inmates, thus achieving the ultimate prison and state-of-being where control, punishment and surveillance is transferred to, and regulated by the inmates, while being overseen by a small number of power-holding guards (Foucault, 1977, pg. 201). The efficacy of the panoptic punishment and discipline model applied to beyond control children extended outside the probation home and approved school and acted as a constant threat until their 18th birthday. The state and their morally empowered agents unequivocally declared to the beyond parental control children that they must meet the state’s social expectations, or this was the pain that is waiting for them.

5.3.1 A System Destined to Punish, Not Release

The treatment of beyond control children is nested within an historical and philosophical framework of control and correction of social wrongs. These
mechanisms have foundations in Latin-Christian legal and moral expectations that travelled with traders and colonial authorities into the Malay Peninsula and the Oceania region from the 17th Century CE (Dusuki, 2002; Chevallier-Govers, 2010; Commonwealth of Australia, 1997; de Vattel, 1844; Pettit, 2015; Malaysia, 2010). A consistent social evolution emerged which enabled legal and social systems to establish what were social wrongs and how these were to be treated, complete with justified punishments and retribution in favour of the common good (Fassin, 2016a; Hampton, 1984, Warder & Wilson, 1973; Berman, 2008; Duff & Hoskins, 2017; Malaysia, 2001 & 2015; Dusuki, 2002).

This emphasis on the ‘common good’ is a foundational utilitarian premise in the justified response to those citizens who commit social wrongs, both criminally and morally. The utilitarian premise is a philosophically imagined consciousness that promotes for all state actions to be in favour of the greatest number of citizens and thereby the common good (Duff and Hoskins, 2017 & Fassin, 2016b). In the case of beyond control children and their families, the children are deemed to have committed moral wrongs against the greater social good that is expected to be present in the Malaysian parent and child relationship. The state projects its expectations of propriety and behavioural normality into this relationship through law (Malaysia, 2001 & 2015), common social development markers and citizenry obligations, such as self-monitoring of behaviour against cultural norms, meeting education standards, and economic and civil participation. Any breach of these normative expectations identifies the eligibility of a beyond control child and their family to be liable for state sanctioned retribution, both morally and legally (Bedau
& Kelly, 2017). In this sense, their relationship breakdown is deemed as not producing the best for the common good and therefore needs to be corrected.

Within Latin-Christian constructions of judicial civil regulation, the authority to correct is naturally transferred to the state and the punishment laid upon the beyond control child and the parental relationship is placed into the space of corrective atonement that isolates perpetrators and involves pain (Fassin, 2016a; Bedau & Kelly, 2017; Berman, 2008). The pain is not limited to the physical or a deprivation of liberty but extends into the psychological, institutional, bureaucratic and the public visibility of the family’s troubles. The pain cannot be delivered without justification, because that would constitute revenge by the state. Revenge is not permitted because it lacks moral authority (Fassin, 2016a; Bedau & Kelly, 2017). The moral authority of the state’s response is enabled through law (Malaysia, 2001 & 2015) and legally-sanctioned corrective processes are upheld and judicially exercised by empowered agents, such as the court for children and DSWP staff. In this environment the pain delivered to beyond control children is legitimised and conceptualised to be in their best interests and a consequence of their lack of social compliance (Duff & Hoskins, 2017; Bedau & Kelly, 2017). This correction is important because their lack of adherence to the normative expectations of behaviour and reverence for the Malaysian state undermines its authority in determining what is in the common good.

A parallel example of the Malaysian state declaring what is in the common good and it being problematic for children, is the treatment of Malaysian children accused of statutory rape (Nini Dusuki, et. al., 2013). In another example of British
colonial moral and legal contagion, the laws relating to rape were modelled on the 1860 Penal Code of India and embedded into the Malaysian Penal Code upon its first enactment in 1936 (Nini Dusuki, et. al., 2013, pg. 8 & Malaysia, 2015b, pg. 2). Statutory rape relates to the consensual agreement between a man or boy and a girl to engage in penetrative sexual intercourse, however, if the girl is below 16 years of age, Malaysian law defines the sexual contact as rape, regardless of consent or a relationship being present (Malaysia, 2015b, Section 375(g), pg. 197 & Nini Dusuki, et. al., 2013, pg. 1). The male perpetrator is liable for a penalty of 20 years imprisonment and whipping (Malaysia, 2015b, Section 376(1), pg. 198). The law does not consider the consensual agreement between the pair or their potential relationship. Procedurally, the legal process treats the female as a victim and the male as a perpetrator, indicating how the state has taken a moral position on Malaysian women’s agency towards their bodies and sexual participation.

With clear overlaps to beyond control children’s treatment, once this morality-laden label was attached to offending couples, they were judicially processed through the criminal justice system which delivered pain and punishment physically, psychologically and bureaucratically. The boys were punished systemically and punitively, through being denied natural legal presumptions and through their incarceration in either prison, reform or approved schools (Nini Dusuki, et. al., 2013). Nini Dusuki and colleagues’ 2013 research on statutory rape commissioned by the Malaysian Prime Minister's Department, investigated 66 respondents across Malaysia, revealing most of the respondents (66.7%) were not given the opportunity or encouragement to defend themselves against the claim of rape, instead they were told to keep silent and accept that they had committed the offence (pg.49). Moreover,
the children were given little to “zero legal representation” throughout the process and the DSW Probation Officers did not fulfil their statutory obligations to provide support under the Child Act, which obliged them to act upon being notified of a child being arrested\(^1\) (Malaysia, 2001, Section 87\((a)\), pg. 80 & Nini Dusuki, et. al., 2013, pg. 51). Most of the children (84.8%) claimed they were not represented by legal counsel, with a lack of finance (48.5%) or it not being offered (18.2%) cited as the top two reasons (Nini Dusuki, et. al., 2013, pg. 54). Neither the arresting police officer nor the magistrates they appeared before informed them of their right to legal representation, constituting a serious breach of rights under Malaysian law and natural legal presumptions (Nini Dusuki, et. al., 2013, pg. 55; The Malaysian Bar, 2004; Malaysia, 2010). This systemic injustice was compounded when the research also revealed 53% of the respondents claimed they “experienced violence while they were detained, mostly due to the police demanding them to confess to the alleged act” (Nini Dusuki, et. al., 2013, pg. 53). Some of the boys were misled and thought pleading guilty would hasten the process and they would be released on a bond but were “utterly dismayed” when they were sent to an approved school or the Henry Gurney School (Nini Dusuki, et. al., 2013, pg. 56).

Nini Dusuki and colleagues’ (2013) findings speak directly to this research’s findings. The lack of systemic protection for vulnerable children and parties under the principles of natural justice and Malaysian law is alarming, if not legally negligent and liable to recourse. While the findings outlined structural similarities in

\(^{1}\) This sub-section was repealed in the 2015 amendments to the Child Act (Malaysia, 2015, amendment 64, pg. 44), but was present at the time of Nini Dusuki and colleagues’ 2013 research.
the treatment of beyond control children and those boys accused of statutory rape, there were also indications of a moral authority being adopted by institutional staff and Nini Dusuki and colleagues (2013) during the research. Nini Dusuki and colleagues (2013) lamented how child respondents held preconceived ideas about the approved schools that stigmatized them as negative locations and declared more effort needs to be done by authorities to highlight how positive the institutions were to “curing these depraved children for a better future” (Nini Dusuki, et. al., 2013, pg. 57), meaning those accused of statutory rape. Confusingly, Nini Dusuki and colleagues (2013) promoted that consensual sexual intercourse should be considered differently, largely through procedural changes that reflected UNCRC (United Nations, 1989) aspirations towards the treatment of children in conflict with the law, but “the empirical findings have demonstrated that being in the respective institutions have mostly augured well in promoting their self-development amongst the boys interviewed” (Nini Dusuki, et. al., 2013, pg. 108). Moreover, the research findings had the DSW double-speak of institutions not being the best place for children accused of statutory rape but those who were incarcerated did receive the “inherent benefit” of receiving religious instruction and being able to recite the Quran and perform prayers correctly (Nini Dusuki, et. al., 2013, pg. 102).

Even in the presence of systemic violence and injustice, the morality of what constitutes proper sexual contact and relationships within Malaysia’s fluid social boundaries justified the punishment against the accused child. Their behaviour has made them eligible and liable to what happened to them, regardless of legal safeguards being breached, procedural injustice or research highlighting how unfair it was (Bedau & Kelly, 2017 & Nini Dusuki, et. al., 2013). This supports Didier
Fassin’s (2016b) claims that justice and punishment is consistently rationalised against moral and social hierarchies, which are less concerned with injustice and inequality than they are in maintaining social order. In the case of those accused of statutory rape, social order is being maintained through recognition of a victim, the individualisation of responsibility and the suffering of retributive punishment, based on incapacitation (Fassin, 2016b). This process satisfies the collective moral authority towards defining Malaysian women’s sexual and social participation and gives reassurance that a moral good has been delivered to a cultural rule breaker, regardless of the systemic injustice that was part of the process. The subtle reflections of the authors and their language choices around “depraved children” (Nini Dusuki, et. al., 2013, pg. 57) and the “inherent good” (Nini Dusuki, et. al., 2013, pg. 102) of being in the privatised punishment locations reflected this, along with DSW and judicial duty bearers’ failures to maintain legal standards and expectations of fairness and impartiality before the law. A boy accused of statutory rape was destined to be incarcerated and treated with a culturally-framed moral authority, which notably mirrors beyond control children’s treatment by the same Malaysian institutions.

5.3.2 Punishment and Surveillance in Beyond Control Children’s Correction

Child research respondents (Respondents 22-25 & 28) shared their experiences of the violence they suffered while in the probation home and approved school, which involved being beaten with rattans by DSWP staff, mandatorily being kept in isolation, and being assaulted by other inmates, at the control of wardens or as part of institutional initiation rituals. Violence was not isolated to the physical or psychological, it also involved sexual contact. One of the contributing factors for
Respondent 22’s transfer into the approved school from another state institution, was being caught sodomising another resident. Moreover, during the interview with Respondent 9, he shared unprompted how “religious boys” liked to engage in sodomy at the probation home. These examples reflect the multifaceted pain beyond control children suffered while under state control. While there is no indication the state actively condoned or encouraged the sexual behaviour described by Respondents 9 or 22, there is a complicity present through how beyond control children found their way into the institutions and the failures along this journey. This research has outlined systemic failures in procedural compliance and legal injustices being perpetrated against beyond control children, which has resulted in them being placed in the DSWP institutions where they suffer violence. This violence is aimed at controlling and correcting the children’s behaviour to meet social expectations of propriety.

The use of institutions to forge compliance with social markers of propriety has been part of the British legal system’s control of children since early in the 20th century CE and was incorporated and transferred with colonial moral and legal arrangements (Dusuki, 2002; Bhutta & Akbar, 2012; Warder & Wilson, 1973). Malaysia’s probation homes and approved schools are modelled on the British borstal training institutions which were designed as alternatives to prisons, locations where recalcitrant teens could be reformed through education, trade-training and a full-work programme (Dusuki, 2002; Warden & Wilson, 1973, pg. 118). The borstal institutions were designed to replicate the British public-school house master system where propriety, class surveillance and self-discipline were achieved through an adherence to Christian behavioural normalities, a strict routine and a reverence to
authority (Warden & Wilson, 1973). With similarities to the Malaysian Child Act (Malaysia, 2001 & 2015), sentenced children aged between 16-21 years were sent to the borstal institutions for a period ranging from one to three years. Institutions that were “once hailed as representing all that is progressive in English penology” (Warden & Wilson, 1973, pg. 118). In the early years, the borstal system claimed a 70% rehabilitation rate, but by the 1970s they had become incongruent with social normalities and 70% of the inmates were “reconvicted” within two years of release (Warden & Wilson, 1973, pg. 118). Warden and Wilson (1973) argue a system designed in the 1930s did not match the needs of children in the 1960s and 1970s; the youth had changed, but the system did not. Furthermore, the “youth culture” at the time of their establishment was one of “loyalty, self-reliance and discipline”, that was reflected in magazines, comic books and books that “extolled essentially ‘public school’ values of middle-class origin among working-class boys” (Warden and Wilson, 1973, pg. 127). Fundamentally, the borstal institutes were designed to take working-class boys and expose them to the discipline required to achieve middle-class standards of social propriety. However, as the United Kingdom evolved, naturally social relationships and expectations of behaviour between young people and adults changed, thus rendering the borstal institutes and the premise of their existence anachronistic.

Malaysia’s approved schools and probation homes represent institutions that act as tools of state oppression, which are designed to recast individuals to meet social expectations and are consistent with less obvious sites such as hospitals, schools, army barracks and factories, according to the French Philosopher Michel Foucault (1926–1984 CE) (1977, pg. 233). Foucault (1977) saw prison as the natural
location for the panoptic schema/view to manifest and develop control of the
individual through creating an internal and external surveillance process, designed to
courage the viewer to see both themselves and others through self-surveillance of
behavioural compliance. An example of Foucault’s (1977) panoptic view is how,
according to Respondent 28, the wardens at the approved school routinely delivered
punishment to achieve control of the children. The example cited by Respondent 28
was when the wardens found contraband items with one student and, rather than
punishing him, they punished the group with whom he shared a dormitory or all
students in the dormitory block. The student found with the contraband watched as
the wardens punished those around him with strikes of the rattan, knowing he would
suffer the same through the revenge sought by his fellow students. The continual
application of this method of punishment and control was to enable a state of
surveillance amongst the students, where they surveil themselves against the
behaviour of those around them. The panoptic schema/view is useful to frame how
beyond control children saw themselves and how they self-regulated their behaviour
to avoid punishment from powerholding wardens or students. The panoptic view is
completed in the approved school when hierarchies are maintained by the students
through physical punishments being delivered to all new arrivals, thereby
establishing social control and systems of authority (Respondent 28 & 25). All the
students surveilled themselves and their behaviour against the behaviour of others,
thus creating an environment of complete control and obedience that identified
perpetrators for punishment, while maintaining order and replicating institutional
expectations of behaviour.
The panoptic view is not only present in the prisons, but extends into all forms of institutions, social behaviours and cultural phenomena, “the exercise of power may be supervised by society as a whole. The panoptic schema, without disappearing as such or losing any of its properties, was destined to spread throughout the social body; its vocation was to become a generalized function.” (Foucault, 1977, pg.207).

Foucault (1977) wrote specifically on delinquents, which beyond control children represent, believing the delinquent is a more risky or problematic entity than the criminal because they have not yet been educated on what is expected of them and their behaviour reveals a lack of compliance and dominance of the panoptic view to reproduce social proprieties. The prison is ideally placed to ensure their conformity and complete their submission, however, their complete life story needs to travel into the prison with them, so it can be unpacked with “sordid detail” and repackaged, so as “to fill the gaps” with compulsion (Foucault, 1977, pg. 252). Once a beyond control child left the approved school or probation home they were surveilled until the expiration of the order to ensure their compliance with social expectations and if they failed they were returned for further social recalibration. This threat remains constant with them until their 18th birthday, because the state can return them to custody while they remain under order or place them on a fresh order (Malaysia, 2001 & 2015). It is not in the interest of the state to release them because it wants to ensure compliance and control, to return the child and their parental relationship to an acceptable state of propriety. Research findings support this pattern, through pivotal decision-making probation officers declaring their lack of trust in the beyond control child to be reformed and the need to continue their monitoring until their order expires.
Foucault’s (1977) thoughts speak to and connect with the treatment of beyond control children under the foundational premise of the borstal institutes, which were designed to recast recalcitrant working-class youth into aspirational middle-class adults (Warder & Wilson, 1973). The borstal institutions were designed to uphold the social and moral aspirations of the day and reflected what was at the time considered to be in the common good. However, there is serious danger in not systemically reviewing and establishing what is considered to be in the common good and resigning it to be an intangible aspiration. A more tangible and measurable concept for the treatment of beyond control children is to act in the best interest of the child. This principle and practice has been internationally defined and demands systemic accountability to decision-making (United Nations Committee on the Rights of the Child, 2013; UNHCR, 2008). It also promotes continual examination of systems and children’s treatment in them to ensure the best performance of the system and individual decision-making accountability. Systems exist because of people’s decisions. People design systems. Systems fail, evolve or thrive because of people. Beyond control children are subjects of a system that involves thousands of individual decisions on their treatment. A warden or religious affairs officer chooses to, or is allowed to, repeatedly hit children with a rattan to achieve control and system compliance. Individuals are responsible to and for the system(s) in which they operate. There is a real risk of losing perspective of individual accountability during the examination of beyond control children’s treatment. Traditional analysis naturally tends to speak of trends, patterns and philosophical positions, however, the recent Australian Royal Commission into Institutional Responses to Child Sexual Abuse
alerts communities, duty bearers and individuals within systems to adopt responsibility and to not ignore improprieties (Commonwealth of Australia, 2017, 2017a & 2017b; McCarthy, 2017). The Australian government commenced a royal commission in 2012 to examine the institutional responses to child sexual abuse and during the process the commission heard from 6,875 survivors, 1,302 witnesses and referred 2,252 cases to authorities for investigation (Commonwealth of Australia, 2017b, pgs. 2 & 4). In terms of institutional responsibilities to vulnerable children in their care, the commission’s findings outlined how the workplace culture of institutions contributed to the sexual abuse of children or put them at risk, “An organisational culture that allows bullying, harassment and intimidation between peers may increase a child’s vulnerability to sexual harm from other students, due to abusive behaviour being tolerated or encouraged, or the bullied child feeling ‘different’ or marginalised.” (Commonwealth of Australian, 2017a, pg. 56). In terms of management’s responsibility to vulnerable children, the commission outlined how leadership and organisational culture shapes assumptions, values and beliefs towards children’s treatment, declaring what was appropriate and inappropriate (Commonwealth of Australia, 2017, pg. 20).

The commission heard stories that reflect the treatment of beyond control children in Malaysia, where Australian children were unnecessarily in state care and not enough had been done to prevent their entry. Indeed, a high proportion of the commission’s final report recommendations relate to increasing efforts to prevent institutionalisation and building workplace cultures that establish and maintain standards which systemically keep children safe (Commonwealth of Australia, 2017, 2017a & 2017b). Moreover, a powerful message that emerged was the complexity of
accountability within institutions and if something is seen or experienced, the primary question asked is: do I do something or not about it? (McCarthy, 2017). The commission’s findings revealed how thousands of moral decisions were taking place on a daily basis in institutions, governments, social hierarchies and within individual lives and interactions. While the enormity of the responsibility and the risks were not lost on the commissioners, ultimately individuals were operating in environments and making conscious moral decisions about children’s treatment and abuse (McCarthy, 2017). They were the powerholders in the child’s relationship with the state and they failed them, causing generational physical and psychological harm, which has impacted and continues to resonate throughout Australia’s social and moral consciousness.

A recurring theme in the treatment of beyond control children was for them to suffer pain and atone for their breach of a social and moral wrong. This fundamental obligation of Latin-Christian justice and punishment expectations was being met and continues to shape and impact on the relationship between the parent and child, long after their formal release from the system. Their suffering and experience of how justice was determined and delivered against them remains unresolved and will serve as a future trigger point in their relationship with the applicant/parent (Respondents 23, 25, 26 & 28). However, there are alternatives that aim to prioritise the repair and reconciliation of relationships over punitive retribution. Islamic justice traditions are potential sources of support to conflicting Muslim families seeking assistance with their children.
Islamic concepts of justice are rooted in the fundamental believe that through achieving a consciousness of God’s virtue man will be just and act justly (Fakhry, 1975). In this sense justice is not achieved and located in courtrooms, prisons or through surveillance, it is a fundamental part of consciousness and morality that is intrinsic and present in all actions, considerations and interactions. Fakhry (1975) utilises the work of the Persian ethical philosopher Abu Miskawayh (932–1030 CE), who expanded and brought together “Plato’s concept of what it means to be just, with Aristotle’s concept of acting justly” (pg. 243). Fakhry (1975) sees Miskawayh as the most important ethical writer in Islam (pg. 244) and fleshes out his justice perspective in detail, where Islamic justice presents as representing a holistic state-of-being that is rooted in the divine justice of God that man obtains through his consciousness of God’s virtue. Once this is in place, man will act justly and be just in his world, a world that encapsulates all demands of justice, including financial, transactional, criminal, spiritual and relational. Justice is fundamental to achieving a successful society and human evolution. Written law is only one form of justice; equality, equity and harmony in social justice are equally important because they enable a social consciousness that forms and shapes what legal regulation is there to protect. If this is achieved, it brings happiness to the moral man and he will always be just and act justly (Fakhry, 1975, pg. 247).

Abu Miskawayh’s perspective underpins and contributes to maqasid al-Shariah’s aspirations of what a just and compassionate Islamic society represents when its objectives and aims are realised (Auda, 2007 & 2008; Kamali, 1999, pg. 396). Logically, justice will be realised if there is harmony in communities, kinship groups, social relations and within families. Specifically, for beyond control children
and their families, achieving justice and harmony will preserve their family and help them to meet their social obligations (Auda, 2007 & 2008).

Accommodating this in the established Malaysian justice system relies on reconceptualising what the system intends to achieve by removing a child from their family unit, isolating them and punishing them into adulthood with moral judgements and surveillance. An alternative view could be to actively engage the Muslim child, their family, kinship group and Islamic community resources to establish options that could be mobilised from this knowledge group. The primary aim is to keep the family together, the child out of custody and to restore balance and harmony to the family and their community. Principally, this is what the ideal customary Islamic justice practice represents, a focus on collective interests, compassion and the restoration of relationships through the incorporation of Islamic truths, wisdom and justice into decision-making (Al-Ramahi, 2008, pg. 3 & Othman, 2007, pg. 65). This sits in stark contrast to the existing DSWP process being applied to Muslim beyond control children and their families. However, change is possible because systems are designed and changed by people.

5.4 Conclusion

The findings and discussion in this chapter highlight how beyond control children’s treatment reflects their breach of culturally established rules of propriety in the Malaysian parent and child relationship, thereby making them eligible and liable for retributive justice by the state and their agents. They have not committed a crime, rather they have committed a social wrong for which the state has legally declared warrants atonement. The state recasts and recalibrates the child’s vision of
themselves and their role in society at the probation home and approved school where DSWP actors enable a culture of self-surveillance that involves physical and psychological punishment to maintain control. This pain serves as a deterrence mechanism and a promotional tool for the continuance of self-regulation outside the school’s and home’s barbed wired fences. Beyond control children know what awaits them if they return and if they do not surveil their behaviour and participation against the social and moral expectations that wraps around them. The state ensures the children know they’re being watched and will be monitored, thereby producing and achieving a total state of control and compliance.

Within this morally sanctioned holistic process of punishment and surveillance there is no benefit to the state to release a child early, it is much better to keep them in the system and under review for the greater good of themselves and society. The findings support this and reveal a continuation of compounding procedural and legal failures that are systemically designed to protect children in the process. No active or consistent actions were taken to address and resolve the parent and child conflict that triggered the child’s entry into the system. Decision-making largely revolved around on one or two pivotal roles influencing a board of visitors and the court for children, whose legislative obligations were to act as system gate keepers with the fundamental remit of keeping children safe and placing them in institutions only as a last resort. Children were subject to physical assaults, routinized beatings and psychological cruelty by DSWP staff. Beyond control children’s experience of the approved school and probation home was survival and the requisite need to learn the formal and informal rules, social hierarchies and how to manage their captors’ traits and expectations as soon as possible.
The overarching question for the treatment of beyond control children is its purpose and how justice is being conceived and delivered to families and impressionable children by the existing approach. The findings of this research clearly reveal injustice, unfairness, disproportionality and vengeful punitive punishment towards children who have committed only relatively minor improprieties. Not present in the process were compassion and mercy, which are fundamental to both Latin-Christian and Islamic justice philosophies, if not all justice systems. Harm is being done to the parent and child relationship and the emerging adult citizen. The British attitude to their borstal institutions, which served as the inspiration for Malaysia’s use of incapacitation for recalcitrant youth to correct their social participation trajectories, shifted considerably when it was realised the system was out of step with the society they were serving (Warder & Wilson, 1973). Conceptual space needs to be created to reimage the purpose of the existing treatment of beyond control children. Culturally appropriate Islamic justice practices that emphasis reconciliation, community harmony and compassion, must be part of the needed reimagining.
6.1 Introduction

The focus of this chapter is to identify and explore where existing civil law and Islamic juristic principles and processes overlap and could potentially assist each other in the treatment of Muslim beyond control children. Malaysian Muslims are located within concurrent aspirational doctrines, one based on international secular principles and the other based on God’s will. Malaysia’s Child Act (Malaysia, 2001 & 2015) is a civil law that establishes a moral standard and codes of practice towards the treatment of children, across all religions. Islam’s al-Shariah defines the will of God, in all aspects of his followers’ lives, across the Muslim world. Both are predicated on declaring the best interests of their target audiences.

The active inclusion or consideration of Islamic practices or beliefs in Malaysian civil law processes is a sensitive topic, particularly when considering the treatment of children (Nini Dusuki, 2015a). The Malaysian human and child rights industries remain vigilant on the treatment of children, often identifying examples where interpretations and traditions at the community level are incongruent with Islam’s contributions towards the care of children, or the expectations of the UNCRC and national law (Nini Dusuki, 2015a; United Nations, 1989; Child Rights Coalition Malaysia, 2012). There is a principled belief in the capacities of the UNCRC (United Nations, 1989) and the aspirations of a secular universal doctrine reflected in the Child Act (Malaysia, 2001 & 2015), to deliver for all Malaysian children and their families (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013 & 2013a). However, the treatment of beyond control children,
particularly when it came to strategies to prevent entry or promote early release from the DSW system, were found to be problematic, primarily through a lack of sustained and coordinated effort to address the source of conflict between the parent/applicant and the child. The aspirations and expectations of Islam were central to the moral correction of Muslim beyond control children in DSWP’s decision-making and while they remained in custody. Considering how important this was to pivotal decision-makers and the liberty of a child, accommodating Islam’s justice practices to better mediate and potentially resolve the breakdown in the parent and child relationship could be beneficial.

6.2 Research’s Findings

Respondent interviews were not only focused on processes but also aimed at elucidating respondent’s and informant’s interpretation and meaning of their role, which is consistent with the case study method adopted (Yin, 2009 & 2011; Stake, 1995 & 2011). This took shape through probative questions relating to how they felt about a beyond control child’s circumstances which revealed personalised interpretations, beyond the boundaries of DSWKL and DSWP standard operating procedures and guidelines. Respondents and informants were given space to share their opinions and to reflect on how these might influence their thoughts and behaviours towards beyond control children. Generally, this portion of the interview pattern was the most information-rich because it was beyond the prescribed process and more about human interpretation and epistemological positions. It also revealed how DSWP employees were considering and often bringing their faith into decision-making at work.
6.2.1 Existing Civil and Shariah Overlaps for Beyond Control Children

Research findings revealed in chapters four and five, describe an environment where Muslim children were held in custody or under surveillance by the civil law while subject to assessments of their morality and potential for release from custody or monitoring defined by their religiosity. Beyond control children were subjected to a series of tests and assessments to establish their comprehension and understanding of the duties, rituals and recitations of Islam during prayers and how they live their lives (Respondents 2, 5, 8 & 10). The results of these tests influenced decision-makers on beyond control children’s future and their recommendations to the court for children (Respondents 8 & 13). A relationship between JAKIM and DSWP existed where JAKIM supplied DSWP with religious affairs officers whose remit was to deliver the religious programmes in the probation home and approved school and assess children’s compliance with those programmes (Respondents 5 & 10).

Daily schedules in the probation home and approved school were designed to accommodate the timings of daily prayers (see Figures 5.2 & 5.5). In both custodial settings, mosques were present within the complexes and the majority of staff and inmates were Muslims.

During interviews with respondents there were clear references towards what Islam could bring to the recovery of a Muslim beyond control child’s morality and behaviour. Primarily these were revealed during discussions about the purpose of the DSWP programme for beyond control children. Responses included, “We want to rehabilitate them. We focus on Islam for them to have a good character and carry out the commands of God” (Respondent 5). Respondent 2 stated that following application of the process “we can see the change in their spiritual values and respect
for their parents”. Overwhelmingly, those respondents directly involved in and responsible to the process saw the recovery of a beyond control child’s morality and behaviour as largely being achieved through the discipline the Islamic faith brings to their lives (Respondents 2, 5, 8, 9, 10, 13 & 14). Some of the beyond control children supported this position through sharing they liked the religious classes, recitation of prayers and the connection to God these brought (Respondents 21 & 27). Involving sheikhs and Imams in DSWP parenting and family workshops was an option used, along with counsellors adopting a “religious approach” during their sessions, depending on the family’s and the child’s religiosity (Respondent 12). These examples clearly demonstrated that Islam’s messages were being accommodated within in DSWP practices and responses to Muslim beyond control children.

Subtle indications of Islam’s message being present were revealed during discussions on an ethical dilemma with Respondent 14, which related to a Muslim beyond control child engaging in sexual relations and the guidance given by DSWP procedures and the workplace culture. Primarily for the parents and Respondent 14, there were serious concerns about the child being “addicted to sex” and the risk of an unwanted pregnancy (Respondent 14). Respondent 14, guided by DSWP procedures and guidelines, advised and counselled the family to use methods such as strict monitoring of the child’s movement, curfews, religious observance and sexual abstinence. During this revelation, the researcher inquired whether, as part of a broad-based educative and preventative strategy, any thought was given to supplying condoms/contraceptives to the at-risk child and the child attending a sex education course. Respondent 14 initially stated this had not been considered because the DSWP guidelines focused on abstinence and did not mention supplying
contraception or sex education as optional strategies. When probed further, Respondent 14 shared her opinion that if the DSWP gave the child condoms it would be promoting sex out of wedlock. Moreover, there was no discussion on this type of ethical dilemma within the DSWP workplace, nor did Respondent 14 discuss her decision-making with her supervisor, rather she relied on her life experience, guided by Islam’s teachings, to counsel the child and family. The beyond control child ended up in an institution and on a three-year monitoring order.

Respondent 15 shared he had a case with similar circumstances and rather than adopting a non-custodial and educative approach, the beyond control child was ‘fast-tracked’ through the system and into a probation home to smother their sexualised behaviour. Respondent 15 discussed this decision with his supervisor and they both agreed they “must” put the child in an institution and on an order, because of the child’s sexual activity. The DSWP’s workplace culture and lack of guidelines to address beyond control children engaging in sex was put to senior management with an acknowledgement a practice gap existed (Respondent 7). Moreover, these dilemmas should have been discussed but they were not because of the Malaysian culture and if the dilemmas were discussed, or contraception was given as a public health strategy, the DSWP would be considered to be promoting sexual relations outside marriage and come under public condemnation (Respondent 7). Respondent 7 detailed that Malaysian cultural attitudes towards sex and relationships was very conservative and not openly discussed within the DSW.

Understanding what maqasid al-Shariah could bring to the treatment of Muslim beyond control children was integrated into interviews, particularly with religious
affairs officers and those respondents with strongly held beliefs that correction to children’s morality and behaviour came through a disciplined devotion to Islam. A majority of the respondents did not know what maqasid al-Shariah was or what it meant in practice and, upon explanation by the researcher, reverted to positions of how fair the DSWP process was or was not to correct beyond control children (Respondents 2, 8, 9, 10, 12, 13, 14, 15, 17 & 20). Those who had a knowledge of maqasid al-Shariah, had either forgotten what it meant (Respondent 10) or did not see its relevance, because they were there to rehabilitate beyond control children (Respondent 5). Respondents 5 and 10, as religious affairs officers, were less interested in maqasid al-Shariah and more interested in ensuring compliance with rituals, recitations and orthodoxy. Analysis of the supplied “individual duty and spirituality” religious assessment forms by respondents 5 and 10, confirmed the DSWP’s focus on assessing beyond control children’s comprehension of the pillars of Islam and their recitation of prayers and completion of rituals, not a philosophical understanding or conceptualisation of Islam’s message. Systemically, these assessments had a great importance for beyond control children because passing them significantly contributed to the potential of them being released from custodial settings.

6.2.2 Mediating Conflict and the Potential of Islam’s Sulh

The lack of sustained and meaningful mediation of the conflict between the applicant/parent and child was a recurring finding, described in chapters four and five. The findings revealed life-changing gaps in performance by probation officers and the expectations of them actively preventing entry to the system, defined by the Child Act (Malaysia 2001 & 2015) and DSWP standard operating procedures. Child
respondents saw mediation as a helpful action to prevent their behaviour and placement on custodial and monitoring orders (Respondents 21, 23 & 27). DSWP and justice duty bearers also saw improved mediation as a necessary step to address persistent parents/applicants and to avoid beyond control children being on court orders (Respondents 1, 6, 7, 13, 14, 17 & 20; Y A Zaim bin Md. Yudin, personal communication, April 4, 2017; Sharmila Sekaran, personal communication, June 6, 2017). Probation officers and counsellors adopted strategies, articulated in Figure 4.1, which included sending children to Islamic schools (Tahfiz centres) to avoid entry to probation homes or approved schools. The DSWP used religiously-oriented counselling strategies to assist vulnerable families and children deemed religious (Respondent 12), with examples such as employing religions teachers (Ustaz) to mediate family conflicts (Respondent 13) and Imams and sheikhs to deliver workshops (Respondent 12). Considering the willingness and openness of the DSWP towards Islamic resource mobilisation in their processes and the existing connections between JAKIM and DSW, the ancient Islamic practice of *sulh* in conflict resolution could be a viable option for conflicting Muslim applicants/parents and children in the beyond control child process.

The *sulh* (amicable settlement) is an Islamic mediation and reconciliation process that concentrates on returning harmony to relationships, rather than one party achieving victory (Othman, 2007; Al-Ramahi, 2008; Rijal, 2011; Rusli, 2013). In Malaysia, the *sulh* is primarily utilised and known as a settlement and negotiation process within the Syariah courts when couples divorce or have marital problems (Y A Zaim bin Md. Yudin, personal communication, April 4, 2017 & Rijal, 2011). However, it has been used to settle broader Muslim community and family disputes,
such as Muslim teenagers engaging in sexual relations outside marriage, or conflicts within families leading to child protection concerns for state authorities and communities (Hutchinson, et. al., 2014; Squire & Hope, 2013; Foundation Terre des hommes, 2011). The fundamental process of a sulh is to allow both parties to sit and openly discuss what grieves them, in the presence of a trusted and skilled mediator who works towards a return of equilibrium in the relationship, not a determination of guilt or responsibility in one party over the other (Othman, 2007; Al-Ramahi, 2008; Rusli, 2013). Sulh decisions can include: compensation being paid financially, materially, or through reparation of labour; on-going dialogues between families, kin or communities; forgiveness or mercy (Hutchinson, et. al., 2014; Squire & Hope, 2013; Foundation Terre des hommes, 2011). The central tenet of the process is to take time to discuss and work through issues, promoting Islamic social justice expectations and compassion. The role of an independent mediator is to work towards an amicable settlement that is accepted by both parties, their families and the communities in which they live. Reaching harmony within the community or kinship groups is as important, if not more important than the conflicting individuals because it can help settle or prevent associated or on-going conflict (Hutchinson, et. al. 2014; Al-Ramahi, 2008, pg. 3; Othman, 2007, pg. 65).

The potential role of a sulh in beyond control children’s treatment was tested with respondents. Some had heard of the process, linking it with divorce and Syariah court processes (Respondent 5 & 10). Most respondents did not know what it meant and, following the researcher’s explanation of the concept, thought it was a good culturally-appropriate idea and within the remit of DSWP strategies to address beyond control children (Respondent 2, 5, 7, 10, 12 & 17). Respondent 7 thought the
idea was very interesting, reflecting that the concept of non-adversarial, community level mediation and resolution mechanisms were not only found in Islam, but were represented in other faiths, such as Hinduism. Respondent 17 shared that he had tried alternative community-level measures to settle conflicts through involving child committees in his work with children and families. These committees consisted of volunteers who were mostly retired teachers, community leaders or police officers who supported DSWP programmes. They visited schools, families and parents, including beyond control children and their families, to discuss and offer solutions to the issues they faced and made the families feel humble. They were not trained in conflict resolution and there were issues regarding confidentiality within the community after visiting families, according to respondent 17.

The embedding of sulh units and processes in Malaysian Syariah Courts started in the early 2000s and has resulted in individual states enacting legislation to govern their application and the conduct of sulh officers (State of Penang, 2006 & Rijal, 2011). Their inclusion into Syariah courts was “aimed at encouraging parties to settle their disputes amicable [sic] and as far as possible avoid divorce” (Rijal, 2011, pg. 3). Predetermined matters, such as custody of children, child maintenance, divorce, dowry and matrimonial property settlements were systemically diverted into the sulh process by Syariah courts (Respondent 3). Respondent 3 was an experienced sulh officer who stated that the sulh success rate was approximately 70%. Success was defined as an amicable settlement being reached, outside the court room. The sulh process adopted by the Syariah court is for both parties to provide a letter of claims to the sulh officer, who assesses them against civil and Syariah legal expectations. According to Respondent 3, careful consideration of Malaysian civil law is required,
particularly around asset separations and their links to loans and mortgages. The *sulh* officer then brings the parties together, without legal representation, and opens discussion. Both parties articulate their claims and the *sulh* officer acknowledged and navigated these while moving the process towards a “win-win” settlement. The average period for the *sulh* was 90 days, with three meetings to discuss details and finalise the settlement for formal ratification in the court (Respondent 3).

When prompted to reflect on the *sulh*, Respondent 3 believed it offers better solutions for society than court processes because *sulh* is a process of purposeful discussion and listening between conflicting parties. Respondent 3 added that the *sulh* concept was part of ancient Malay societies when Imams and village chiefs settled problems with communities rather than sending them into lengthy and expensive court processes. This position was supported by Syariah High Court Judge, Y A Zaim bin Md. Yudin, who added that the *sulh* process, and Islamic justice in general, focuses less on punishment than on educating the person to be a good Muslim, to realise their obligations before God (personal communication, April 21, 2017).

Table 6.1 reveals that the adoption of the *sulh* process is evenly spread across all Syariah courts in Penang and successfully resolves approximately two thirds of its cases. This means that only one-third of the cases sent for *sulh* mediation cannot reach settlement and require the courts to make determinations for the conflicting parties. Table 6.1 also reveals the gradual, but increased usage of the process and skill development throughout the seven-year period.
Table 6.1: Penang Syariah Courts’ *Sulh* Cases 2010-16
(Supplied by the Syariah High Court of Penang)

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<td><strong>Success Average %</strong></td>
<td>61</td>
<td>61.75</td>
<td>51.5</td>
<td>55.5</td>
<td>62.5</td>
<td>68.5</td>
<td>72.75</td>
<td>61.9</td>
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</table>
Sulh officers’ capacity building was an important part of the strategy.

Respondent 3 has been receiving on-going training and development by JAKIM to improve his performance in the sulh process since 2011, having received about three training sessions per year. The result of this on-going development was a confident sulh officer who felt his experiences in the role and life contributed to successful mediations. Respondent 3’s adopted mediation technique was a mixture of life experience, faith, intuition and policy to reach amicable settlements. Furthermore, respondent 3 shared that he often injected teachings from the Quran and its messages on legal and social expectations between husband and wife into discussions with conflicting parties, with positive results. When combined, these findings appear to present as an opportunity to explore how Islam’s teachings and justice processes could be considered in the treatment of Muslim beyond parental control children.

6.3 Discussion

The research findings in this chapter reveal existing connections between secular DSWP processes and Shariah societal expectations. DSWP respondents were anchoring their interpretations of treatment for beyond control children in both DSWKL procedures and the capacities of Islam to create change and correct behaviours. However, the DSWP respondents were limited in their understanding of maqasid al-Shariah and the potential for a sulh to mediate parent/applicant and beyond control children’s conflicting relationships. This is not surprising, considering the relocation and centralisation of problem responses to state control, including mediating community and family conflicts, rather than seeking solutions within local communities (Assistant Professor Atikullah, personal communication, March 29, 2017, Associate Professor Azam, personal communication, June 13, 2017;
Clark & Stephens, 2011). The state and its legally empowered functions are present and active in Malaysian families and reflects the global expectations of positivistic universalism in human rights rule of law agendas (Reynart, et. al., 2009; Morrow, 2011; Fleer, et. al., 2008). However, the dominant narrative of secular rule of law processes being the *only* answer, particularly in traditional or deep-faith communities, has shifted and is being questioned to enable better outcomes around the world, including Malaysia (Nini Dusuki, et. al., 2013; Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a; UNICEF, 2006; UNICEF, Al-Azhar University and Coptic Orthodox Church, 2016; Organisation of Islamic Cooperation, 2005a; UNICEF, 2012; UNICEF and Al-Azhar University, 2005).

In terms of children in conflict with the law and punishment responses, there is an active global movement towards improving accommodation of faith and ancient traditions in secular processes (UNICEF, 2017; Raoul Wallenberg Institute, 2015; Clark & Stephens, 2011; Wojkowsa, 2006; Foundation Terre des hommes, 2011). Processes are being developed to consciously involve communities in determining punishments and compensation to conflicting parties, or wronged individuals, while acknowledging the centrality of religion and tradition in the process and decision-making. The ancient Islamic *sulh* process is part of this global conversation in reconceptualising children in conflict with the law and punishment responses at the community and state levels (Hutchinson, et. al., 2014; Squire & Hope, 2013; Foundation Terre des hommes, 2011).
6.3.1 Religion and Faith in Secular Processes and Practices

A tension point in the DSWP systemic response to Muslim beyond control children and the potential for Islamic mediation practices, is the acceptance and inclusion of faith practices in secular processes (Nini Dusuki, 2015a & Child Rights Coalition Malaysia, 2012). The Malaysian Child Act (Malaysia, 2001 & 2015) and DSWKL procedures are built on a secular foundation (S. Sekaran, personal communication, June 14, 2017). A foundation that sets expectations of performance and compliance for its employees. While not unique to Malaysia, there is an inherent expectation in secular constructions of what the public sphere constitutes and permits (Hoffstaedter, 2013; Guan, 2005 & 2011; An-Naim, 2000; Taylor, 2007), particularly when it comes to government employees separating their professional and private lives while engaging with clients. However, research findings consistently revealed the pivotal presence of Muslim respondents’ moral positions towards Muslim beyond control children’s futures. Decision-making was influenced by Muslim respondent’s social and moral expectations, specifically when reacting to children’s Quranic knowledge, obedience to prayer rituals, responses to parental authority and sexual behaviour. S. Sekaran, a Malaysian lawyer with extensive experience in the juvenile legal system and the not-for-profit sector, articulated that while Islamic practices are “not formally” in the beyond control system because of its secular expectations, informally, Islamic perspectives are present and significant (personal communication, June 14, 2017). Research findings support this reflection.

This reflection feeds into a recurring and prickly national conversation surrounding competing truth claims on the ‘Islamisation’ of Malaysia (Jha, 2009, Guan 2005 & 2011; Hoffstaedter, 2013) and its threat to Malaysia’s constitutional
status as a secular state that declares Islam as the national religion, with freedom to practice other religions (Malaysia, 2010, Sections 3(1) & 11(1)). The politicisation of religion and identity is nothing new in human and social development. History serves as a rich reference site to the dominance of truth claims and their impact on power and control (Said, 1978; Commonwealth of Australia, 1997; De Vattel, 1844; Hobbes, 1651; Ibn Khaldun, 1958; Pettit, 2015; Russell, 1935 & 1961). A more nuanced philosophical analysis of the Malaysian ‘Islamisation’ debate suggests the need for a deeper evaluation of what ‘secular’ means for citizens and states, because it is not being fully understood or conceptualised, rather religious identities and contributions are being weaponised (Guan 2005 & 2011; Taylor, 2007; Hofstædter, 2013).

Canadian philosopher Charles Taylor’s (1931–CE) seminal publication *A Secular Age* (2007) provides an historically-rooted and reflective perspective on the inclusion of religious doctrine in the secular public sphere. Taylor (2007) locates his perspective in contestation and critique of the dominant Western Christian narratives that are based on naturalism and have fed positivistic definitions of what is secular. Instead of being inclusive, the current secular phenomenon has constructed a polemic interpretation of ‘religion’ and ‘secularity’ that denies each other’s contribution to pluralist society, rather they are portrayed and received as incompatible combatants (Hofstædter, 2013 & Guan, 2011). Essentially, Taylor’s (2007) interpretation of secularity adopts a cosmopolitan lens which promotes accommodating and exploring the potential of multiple contributions into the public sphere, rather than the dominance of one set of truth claims, to the exclusion of others. Taylor (2007) defines the existing secular phenomenon as constituting three concurrent
components: first, a public space devoid of God; second, a social decrease in religious beliefs and practices; and third, a social change from where there was an acceptance of belief in God, to one where belief is an option and privatised. Taylor (2007) laments the narrow perspective this interpretation of secularism brings to what he calls the ‘frame’ of life, meaning life’s purpose and fullness. He questions the persuasive naturalism that is present in the secular narrative towards scientific reasoning being the primary source of interpretation in people’s lives (Taylor, 2007, pg. 594 & Hoffstaedter, 2013). Taylor (2007) calls this positioning an ‘immanent frame’, meaning a worldview predicated on individualism, technology and science that can be understood or conceptualised without reference or consideration of the metaphysical or transcendent (pg. 594 & Hoffstaedter, 2013). The perpetuation of this ‘immanent frame’ and its influential dominance on what constitutes a ‘secular public sphere’ impacts and defines the rules of engagement by citizens or governments. It also facilitates and incites competing ideologues and ideologies whose narrative is valid, permitted and can occupy the public sphere. Taylor (2007) argues the secular elimination of transcendent belief or the ‘transcendent frame’ from the public sphere does not limit its presence in the private citizen, rather it makes way for different forms of participation to flourish, which are not always positive or safe contributions (pg. 432 & Guan, 2011).

Using Malaysia as an example, Hoffstaedter (2013), makes connections between Taylor’s (2007) frames and Foucault’s (1977) panoptic schema/view, positing Malaysia is trapped in a “closed transcendent frame” through the ‘Islamisation project’ which is “engaging Malaysians as willing participants in the self-censorship and self-disciplining inherent in a system of hegemony” (pg. 481).
Guan (2011) sees the contested truth claims on the ‘Islamisation’ of Malaysia as an optimistic opportunity to forge pluralistic commitments and enable civic participation. The debate provides fertile ground to create national conversations, bring together interested parties and different religiously-identified groups into the secular public space to talk about religion and its role in the state. However, Guan (2005 & 2011), citing civic protests and the Malaysian government’s historic response towards allowing public debates, promotes a better appreciation of each other’s histories to achieve a greater understanding of each other’s claims to advance social positions, not entrenching them and embedding conflict.

Connecting this to beyond control children treatment, the consideration of historic Islamic mediation practices in secular Malaysian government processes that could potentially prevent unnecessary institutionalisation are within a cosmopolitan construction of a secular state and its responses. Holistically, the arguments offered by Taylor (2007), Guan (2011) and Hoffstaedter (2013) suggest current constructions of the Malaysian secular public sphere should not be about the systemic exclusion or dismissal of Islam’s contribution to public discourse, policy or practice development. Rather, it concerns a state’s obligation and responsibility to facilitate a protective space for all perspectives and belief systems to enter the public sphere to be heard and considered, for the benefit of all citizens. Furthermore, all actors have an obligation in the public sphere to acknowledge alternative contributions, including their foundational belief systems, as worthy and considerable, not to be dismissive or hostile to serve their own gain. Taylor (2007), through declaring his hopes for a pluralistic secular state that can accommodate multiple constructions of ‘worldly-order’ to achieve a more fulfilling transcendental frame of being, represents the best
construction of what secularity means. It is saying there can be a multiplicity of beliefs and hopes in the public sphere, including those framed on a multiplicity of faith or non-faith transcendent truths. In a curiously perpetual dependency, having multiple perspectives that can be often conflicting is healthy for the secular state because it needs this to activate progress and move citizens into the public sphere (An-Na’im, 2000 & Guan, 2011). A mature and confident state can accommodate this, without being frightened by the public conversation. Systemically, it does not favour one transcendent ontology over another, but pluralistically brings them all in and gives each active consideration. Interestingly, this cosmopolitan and inclusive consideration of multiple belief systems to enrich the social good has been part of Islam’s philosophical and social development (Abdalla, 2016) and is consistent with maqasid al-Shariah’s hopes for all Muslims when it comes to seeking knowledge and doing good (Auda, 2007 & 2008; Abdul Rauf, 2015; Kamali, 1999, 2007, 2008, 2012).

6.3.2 Religion and Faith in Mediating Conflict

A root cause of Muslim beyond control children being in contact with the DSW and the justice system is unresolved conflict between an applicant/parent and a child. Research respondents within the DSW system, including beyond control children, declared that addressing this conflict would have significant influence on whether a child entered or remained in the system. Considering the emphasis and hopes placed on Islam’s messages and rituals to correct beyond control children’s behaviours within the existing DSW system, the application of an Islamic mediating framework and process appears an obvious choice. However, natural questions exist on what benefit a faith-based mediation process has over a secularly framed process.
that is underpinned by naturalistic scientific reason, such as psychological counselling.

The DSW applied their ‘Guide to Counselling and Psychological Service and Structure Manual’ on the assumption the applicant/parent and the child are irrational and following the application of emotional and behavioural therapies, there will be a return to normalcy (Respondents 4, 12 & 14). There is limited formal inclusion of religion or faith-based counselling or procedures in the process and they are only included on a case-by-case basis (Respondent 12 & 14). However, research findings revealed that respondents informally included their Islamic worldview in decision-making and judgements towards clients, including beyond control children. Moreover, these decisions and judgements were frequently left unsupervised or not monitored to assess their impact (Respondents 11, 12, 13, 14 & 20). The mixing of public compliance with DSW procedures and the introduction of private worldviews in client-based counselling, while not surprising, is something that requires careful consideration and monitoring.

A research project that explored the accommodation of Jewish, Islamic and Christian religious truths in the secularly framed working lives of 92 legal and science professionals concluded most participants reconciled the conflicting truth claims by adopting a public secular neutrality, while maintaining a private commitment to their faith’s truths (Vaidyanathan, Johnson, Prickett & Ecklund, 2016). Interestingly, the Sunni Muslim respondents rejected the incompatibility of scientific and religious truth claims to provide answers about the world, because having a worldview shaped by both helped them to know God’s design better.
Moreover, many of science’s truth claims are already revealed in the Quran; science is confirming what was already known by God, because he is the ultimate creator (Vaidyanathan, et. al., 2016, pg. 12). The research illuminates the presence of public and private identities in secularly framed workplaces. Moreover, self-surveillance is required by workers in secular processes towards maintaining compliance with professional standards and expectations, while consciously acknowledging and accommodating competing interpretations and worldviews. Importantly, both can be accommodated and be helpful, within a foundation of considered and monitored inclusion to measure results and impact.

Faith messaging in counselling practice or while working with religious families in crisis has proven potential and has been included in secularly framed responses in Australia (Dr. Nada Ibrahim, personal communication, July 18, 2017; Ibrahim & Abdalla, 2010; Ellison, Trinitaoli & Anderson, 2007; Butler, Stout & Gardner, 2002). Ibrahim has worked extensively with secular Australian government emergency agencies on their responses to domestic violence in Muslim households (personal communication, July 18, 2017). Ibrahim’s approach and strategy included actively engaging Muslim community members and their responsibilities towards preventing and responding to domestic violence. Included in the programme was training and discussion on Quranic verse 4:34 (The Nobel Quran, 1998/1419AH), which relates to the treatment of wives by their husbands (personal communication, July 18, 2017; Ibrahim & Abdalla, 2010). Ibrahim shared that Islamic community leaders, Imams and community members had limited knowledge and narrow interpretations of verse 4:34 (The Nobel Quran, 1998/1419AH), mostly relying on what they had been told while growing-up, which could be problematic when
identifying and responding to domestic violence (personal communication, July 18, 2017). Ibrahim reflected the inclusion of messages from the Quran and al-Shariah was important and impactful during training with Muslims because of the centrality of faith in their lives and social conduct (personal communication, July 18, 2017). Moreover, because of the ingrained and comfortable presence of al-Shariah and Islamic truths, the use of these foundation blocks to reorient interpretations and meanings, represented a respectful method of deep engagement with a highly sensitive topic (Dr. Nada Ibrahim, personal communication, July 18, 2017).

Conversely, while working with secularly-framed responses by emergency service agencies and personnel there was a reluctance or resistance to engage with the capacities of religious messaging to effect change or assist vulnerable Muslim women or children (Dr. Nada Ibrahim, personal communication, July 18, 2017).

Another example of the considered appropriation of religious messaging in conflict resolution comes from a survey research project carried out in the United States of America with 230 Christian married couples on the effects of spiritual guidance and prayer during periods of personal or marital conflict (Butler, et. al., 2002). Research results revealed that prayer was helpful in settling personal and marital conflict, with examples of conflict-reducing results being that prayer: brought the respondent closer to their God; invoked mindfulness and accountability; de-escalated the conflict; increased emotional control; increased empathy of the other party and increased capacities for reconciliation and problem solving (Butler, et. al., 2002, pg. 31). Butler and colleagues (2002) believed prayer was an efficient “self-intervention” strategy during conflict and something therapists should be actively promoting and coaching couples and individuals in conflict to adopt (pg. 34).
Furthermore, therapists should not avoid spiritual practices with clients, “our findings support therapists in exploring the spiritual dimension of their clients’ lives: its effect on interaction processes in their relationships and its relevance as an intervention in therapy” (Butler, et. al., 2002, pg. 34). An important finding of the research was that prayer’s efficacy as a conflict reduction strategy increased when research participants engaged in “traditional” prayer, rather than “ritualized” prayer, meaning the participants turned to spontaneous prayers, separate from the ritualised moments experienced during recitations and church services (Butler, et. al., 2002, pg. 27).

What comes through Butler and colleagues’ (2002) research is the important presence of compassion, fairness and contemplation, through a consciousness of God’s message, to successfully address conflict. This is consistent with the philosophy and aim of maqasid al-Shariah, namely achieving justice, compassion and virtue in God’s consciousness (Kamali, 1999, pg. 396). Couples and individuals are pausing and mindfully reflecting on what God’s messages is for them while they are in conflict. They are being therapeutically coached towards finding meaning in religious messaging, and empathy and compassion for themselves and the other party to settle and resolve conflicts. Justice emerges through both parties becoming conscious of the other’s position, and reconciling wrongs to return harmony to their relationship. Of particular note was the efficacy of non-ritualised prayer in research findings. This demonstrated that compliance with rituals was not as effective as a consciousness of meaning in God’s message for them. This consciousness reflects a meaningful commitment beyond the rituals of faith and into an active behavioural commitment and internal trust in God’s message. This is a solid example of what
maqasid al-Shariah is seeking when it guides Muslims towards a consciousness of God’s message in their worldviews and actions, not just compliance with rituals (Kamali, 1999, chapter 20; Ibrahim, 2014; Auda 2007 & 2008). These are active examples of what maqasid al-Shariah is seeking in individuals as they go about their lives and their relationship with each other and Islam’s al-Shariah. Importantly, reaching this level of consciousness will achieve an essential value of maqasid al-Shariah to preserve families through the reconciliation of conflict with fairness and compassion (Auda, 2007 & 2008; Kamali, 1999, chapter 13 & 2008).

A central consideration for state justice systems is how to regulate and include informal traditional reconciliation processes, particularly when ensuring compliance with compensation or retributive punishment decisions. Overarching and understandable concerns surround the inclusion of natural justice principles and proportionate, allowable punishments. Emerging as having potential to circumvent drawn out legal determinations in favour of community negotiated compensatory settlements are hybrid justice systems. Hybrid systems incorporate community-based justice and reconciliation processes with formal justice systems that oversee and regulate decision-making (Clark & Stephens, 2011).

Indonesia’s colonial history has parallels with Malaysia through the incremental creep of European law which initially accommodated traditional customary ‘Adat’ laws and procedures, only to see their accommodation reduced and ultimately dissolved when the new Indonesian republic was formed in 1945 (Clark & Stephens, 2011, page 11). Between 1945 and 1999, law and justice roles and expectations based on post-colonial Dutch law were centralised by the state. A shift
to better accommodate regional governance and localised dispute resolution practices came in 1999, following the passing of law number 12, which relocated dispute resolution authority to village heads and Adat Councils (Clark & Stephens, 2011, page 12). Clark and Stephens (2011) highlight how there are good examples of the efficiency and conflict reconciliation capacities of localised customary justice practices through emphasising examples where community disputes are mediated with discussion and apologies, rather than by police officers and in courtrooms (pg. 17). However, they also underscore a rape case study where the interests of the families in conflict superseded the wrong doing against the female victim (Clark & Stephens, 2011, pg. 21). In this case the female victim felt dissatisfied by the decisions made by the village leader, Adat Council and community deliberation process, primarily because she was not directly included in the process, rather she was informed of the outcome (Clark & Stephens, 2011, pg. 21). Clark and Stephens (2011) promote better oversight by the formal Indonesian justice system towards community level outcomes and a monitoring of their processes to prevent problems highlighted in the rape case example (pg. 21). In the rape case study, restoring clan or kinship relationships took precedence over the individual rights of the female victim, leading to concerns about whether justice and fairness has been achieved.

The rape case determination highlighted by Clark and Stephens (2011) is not unusual when it comes to community-based legal systems. In the Islamic *sulh* process restoring community harmony can take precedence over an individual’s interests (Hutchinson, et. al., 2014; Squire & Hope, 2013; Foundation Terre des hommes, 2011). However, the process of achieving reconciliation and coming to a ‘just decision’ is as important and given equal consideration in the *sulh* process. Al-
Ramahi (2008) highlights how western conflict resolution focuses on the immediacy of individuals securing a fair deal that is formalised in a written agreement (pg. 19). In comparison, Islamic traditions consider the restoration of dignity, family or group honour and long-term relationships within a powerful and binding ritual that is sealed with a handshake and a collective meal (Al-Ramahi, 2008, pgs. 19-20). The essential difference in the *sulh* processes is the acknowledgement and connectedness of the conflict with others and how individual victories can be problematic to collective harmony. Islam’s message from the Quran is for conflicting parties to find peace and justice that is fair and equitable (The Nobel Quran, 1998/1419AH, 49:9). The *sulh* is designed to settle conflicts amicably and fairly between both parties, conscious of Islamic brotherhood, community benefit and post-conflict relations (Al-Ramahi, 2008). Achieving these outcomes for the beyond control child and parent relationship would meet an essential value of maintaining and restoring a family’s integrity which is within the aims and objectives of maqasid al-Shariah.

6.4 Conclusion

The existing DSW and Malaysian justice system’s response to Muslim parents/applicants and beyond control children is shaped and informed by western secular judicial expectations of an immediate response that favours one party over another. However, the system incorporates assessments of the potential for children to enter the system or to be released based on their compliance with the rituals of Islam. Furthermore, Muslim DSW employees brought their religiously-framed worldviews into decision-making on the future of beyond control children. Clear procedural overlaps exist between secular civil processes and Islamic religious propriety in the treatment of beyond control children. A better acknowledgement and
adaptation of these concurrent truth streams to change beyond control children’s
treatment or prospects, is caught up within unresolved civic histories and conceptions
of what an inclusive Malaysian secular public sphere represents.

Ensuring fairness, justice and compassion between conflicting
applicants/parents and beyond control children is an essential part of returning
harmony to the relationship and in the best interest of the child. The current DSWP
approach is failing conflicting Muslim families. Courtrooms are not the best place
for families in conflict because law and authority inherently take priority over justice
and compassion (Goldstein, et. al., 1973; Bryant, 2017; Spence, 2018; Walker,
2018). A central component of the Islamic sulh practice is to facilitate a return of
harmony between conflicting parties, with the essential purpose of encouraging
forgiveness, mercy and tolerance, rather than violence, retribution and conflict
elongation (Rusli, 2013; Al Ramahi, 2008; Gopin 2001). The hybrid inclusion of a
tradition based, community-justice process within formal justice system
responsibilities is being accommodated in neighbouring Indonesia, with positive
results and problems being identified (Clark & Stephens, 2011). The Malaysian
Syariah Courts have been using the sulh process for eight years, achieving high
success rates and they present as potential educative sites. The consideration of a
mediation process that promotes restoration of parent and child harmony, to avoid
unnecessary deprivation of liberty, while accommodating Islamic messaging,
traditions and emphasis on reconciliation, appears to have some merit for
consideration in the best interest of the child.
7.1 Conclusions

Beyond control children represent a unique group of children within the Malaysian justice system, they haven’t committed a crime, rather they have trespassed on the expectations of propriety in the parent and child relationship in Malaysian culture. This breach in social and moral obligations brings the state into their lives and their family unit, with a focus on rehabilitating and returning their behaviour back into a recognisable normalcy. Essentially, they have committed a social and moral wrong which justifies the punishment they receive (Fassin, 2016a & 2016b; Hampton, 1984; Berman, 2008; Duff & Hoskins, 2017; Bedau & Kelly, 2017) and their behaviour has made them eligible and liable for state sanctioned punishment and control to recalibrate their participation in Malaysian society (Duff & Hoskins, 2017; Bedau & Kelly, 2017; Foucault, 1977). The state has declared its interest in this breakdown of expectations via its Child Act (Malaysia, 2001 & 2015), thereby empowering DSWP and court for children stakeholders to assume a legal and moral authority in the correction of the recalcitrant child for the common good.

The treatment of beyond control children is nested within Latin Christian judicial expectations that were shipped out to colonies across the world by the British and incrementally crept into and embedded themselves in national and state law. The Malaysian Child Act (Malaysia, 2001 & 2015) is a good example of this and its evolution can be traced back to 1922 CE, following the introduction of British Common Law from 1826 CE (Dusuki, 2002). Islam’s presence on the peninsula can be traced back to the 14th Century CE (Dusuki, 2002; Adil & Ahmad, 2014;

The 1957 Malaysian Federal Constitution (Malaysia, 2010) declares Islam as the religion of the federation, along with freedom to practice other religions (article 3(1)). Ethnic tensions exist and have been simmering for decades, over who has the legitimacy to occupy the secularly constructed public sphere (Jha, 2009, Guan 2005 & 2011; Hoffstaedter, 2013). The expectation on the DSWP is to carry out its mandate with a commitment to all Malaysians, regardless of their ethnic identities and respond to needs with neutrally framed standards and procedures. However, this research has found some serious concerns regarding beyond control children’s treatment by the state, suggesting there is room for improvement and to consider the inclusion of culturally appropriate Islamic judicial practices, that could be in the best interest of Muslim children.
Research findings revealed the narrow and limited effort that took place to prevent Muslim children from being declared beyond parental control. Largely, most efforts to mediate and address the conflict triggers were based on unregulated individual decision-making. Decision-making that often didn’t correspond with established DSWKL standards or the spirit of the Child Act (Malaysia, 2001 & 2015) towards natural justice or the protection of children to ensure institutions were the last resort. Child respondent’s voices in the research brought an alternate view of the system which often stood in stark contrast to the favourable adult respondents’ interpretation. Child respondents outlined how they had been tricked, lied to and intimidated into silence during the determination process. In some extremely worrying examples, legally empowered and trusted state agents had manufactured claims that saw children placed on three-year surveillance orders that deprived them of their liberty and subjected them to physical and psychological violence. Courts for children and DSWP custodial sites placed a non-scrutinised and problematic amount of trust in probation officers to be presenting an evidence-based, accountable and truthful account of beyond control children’s lives and circumstances. These accounts were pivotal on children’s futures and how they were subsequently seen by those charged with their moral and social correction. Probation officer’s reports declared to system duty bearers this child needs correction. This declaration enabled the establishment and transferral of a sanctioned moral authority to courts and DSWP stakeholders to remove the child’s liberty over their body and mind. The state adopted total control of these children, forging and recalibrating their vision of themselves and their relationship with their society, under the assumption this was in
their best interests and the common good. This action represents the ultimate state of control over a citizen.

Research findings also revealed responsible DSWP staff at the probation home and approved school had little interest in addressing the conflict triggers or the circumstances that led to the child being declared beyond control. It was someone else’s responsibility. This lack of interest in identifying and reconciling root causes was compounded with children’s futures being determined by either the probation officer or the principal, regardless of procedurally engineered expectations of decision cross-checking, accountability and systemic review (Malaysia, 2001 & 2015; Malaysia, 2017). Stakeholders who held these responsibilities or a remittance under law, were routinely trusting and following the decisions of these pivotal and powerful individuals. Ultimately, children’s lives and futures were shaped by a handful of often emotionally charged decisions. Children’s accounts reveal state run custodial settings that systemically engaged in physical and psychological violence to ensure control and compliance.

The state incarcerates beyond control children both physically and mentally. Physically they were contained within the probation home and approved school where they were conditioned with a panoptic view of their behaviour against socially and morally constructed expectations of propriety (Foucault, 1977). The state declared and ensured compliance with the constant threat of return until their 18th birthday. Mentally they were imprisoned to this threat and the potential of return to physical and psychological pain, if they didn’t regulate their behaviour and meet expectations. Once identified, research findings found the state didn’t show any
interest in releasing the child or their family from surveillance until the expiration of
the order because this enabled a conscious presence of the state in their home and
psyche. The state and its agents wanted to inflict pain and suffering on the
recalcitrant child to ensure compliance with standards and to atone for their social
wrong. They were removed from public participation, isolated from their family,
brought into a state of acquiescence to the state’s authority and then released with a
constant threat of return. However, the injustice that was perpetrated upon many of
the child respondents by the state or their parents/applicants was not forgotten and
remained unresolved or reconciled, regardless of their outwards signs of compliance
(Respondents 23, 25, 26 & 28). The long-term impact of the state’s incursion on
their liberty has not been fully revealed by this research, because it was bounded by
investigating beyond control children’s experience in the present, not the past.

The social reengineering of Malaysian beyond control children was founded on
the standards and practices set by the British borstal institutions that sailed out into
the colonies from the start of the 20th Century CE (Warder & Wilson, 1973; Dusuki,
2002; Bhutta & Akbar, 2012). However, their role and efficacy in correcting and
punishing United Kingdom youth changed in the 1960’s and became redundant as
society advanced, along with the recognition it was not in the best interest of children
to respond to social and moral wrongs with incapacitation, punitive punishment and
surveillance (United Nations, 1989; Warder & Wilson, 1973). Irrespectively,
Malaysia remains faithful and devoted to early 20th Century CE, British, Christian
rooted standards of incapacitation, punitive punishment and corrective practices for
children who have committed minor social improprieties. This is regardless of
Malaysia’s commitments to the UNCRC and international standards that champion
early intervention and systemic diversion for children to avoid unnecessary institutionalisation (Ministry of Women, Family and Community Development and UNICEF 2013 & 2013a; United Nations, 1989; Malaysia, 2001 & 2015). The DSWP mantra of ‘institution is a last resort’ frequently echoed and bounced into respondent’s interviews but wasn’t reflected in the results of this research. Once a beyond control child came into contact with the DSWP system they were more likely to be enslaved to it than released. The system was unfairly and unethically stacked against them, mostly through a lack of systemic scrutiny of pivotal decision makers, such as probation officers. Malaysia can learn from Australia’s recent Royal Commission into Institutional Responses to Child Sexual Abuse when it comes to the impact of systemic failures of accountability on individual children’s lives into adulthood, their families and the collective Australian social consciousness (Commonwealth of Australia, 2017, 2017a & 2017b). The Australian state failed many children and families with catastrophic affects, primarily through a failure to systemically scrutinise, reimagine and discipline child protection systems thought to be in the best interest of children.

Research findings reveal DSWP staff and the custodial settings were placing emphasis on Muslim beyond control children displaying a moral correction through their commitment to Islam’s rituals and knowledge of the Quran. This compliance factored into decisions regarding their release from custodial settings but not the system. Moreover, Muslim DSWP staff were making decisions on beyond control children’s futures guided by their faith in Islam’s truths and interpreting their circumstances based on their own worldviews. Like many of the decisions in beyond control children’s treatment, these consciousness-based decisions and actions were
mostly left unchecked and unreviewed. The findings revealed multiple cross-over points, within a secularly framed policy, where Islamic standards of behaviour and belief were adopted and present in the treatment of beyond control children. However, there were no active inclusions of Islamic justice practices or philosophy in responses to conflicting children and their families.

Islamic justice practices are framed and guided by the aims and objectives of maqasid al-Shariah for all Muslims to be just and act justly through trusting God’s will, as revealed in the Quran (Fakhry, 1975; Auda, 2007 & 2008; Kamali, 1999, chapter 13 & 2008). Islamic justice emphasises restoring equilibrium to relationships and settling conflict through reaching amicable settlements (sulh), because these have a long-term impact on not only the parties in conflict but also their kinship group and communities (Al-Ramahi, 2008; Othman, 2007; Fassin, 2016b). A fundamental difference between Latin Christian and Islamic justice practices is the importance of collective harmony over an individual’s victory (Al-Ramahi, 2008; Othman, 2007; Fassin, 2016b). Often the collective interest of an Islamic community takes precedence over an individual victim’s interests, because harmony in communities will bring peace and keep the ummah together thus preserving the Islamic religion and families, thereby reaching two objectives of maqasid al-Shariah (Auda, 2007 & 2008; Kamali, 1999, chapter 13 & 2008). This challenges Western positivistic justice traditions that champion an individual’s rights and claims on the justice process to compensate them for the wrong committed and to deliver punitive retributive pain against the wrong doer (Fassin, 2016a & Al-Ramahi, 2008). Fundamentally, this claim is the philosophical framework that responds to Malaysian parents who make a complaint against their children’s
behaviour and underscores the moral authority of the DSWP and its associates in
their treatment.

The Islamic *sulh* process has been embedded in the Penang Syariah Court since
early in the 21st Century CE with mostly positive results; approximately 2/3 of
conflicting couples reached an amicable settlement without needing the court to do it
for them. The message taken from respondents in the Penang Syariah Courts was the
process took time, relied on an accountable process carried out by skilled and
constantly developed mediators (Y A Zaim bin Md. Yudin, personal communication,
April 21, 2017 & Respondent 3). Islam’s guidance was incorporated into discussions
with conflicting parties, along with compliance expectations that overlapped with
Malaysian civil legal obligations when it came to mortgages, property and legalities.
In short, the mediation process maintained a commitment to Islamic justice
principles while remaining compliant with Malaysian civil law expectations and
regulation standards. This could be a potential model for DSWP duty bearers to
adapt when it comes to beyond control children.

Malaysia is surrounded by culturally and religiously relevant examples that
meet modern international expectations of early intervention and systemic diversion
of children from formal justice systems into hybrid systems that accommodate
customary practices and religious truth claims (Clark & Stephens; UNICEF, 2017;
Raoul Wallenberg Institute, 2015). The ultimate goal of these systems is to prevent
unnecessary institutionalisation of children, while accommodating their vulnerability
as emerging adults and the cultural expectations that are on the families to be
participating and complying with community standards. Courtroom appearances are
kept to the very minimum, while wisdom based, compassionate conversations are
centralised. Conversations that take time and shift power from the state into the
individuals in conflict, their families, kinship groups and community resources to
provide solutions (Clark & Stephens, 2011; Ungar, 2002). Religious truths, cultural
normalcies and community histories are involved and circulate the mediation
process, along with accountable and scrutinised decision-making. Islam’s sulh or
similar practices are part of the solution to communities and individuals in conflict
(Clark & Stephens, 2011; Hutchinson, et. al., 2014; Squire & Hope, 2013;
Foundation Terre des hommes, 2011). Critically, this process is focused and shaped
by long-term interests in the reconciliation of conflicting parties within their
communities and cultures, not short-term custodial remedies that isolate and put
more distance in already fractured relationships.

Maqasid al-Shariah has been the theoretical and conceptual framework of this
research as described by Mohammad Kamali who referenced ancient Islamic
iterations from Islamic scholars between the 5th and 8th Islamic Centuries AH (Auda,
Islamic scholars are promoting its relevancy and adaptability to address and
contribute to community conversations and development (Abdul Rauf, 2015; Auda
2007 & 2008; Kamali, 1999, 2008, 2016a, 2016b & 2017). However, there were
only a few examples found where it had been positioned as an interpretive lens to
promote reflection and change responses to a cultural phenomenon (Ali, 2014;
Kamali, 2017; Auda, 2007; Abdul Rauf, 2015; Saifuddeen, et. al., 2013; Husni, et.
al., 2015). This research continues in this vein and reinforces the relevancy and
potential of maqasid al-Shariah’s meaning to be a contributor in addressing social
concerns within Muslim communities in Malaysia and beyond. Importantly, this research has highlighted how its overarching principles of keeping Muslim communities and families together, through achieving justice and compassion for conflicting parents and children, is relevant to secularly framed constructions of achieving the best interest of the child. Current international trends that respond to children in conflict with the law consistently promote early intervention, formal justice system diversion and the inclusion of culturally appropriate mediation and compensatory practices to keep children out of institutions and in families. This is a fundamental message and objective of maqasid al-Shariah and Islamic justice principles.

There is a compatibility in Christian and Islamic justice objectives of achieving what is best for children, but the methods and philosophical frameworks to reach them are significantly different. The current treatment of Muslim beyond control children needs to be reconceptualised to acknowledge what maqasid al-Shariah and Islamic justice practices can bring to the existing Malaysian state’s response. Islam’s emphasis in reconciling and mediating conflicting parties to restore harmony in their relationship is already being achieved in the Malaysian Syariah Courts and reflects the global shift towards enabling hybrid justice systems that accommodate secularly framed state law and customary justice principles and practices (Clark & Stephens, 2011; UNICEF, 2017; Raoul Wallenberg, 2015). This is based on the widely held recognition that courtrooms are not the best place to reconcile fractured relationships (Spence, 2018; Walker, 2018; Goldstein, et. al., 1973; The Nobel Quran, 1998/1419AH; Othman, 2007, Rusli, 2013; Al-Ramahi, 2008).
The inclusion of maqasid al-Shariah and Islamic justice practices in the secularly framed Malaysian public sphere represents a confident and cosmopolitan worldview. A perspective which respectfully recognises faith commitments and transcendent beliefs to be important in people’s lives and their capacities to regulate moral responses to vulnerable children and families for the common good. With this inclusion comes a responsibility and obligation for all stakeholders, regardless of their histories or truth claims, to maintain a perpetual curiosity and consciousness towards what ‘the common good’ constitutes. A fundamental demand is to ensure the secular public sphere is maintaining space for more inclusive and expansive contributions that achieve and accommodate a plurality of truths and potentials in human development.

7.2 Recommendations for Future Research

Research recommendations that emerged from the findings are guided by the potential of maqasid al-Shariah and Islamic justice principles to contribute to existing international momentum that promotes keeping children out of custody and in families. Primarily through building social welfare responses that ensure early intervention, mandatory diversion from justice systems and the inclusion of customary justice and reconciliation practices.

- More research is needed to expand the practical application of maqasid al-Shariah’s objectives in addressing cultural phenomena of concern in Muslim nations and communities, both in Malaysia and internationally.
Further research is needed that actively trials and measures the efficacy of systemic diversion of conflicting Muslim families into mandatory mediation. Mediation and reconciliation practices that are shaped by the wisdom and intentions of the ancient Islamic *sulh* process, not therapeutic corrective counselling.

Further research is needed to establish the efficacy of the current treatment of beyond control children. Taking lessons from the United Kingdom and their realisation of the inefficiency of the borstal institutes to address recalcitrant youth in the 1970’s, a tracer study of beyond control children processed by the system would be helpful. Research that measures and inquires on the efficacy and impact of the existing responses towards beyond control children’s emerging adulthood, civic participation and familial relationships.

Research is needed into examining the workplace culture and management practices at both the DSWP approved school and probation home that either encourages, tolerates or spawns systemic violence and cruelty to children in their custody.

Research is needed to investigate the status and impact of DSW staff’s attitudes and performance towards sexually active children. The response examples identified in this research indicate how a lack of clarity, guidance and discussion within the DSW culture is resulting in children’s incarceration. This could be prevented through a better equipped workplace response and engagement with the child and their behaviour.
7.3 Recommendations for Policy Stakeholders

The following recommendations are focused on the more immediate needs of vulnerable beyond control children and their families being processed by the DSWP. The research has revealed some serious concerns towards children’s treatment, particularly regarding the state’s failure to keep them safe in custody or to be protected under fundamental expectations of natural justice within their civic participation.

- Repeal Section 46 of the Child Act (Malaysia, 2001 & 2015). The current state response to behavioural improprieties within the parent child relationship is an anachronism and inconsistent with international expectations and Malaysia’s own commitments and declarations towards children’s rights and social participation.

- To improve case management decision-making and accountability by case officers and supervisors, introduce a three-tiered system of decision review within the DSWP/DSW for any decision that involves a custodial recommendation. The research has revealed systemic failures in the treatment of Malaysian children, largely through the lack of decision-making accountability and review by DSWP management. Any recommendation that involves placing a child in an institution needs to be monitored for reliability and compatibility with existing legal and policy requirements. Having a three-tiered process of review that involves supervisors and section chiefs, reflects the gravity of depriving a child of their liberty and promotes better safeguards for children.
• All children who appear in a court must be represented and assisted by independent legal counsel. The research has revealed how intimidated children felt by the legal process, breaches of their legal rights and the trust put in DSWP reports to be truthful. The protection of the child by independent legal counsel would contribute to their inherent right to due process before the law.

• Probation officer’s reports should be delivered under oath and the report tendered as evidence. This would promote the ability of the child’s legal counsel to cross-examine and to test the reliability of the claims made against their clients. Moreover, it would open the probation officer, as an officer of the court, to be liable to legal recourse if the claims made in the dock or their report were found to be false or misleading.

• Critically and independently review the performance of the board of visitors regarding their obligations under law to be monitoring the approved school. The research has revealed this systemic safeguarding function is not operating as imagined.

• Facilitate an independent and complete case review of all beyond control children in custodial settings, with a focus on their contact with the DSW/DSWP to establish them for fairness and compliance with law and policy. Any irregularities should identify responsible individuals for disciplinary or capacity development actions.
▪ Building on positive examples of informal diversion practices already present in the system at the DSWP district offices and court for children, increase better recording of these for their efficiency and effectiveness in preventing formal beyond parental control applications.

▪ Encourage DSW/DSWP to connect with the Penang Syariah Courts’ sulh units to examine the practicalities and guidance that can be taken from their experiences reconciling conflicting couples.

▪ The DSWKL needs to establish and disseminate a clear policy and practice direction for their staff towards responding to sexually active children. This research has highlighted how a lack of policy or direction has resulted in children being incarcerated as a leading response, primarily because the DSW want to avoid awkward and difficult conversations internally and publicly.
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Appendix A

RESEARCH CONSENT FORM

Research Title: Navigating Malaysian civil law and maqasid al-shariah in the best interest of children beyond control: a case study in Penang.

Researcher’s Name: Jason Squire (Ph.: 0165 273 484)

INTRODUCTION

You are invited to take part voluntarily in a research study on Muslim children who have been determined to be beyond control under the Malaysian Child Act, 2001. Children under this legal decision are a dedicated group in need of care and protection by the Department of Social Welfare and the Court for Children. This research is focusing only on Muslim beyond control children in Penang.

Children’s journey into and out of custodial probation hostels and Sekolah Tunas Bakti (approved schools) is based on human assessments and judgements by parents, the child, Department of Social Welfare, Court for Children, hostel and school staff. Decisions made along this journey are pivotal, because they either place, or keep the child in custodial conditions.

A fundamental consideration in the decision-making continuum is the best interest of the child. This principle is consistent with both civil and Islamic juristic principles; namely they want them to be safe and to have full and healthy lives. How this is achieved, who is involved, and if consideration of Islamic religion and culturally appropriate support mechanisms could assist in established determination processes, are significant factors in practice and decision making.

Before agreeing to participate in this research study, it is important that you read and understand this form. If you participate, you will receive a copy of this form to keep for your records.

Your participation in this study is expected to last up to 12 weeks. Up to 30 people, including children, will be participating in this study. I remain available by telephone or email to address any concerns of question you might have throughout the research or after.

PURPOSE OF THE STUDY

The objective of the study is to explore whether Islamic juristic and cultural practices could support the Penang Court for Children, Department of Social Welfare child protection practitioners, Islamic communities, families and children to prevent entry into, or promote early release from state institutions where beyond control children are held.

QUALIFICATION TO PARTICIPATE

The focus of the research will be children (12-17 years), government department workers, parents and Islamic community members who are an influence or could be, on whether Muslim children are declared beyond control by the Court of Children in Penang and living in Asrama Akhlak (probation home), Paya Terubong or the Sekolah Tunas Bakti (approved school), Teluk Air Tawar. Furthermore, the staff in these institutions that hold responsibility for the Islamic education of the children and the Board of Visitors that monitors them and considers their release.
Nominated staff from the Penang Court for Children and the Penang Syariah Court mediation unit are also included in the study.

STUDY PROCEDURES

The data for this study will be primarily gathered using personal interviews with those qualified to participate. Interviews are estimated to take approximately one to two hours depending on how the participant is involved with beyond control children and the process. A series of interviews will be requested with key information sources. All interviews will be arranged at a convenient time and in locations that ensure privacy and comfort for research participants, particularly children.

Prior to formal interviews, meetings will take place with research participants with the objective of establishing trust and fully informed consent of the research process and outcomes. Confidentiality and anonymity of all research participants will be maintained by the researcher in all interviews, doctoral thesis and any publications that may result from the research.

Secondary information sources, such as internal policy and practice materials, training curriculums, statistics and relevant documents will be requested and gathered to add towards grounded, practice-oriented interviews that focus on the lived experiences of research participants, to get the most from the process.

A Muslim child determined to be ‘beyond control’ by the Penang Court for Children will be selected for in-depth case study review, on the informed consent of their parent(s)/guardian and the children. Their willingness to be involved and their full exposure to the system will be a selection criterion. Preferably it would be a male and female child who are pending release from the institutions and have traversed the various stages from court application, through to release assessment by the Board of Visitors.

Child participants will be shown care and consideration, with their well-being taking precedence over the research always. Their informed consent and of their parent(s) or legal guardians will be obtained before any formal interviews take place.

The researcher is a native English speaker and has limited capacities in Bahasa Melayu. Given the nature of the research and the need for participants to be able to express themselves with the greatest meaning, a translator will be used and contemporaneous notes will be kept of the responses. If respondents feel comfortable in English, the interviews will be carried out in English.

Given the nature of the research being based on exploring people’s experiences of a process, both privately and professionally, feeding back results to research participants is important. At the completion of the field research and analysis of the data, the researcher will offer to present or discuss privately the findings with participants.

RISKS

Confidentiality and anonymity of information sources will be maintained throughout the research and any potential publications to mitigate any risks, either publicly or privately, to all research participants.

A risk of family disharmony is present for the families and children involved in the in-depth case studies due to an examination of the circumstances and process that led to the child being in institutional care. The comfort and maturity of the child and the strength of the family unit to retrace and explore decisions is a serious ethical consideration of selection. If the researcher, child, family or research participants feel there is any risk during the previously consented process, the child and family will cease to be a case study.
PARTICIPATION IN THE STUDY

Taking part in this study is entirely voluntary. You may refuse to take part in the study or you may stop participation in the study at any time.

POSSIBLE BENEFITS

Ultimately this research aims to create an practice oriented knowledge base that can be utilised by Islamic scholars, Islamic community members and government child protection specialists when considering the care and protection of Muslim children. It aims to identify culturally appropriate support mechanisms that can be understood and valued by Malaysian State child protection duty bearers and the Islamic community to prevent Muslim children being unnecessarily in institutional care. Focusing on what civil law duty bearers and Islamic communities have in common, rather than where they disagree, this research will better shape the effectiveness of the investment made in Islamic communities regarding child protection to ensure its cultural appropriateness and to assist in better best interest of the child determinations.

This research has significant implications for how child protection interventions are designed and implemented in Malaysia and at the global level. While there is a growing recognition that child protection agencies need to meaningfully engage with religious communities to better protect children, there are few published and available case study examples of how Islamic juristic and cultural practices could be explored to support and add to civil law initiatives to protect children.

QUESTIONS

If you have any question about this study or your rights, please contact;

Mr. Jason Squire  
Department of Social Sciences  
Centre for Islamic Development Management Studies  
Universiti Sains Malaysia Penang Campus  
Ph: 016527 3484

Dr. Zahri Hamat (Jason’s Supervisor)  
Centre for Islamic Management Development Studies (ISDEV)  
Universiti Sains Malaysia, Penang Campus  
Tel :604-6533422  
Email: zahri@usm.my

If you have any questions regarding the Ethical Approval or any issue / problem related to this study, please contact;

Mr. Mohd Bazlan Hafidz Mukrim  
Secretary of Human Research Ethics Committee USM  
Centre for Research Initiatives, Clinical & Health Sciences  
USM Health Campus  
Tel. No.: 09-767 2354 / 09-767 2362  
Email: bazlan@usm.my/jepem@usm.my

CONFIDENTIALITY

The information your give in interviews, or in writing, will be kept physically and electronically secure and remains confidential, unless request by a legal authority for disclosure.
Handwritten notes taken during the interview will be retained by Mr. Jason Squire and kept physically secure. This consent form will be scanned, and an electronic version archived on hard drive. The original copy will be destroyed after two years.

Data obtained from this study, that does not identify you individually, will be published for knowledge purposes.

The Universiti Sains Malaysia ethical review panel and regulatory authorities may review the study data.

By signing this consent form, you authorize to an interview(s), information storage and publications described above.

SIGNATURES

To be entered the study, you or a legal representative must sign and date the signature page [ATTACHMENT A and B].
ATTACHMENT A

Subject Information and Consent Form

Research Title: Navigating Malaysian civil law and maqasid al-shariah in the best interest of children beyond control: a case study in Penang.

Researcher’s Name: Jason Squire

To become a part this study, you or your legal representative must sign this page. By signing this page, I am confirming the following:

- I have read all the information in this Consent Form including any information regarding the risk in this study and I have had time to think about it.
- All my questions have been answered to my satisfaction.
- I voluntarily agree to be part of this research study as requested.
- I may freely choose to stop being a part of this study at any time.
- I have received a copy of this Consent Form to keep for myself.

Participant’s Name

Participant’s Title

Signature of Participant Date (dd/mm/yy)

Signature of Parent or Legal Guardian (children 15-17 only) Date (dd/mm/yy)

Name & Signature of Witness Date (dd/mm/yy)
ATTACHMENT B

Material Publication Consent Form

Research Title: Navigating Malaysian civil law and maqasid al-shariah in the best interest of children beyond control: a case study in Penang.

Researcher’s Name: Jason Squire

To become a part of this study, you or your legal representative must sign this page.

By signing this page, I am confirming the following:

- I understood that my name will not appear on the materials published and there has been/will be efforts to make sure that the privacy of my name is kept confidential although the confidentiality is not completely guaranteed due to unexpected circumstances.

- I have been/will be offered the opportunity to read the manuscript and to see all materials in which I am included.

- The materials will be used in local and international publications, book publications and accessed by many local and international students, academics, professional and any interested parties worldwide.

- I hereby agree and allow the materials to be used in other publications required by other publishers with these conditions:
  - The materials will not be used for advertisement purposes nor as packaging materials.
  - The materials will not be used out of context, i.e.: Sample pictures/figures will not be used in an article which is unrelated to the subject.

Participant’s Name

Participant’s Title

Signature of Participant Date (dd/mm/yy)

Signature of Parent or Legal Guardian (children 15-17 only) Date (dd/mm/yy)

Name & Signature of Witness Date (dd/mm/yy)
Appendix B

Research Participant’s Information Sheet

Research Title: Navigating Malaysian civil law and maqasid al-shariah in the best interest of children beyond control: a case study in Penang.

Researcher’s Name: Jason Squire (Ph.: 0165 273 484)

You are invited to take part voluntarily in a research study on Muslim children who have been determined to be beyond control under the Malaysian Child Act, 2001. Children under this legal decision are a dedicated group in need of care and protection by the Department of Social Welfare and the Court for Children. This research is focusing only on Muslim beyond control children in Penang.

Before you decide whether to participate, you need to understand why the research is being done and what it would involve. Please take time to read the following information carefully; talk to others about the study if you wish.

Ask me if there is anything that is not clear or if you would like more information. Take time to decide whether you wish to take part. If you choose to be part of the study, you will receive a copy of this document for your records.

1. What is the purpose of the study?

The objective of the study is to consider whether Islamic juristic and cultural practices could support the Penang Court for Children, Department of Social Welfare child protection practitioners, Islamic communities, families and children to prevent entry into, or promote early release from state institutions where beyond control children are held.

2. Why have I been invited?

You have been invited to participate because of:
- Your experience with beyond control children
- You have a connection with the process that might prevent children being judged to be beyond control
- You might be able to assist in their early release from state care

Your views and opinions will help me understand how decisions are made about their treatment. You can also provide information on the facilitators of, and barriers to, decision-making for beyond control children.

3. Do I have to take part?

No, your participation is entirely voluntary, and it is up to you to decide. I will describe the study and go through this information sheet with you when we meet. If you agree to participate I will then ask you to sign a consent form. You are free to withdraw at any time, without giving a reason.

4. What type of study is this?

This is a qualitative study, under the supervision of Universiti Sains Malaysia, using the method of in-depth face-to-face interviews and case studies. Secondary information sources, such as internal policy and practice materials, training curriculums, statistics and relevant documents might be requested and gathered to add towards grounded, practice-oriented interviews that focus on the lived experiences of research participants, to get the most from the process.
5. **What will happen to me if I take part?**

Your participation is entirely voluntary, and you can stop at any time. You can choose not to answer any question. I will be interviewing about 30 people, including children, over a three-month period. I might ask for a few interviews with key informants because they are intimately involved and have a lot of information to share.

I am wanting to hear your valued thoughts and opinions within a relaxed discussion. I will ask questions related to your experience with beyond control children, or the case studies being explored in-depth. I will take notes as we speak. Interviews will be pre-arranged at convenient times with the use of a Bhasa Melayu interpreter, if needed. Interviews are predicted to last between one to two hours and will be arranged to fit with your schedule.

6. **What will I have to do?**

Be available for interview(s). I will ask you questions based on your personal experience. However, you can refuse to answer any questions which you feel are uncomfortable about and you can stop the interview at any time.

Depending on what comes up and out of the interview, I might ask for copies of documents that further explain what we have discussed; there is no obligation to supply them.

7. **What if there is a problem?**

Any complaint about the way you have been dealt with during the study or any possible risk or harm you might suffer will be taken seriously.

If you do not feel comfortable speaking to me directly about the issue, you can contact my research supervisor and/or the Secretary of the USM Human Research Ethic Committee:

**Dr. Zahri Hamat**  
Centre for Islamic Management Development Studies (ISDEV)  
Universiti Sains Malaysia, Penang Campus  
Tel :604-6533422  
Email: zahr@usm.my

**Mr. Mohd Bazlan Hafidz Mukrim**  
Secretary of Human Research Ethics Committee USM  
Centre for Research Initiatives, Clinical & Health Sciences  
USM Health Campus  
Tel. No.: 09-767 2354 / 09-767 2362  
Email: bazlan@usm.my/jepem@usm.my

8. **Will taking part in the study be kept confidential?**

Yes. I will follow ethical and legal practice and all information about you will be handled in confidence.

Confidentiality and anonymity of information sources will be maintained throughout the research and any potential publications to mitigate any risks, either publicly or privately, to all research participants.

9. **Is the purpose of this study educational and what happens after?**

Yes, part of the data from this research will be used for a PhD study and potential publications to share the outcomes. You will not be identified in any report, publications or presentation without seeking your full consent. Direct quotes from the interviews may be used in reports and publications; however, the quotes will be anonymised to ensure that you cannot be identified.
As part of the agreement between the Department of Social Welfare and I, that allows me access to government research sites and departments, I must supply a copy of my thesis to them for record keeping and review. They are interested to know what the outcomes of my research are.

Given the nature of the research being based on exploring people’s experiences of a process, both privately and professionally, feeding back results to research participants is important. At the completion of the field research and analysis of the data, I will offer to present or discuss privately the findings with participants.

10. Are there any risks?

Confidentiality and anonymity of information sources will be maintained throughout the research and any potential publications to mitigate any risks, either publicly or privately, to all research participants.

A risk of family disharmony is present for the families and children involved in the in-depth case studies due to an examination of the circumstances and process that led to the child being in institutional care. The comfort and maturity of the child and the strength of the family unit to retrace and explore decisions is a serious ethical consideration of selection. If the researcher, child, family or research participants feel there is any risk during the previously consented process, the child and family will cease to be a case study.

11. Can I review the questions that will be asked?

This research does not intend to have a formal questionnaire. The interviews will be guided by several inquiry themes on the beyond control children process; questions will be flexible to accommodate age, experience and exposure of the research respondents.

I can supply a general overview of the themes that will be covered in the open discussion. This could be helpful for your preparation for the interview; please let me know either, in person, by telephone or email.

12. Who is organising and funding the research?

There is no funding for this research.

13. Will I be paid to be part of the study?

No. No financial payment will be made to participants to take part in the study.

14. Further information and contact details.

Mr. Jason Squire
Centre for Islamic Management Development Studies (ISDEV), USM Penang
Ph.: 0165 273 484
Email: jss14_soc077@student.usm.my
Appendix C

SAMPLE QUESTIONING THEMES

Research Title: Navigating Malaysian civil law and maqasid al-shariah in the best interest of children beyond control: a case study in Penang.

Researcher’s Name: Jason Squire (Ph.: 0165 273 484)

Below are a set of sample foundational questions that will be put to the various respondents; language and word usage will change depending on the respondent’s age, position and capacities, in the ‘beyond control’ children determination or reform process. Subsequent clarifying questions will naturally follow these, depending on the answers given. The length and breadth of the interview will be determined by the respondent’s role, function and experience.

Prior to the commencement of interviews, a research information sheet, informed consent or assent form will be presented to the respondents for signature that outlines the interview process, their right to choose the questions they want to answer and what happens with the information given. Care will be taken with children to ensure they are fully informed and the interviews will take place in an environment, where the child feels safe and comfortable. The child’s well-being and interests will take priority over the research.

Requests will be made to some respondents to be interviewed several times, depending on information obtained in other interviews that might need to be cross-checked for clarity or precision.

Secondary information sources, such as internal policy and practice materials, training curriculums, statistics and relevant documents will be requested and gathered to add towards grounded, practice oriented interviews that focus on the lived experiences of research participants, to get the most from the process.

ADULTS

General over-arching themes:

What is your role and function in the determination and processing of ‘beyond control’ children?

How long have you been doing this? (experience and examples)

What are the strengths and weaknesses of the determination process?

Who is involved in determining a child is ‘beyond control’?

From your experience, what are some examples of behaviour that have led to a child being determined beyond control?

What is the process and practice within the JKM (Penang) when a request is made to carry-out a social assessment of a child considered beyond control?

What happens to the child in this initial phase of assessment?

What are the strengths and weaknesses of the probation hostel/approved school (Penang) process and practice?

What is the daily routine of a ‘beyond control’ child in the approved school or probation hostel (Penang)?
What is the nature and purpose of the education curriculum for ‘beyond control’ children?

What are the indicators of success for a ‘beyond control’ child to be released from the approved school (Penang)? (examples)

From your experience, what is an example of good practice, when dealing with children that are being assessed for being beyond control?

From your experience, what is an example of good practice, when dealing with children that have been placed in the probation hostel/approved school, to allow for early release?

When dealing with Muslim families/children, do you make any specific cultural/traditional modifications to your process or practice? (examples)

Can you think of any Islamic community practices or existing support mechanisms that could be useful to prevent children being determined to be beyond control or to assist them to be released from state care?

Do JKM (Penang) child protection officers, hostel/school staff mediate, or facilitate others, to address the root causes of the ‘beyond control’ behaviour? (positive/negative examples)

Are external actors, or other GoM/NGO agencies brought into determination process? (positive/negative examples)

What do you see as the root cause of a child being beyond control?

What do you or JKM do about these root causes?

CHILD

General over-arching themes:

Can you tell me what your life was like before coming into the Asrama/STB?

Did you like school?

Did you have many friends?

What did you like to do for fun?

Why are you in the Asrama/STB? What happened?

Who made the application for you to be in the Asrama/STB? Why did they do that?

Can you tell me your understanding of what the legal/JKM process was to place you in the Asrama or STB?

How do you feel about that process?

What could be improved in the legal/JKM process?

What do you think about being in the Asrama/STB?

What do you like/dislike about being in the Asrama/STB?

What could be better in the Asrama/STB?

How often do you see your family/friends from outside the Asrama/STB?
What do you think about the Asrama/STB assessment system? Is it helpful/fun/interesting/boring/etc.?

Have you received counselling in the JKM, Asrama/STB? What do you think about it?

What is the relationship like now with your parent(s)/guardian? Does anyone help you with that relationship?

What are your plans after the Asrama/STB?

If you were the boss of dealing with beyond control children in Malaysia what would you change? Why?

What do you think would have been the most helpful to prevent you being in the Asrama/STB?
Appendix D

Child Assent Form

Research Title: Navigating Malaysian civil law and maqasid al-shariah in the best interest of children beyond control: a case study in Penang.

My name is Jason Squire; I am from Australia and I am a student at USM at the Department of Social Sciences. I am doing research into Muslim children who have been judged to be beyond control by the Children’s Court in Penang and put into state care. I would like to ask you whether you want to be part of a study but first I would like to tell you about it because it is important for you to understand it fully.

I would like you to read this form and ask questions. You don’t need to decide now; you can talk to your parents, teachers or friends and let me know later.

What is research?
Research is where students like me want to collect information and ask questions about a certain thing and learn more about it. I am asking a lot of people and other children questions about this. It isn’t a test, like school. There isn’t a right or wrong answer, and no-one gets a grade or is punished for their answers or for not participating in the research.

Why am I doing this research?
I am doing this research because there are many children like you that are in state care for being judged to be beyond control. I want to know if we can change that by seeing if Islamic community people and their practices could help children like you. I want your opinion and for you to tell me what you think.

This is important to remember; my research is only to look into why and what is happening now. I am unable to change things for you directly, but it could be my research helps to create some change in the government or community to help other children who might face the same things you are experiencing in the future.

What happens if I choose to be in the research?
I will need your signature on this form and then we will arrange a time to sit and talk. My Bahasa Melayu is not too good, so I will have an interpreter with me, unless you feel confident speaking English.

You can have a trusted adult with you while we talk, if you want. I hope it will take about 1 hour, but if you feel tired we can stop, or we can take breaks. I might also ask to interview you a few times to make sure I have what you want to say clearly.

What happens with the information you give?
What you tell me is kept confidential and private, along with your name and personal details. What you tell me helps me understand things from your own experience and it is very important that I get your story.

After I have spoken to many people and gathered all their stories I will write a report that will be examined by the university. A copy of my report will be given to the government; Department of Social Welfare. They are interested to know what the outcomes of my research are.

After I finish the research I will contact you again and let you know the results. It is important that people who participate in research get feedback and I want to make sure you get that.

Are there any risk or discomforts to you?
I hope not, and I will be constantly asking you if you feel uncomfortable. You do not have to answer all the questions I ask, and you can tell me to stop. You can also tell me you do not
want to be part of the research at any time. It is not compulsory; it is completely your decision.

There is one thing that I think might be difficult for you and that is talking about what happened and why you were judged to be beyond control by your parents and the court. This also means talking to your parents or family about what happened and why you are here. This could be difficult for you and your parents/family and I want to make it clear that if you do not feel comfortable about this then I will not do it. I might be wrong, and you are happy to talk about, please tell me how you feel about it.

**Do you have to be in the study?**
No, you don’t. Research is something you do only if you want to. No one will get mad at you if you don’t want to be in the study or you choose to start then stop. What is important is that you feel comfortable and understand you are in control.

**Do you have any questions?**
You can contact me if you have questions about the study, or if you decide you don’t want to be in the study any more. You can talk to me, or your parents, or someone else at any time during the study. **My phone number is 0165 273 484 (Mr. Jason) and my email is jss14_soc077@student.usm.my**

**Signature:**
If you decide to participate, and your parents/guardian agree, we’ll give you a copy of this form to keep.

**If you would like to be in this research study, please sign your name on the line below.**

______________________________________
Child’s Name/Signature & Date

______________________________________
Signature of Researcher & Date

______________________________________
Signature of Parent or Legal Guardian & Date
Appendix E

Respondent Interviews: Frequency, Date, Location and Time Length

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Interview Location &amp; Date</th>
<th>Time</th>
<th>2\textsuperscript{nd} Interview Location &amp; Date</th>
<th>Time</th>
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