



The Correctional Services Amendment Bill **[B32 – 2007]**

SAHRC Submission to the Correctional Services Portfolio Committee, National Assembly, 4 September 2007

Introduction

The Department of Correctional Services (DCS) plays a critical role in the fight against crime and violence in South Africa. This Department receives those persons found guilty of committing crimes and sentenced to imprisonment. The Department is responsible for the important and difficult function of rehabilitating offenders and preparing them for reintegration back into society.

The Correctional Services Amendment Bill [B32 – 2007] (Amendment Bill) seeks to introduce a number of changes to the current framework piece of legislation, the Correctional Services Act 111/1998 (the Act). A number of these changes have the potential to impact on constitutionally enshrined rights. The South African Human Rights Commission (the Commission) thus welcomes the invitation extended to it to comment on the Amendment Bill. The Commission's submission will focus on: the changes to the office of the Judicial Inspectorate (JI); the separation age of children from incarcerated mothers; and, the definition of disability.

The Commission notes that many civil society organizations have taken advantage of the opportunity provided to participate in the submission writing and public hearing process. It is encouraging that there is a vibrant civil society sector that voices the human rights concerns of prisoners, a vulnerable and marginalised group. The commission will also comment briefly on some of the aspects that these organizations have raised.

The mandate of the South African Human Rights Commission

The mandate of the Commission is captured in section 184 of the Constitution and states as follows:

- “The South African Human Rights Commission
- Functions of the South African Human Rights Commission**
184. (1) The South African Human Rights Commission must-
- (a) promote respect for human rights and a culture of human rights;
 - (b) promote the protection, development and attainment of human rights; and
 - (c) monitor and assess the observance of human rights in the Republic. ‘

1. The Amendment Bill adversely affects the independence of the Judicial Inspectorate

- 1.1. Clause 73 of the Amendment Bill amends section 89 of the Act by:
- The creation of the position of a Chief Executive Office (CEO) within the JI. This persons shall perform all financial, administrative and clerical functions

pertaining to the Office. (section 89(1)(a)) Further more the CEO will be seconded from the DCS

- Stipulating that all staff will be seconded from the DCS (section 89(1)(b))
- Stipulating that conditions of services, including salaries and allowances will be regulated by the Public Service Act (section 89(2)).

1.2. In terms of section 85(1) of the Act, the JI of prisons is an independent office under the control of the Inspecting Judge.

1.3. *Comments*

1.3.1. *Ensuring the independence of the JI*

Whilst the Commission is not in principle opposed to the creation of an office of the CEO, the Inspecting Judge must have the legal power to appoint this person. It is not acceptable that the CEO is seconded from the Department of Correctional Services by the Director-General thereof.

The inability of the Inspecting Judge to appoint his or her CEO would fly in the face of the Judicial Inspectorate being an independent body. It would negatively affect the reputation and credibility of the JI.

A parliamentary *ad hoc* committee under the chairmanship of Prof. K Asmal has recently carefully studied and reviewed the chapter 9 and related institutions. Whilst the JI is not a constitutionally mandated body, many of the Reports' comments are of relevance to the proposed amendments.

Chapter 1 of the Report identifies guiding principles from which the Committee worked. The principles include:

- Whether the institution is part of government
- Whether organs of state must assist and respect the institution
- The degree of financial independence of the institution
- The degree of administrative independence of the institution
- The independence of the office bearers and the appointment and removal procedures¹

In respect of determining whether an institution is independent, the Report states:

“The Constitutional Court set out a general test that could be used to judge the independence of an institution in its judgement in *Van Rooyen and Others v S and Others*. According to the Constitutional Court, the determining factor is whether, from the objective standpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence. The judgement said that in determining independence consideration should be given to the perception of independence by a well-informed and objective person. Such person should be guided by the social realities of South Africa and the Constitution, particularly the values contained in the Constitution and the differentiation it makes between the different institutions. The factors such an observer may look at to determine whether an institution is independent or not are: financial independence; institutional independence with respect to matters directly related to the exercise of its constitutional mandate, especially relating to the institution's control over the administrative decisions that bear directly and

¹ Parliament of the Republic of South Africa (2007) Report of the *ad hoc* Committee on Review of Chapter 9 and Associated Institutions. A Report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa see chap. 1

immediately on the exercise of its constitutional mandate; appointments procedures and security of tenure of appointed office-bearers.”²

The Report states further on:

“Thus some basic principle can be identified to establish the minimum requirement for independence. As indicated earlier, there is a constitutional imperative for these institutions to be seen not to be part of government. Thus any involvement by the Executive in the daily operations or institutional arrangements of an independent institution would be constitutionally unacceptable.”³

1.3.2. *South Africa’s obligations in terms of OPCAT*

On 26 September 2006, South Africa signed the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment⁴ (OPCAT). The objective of the Protocol is to “establish a system of regular visits undertaken by independent and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel inhuman or degrading treatment or punishment.”⁵ State parties are expected to set up one or more visiting bodies.⁶ In order to comply with the obligations in terms of OPCAT, Article 18(1) states that “(t)he State Parties shall guarantee the functional independence of the national preventative mechanisms as well as the independence of their personnel”.⁷

Prisoners account for the vast majority of persons deprived of their liberty. Whilst it is yet to be decided, the Judicial Inspectorate is well positioned to fulfill South Africa’s OPCAT monitoring obligations for prisons - at a minimum.

The proposed amendments will move the Judicial Inspectorate further away from possible compliance with the OPCAT. There is a need for South Africa to move swiftly and to set up the NPM. Should it be determined that the JI be responsible for the monitoring of prisons, which the Commission is of the view it should be, the Correctional Services Act would need to be analyzed and the necessary amendments made to ensure compliance with OPCAT. Thus, at this stage, the powers of the JI should not be encroached upon by the proposals contained in clause 73. Section 89 of the Act should either remain as it currently is. Alternatively, section 89 could be amended to provide for a CEO. However, the power to appoint the CEO must reside with the Inspecting Judge.

1.4. The Commission does not have any objections to the amendment that allows for a legal practitioner of not less than 10 years experience in legal practice to be appointed as the Inspector-General.⁸

2. The separation of children from their mothers must be done in accordance with the constitutional ‘best interest of the child principle’

2.1. Clause 20 of the Amendment Bill amends section 20 of the Act by reducing the age a prisoner mother may have her child with her⁹. Whereas previously a child

² Ibid 9

³ Parliament of the Republic of South Africa (2007) Report of the *ad hoc* Committee on Review of Chapter 9 and Associated Institutions. A Report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa, 14

⁴ Adopted on 18 December 2002 at the 57th session of the General Assembly by resolution A/Res/57/199

⁵ see Article 1 OPCAT

⁶ see Article 3 OPCAT

⁷ see Article 18(1)

⁸ Clause 70 amending section 86()(b)

⁹ “Amendment of section 20 of Act 111 of 1998, as amended by section 10 of Act 32 of 2001

could remain with her or his mother until the age of five years, the Amendment Bill now reduces this to two years of age.

2.2. In August 2006, the South African Human Rights Commission made a presentation to the Correctional Services Portfolio Committee on “the Impact of Imprisonment on Women and Children; Are We Acting in Children’s Best Interests” (attached Annex “A”). Some of the Commissions’ suggestions included:

- Conducting more research and collecting information in order to understand the impact of incarceration on children
- Encouraged greater use of non-custodial sentences. In this regard the Commission said that it is not in the best interest of the child to serve a prison sentence with his/her mother and such circumstance should be taken into consideration when the Court seeks to hand down its sentence.
- Educating and sensitizing parole boards about the impact of imprisonment on children.

2.3. Determining whether a child should remain with his or her mother in prison is a difficult matter. It is difficult in that the rights of the child must be respected and protected. There is the potential and in most cases it is inevitable that both options, in prison and out of prison, will have some detrimental impact on the child. A determination needs to be made as to what is in the child’s best interests. It is possible to make clear and convincing arguments for and against children remaining with their mothers in prison. Whether a child enters prison and the age when the child is removed from her or his mother is a matter that must be determine on a case-by-case basis. Each child is bestowed with rights in terms of the constitution and these rights can only be best determined on an individual basis.

2.4. The Amendment Bill should state that whenever a mother is sentenced to imprisonment, the care of the children should be referred to the Department of Social Development in terms of the Children’s Act.¹⁰

2.5. There is an urgent need for the regulations referred to in section 20(1) to be drafted as soon as possible.

3. The definition of disability is outdated and not in keeping with international human rights developments¹¹

3.1. Disability is defined in section 1 of the Act as follows:

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- 20.** Section 20 of the principle Act is hereby amended be the substitution for subsection (1) and (3), respectively, of the following subsections:
- “(1) A female **[prisoner]** inmate may be permitted, subject to such conditions as may be prescribed by regulation, to have her child with her until such child is **[five]** two years of age.
[...]
- (3) Where practicable, the National Commissioner must ensure that a mother and child unit is available for the accommodation of female **[female]** inmate and the children whom they may be permitted to have with them”⁹

¹⁰ Act 38/2005

¹¹ The only place this definition is used in the Act is in section 96(3)(c) 0 - Powers, functions and duties of correctional services officials

“disability” means a physical or mental condition which prevents a prisoner from operating in an environment developed for persons without such an impairment, and includes-

- (a) deafness;
- (b) dumbness;
- (c) paraplegia;
- (d) quadriplegia;
- (e) non-certifiable mental conditions;
- (f) blindness or extreme impairment of vision.

Since this definition was inserted into the Correctional Services Act¹² there have been considerable developments at an international level pertaining to our approach towards and defining persons with disability. In December 2006, the United Nations adopted the Convention on the Rights of Persons with Disability (Disability Convention). South Africa was one of the initial signatories to the Convention when it opened for signing on 20 March 2007. As a country we now need to move towards the ratification of this new Convention.

Article 1 of the Disability Convention states that:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

The definitions section contained the following definition”

“Discrimination on the basis of disability “means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others, of all human rights and fundamental freedoms in the political economic social cultural civil or any other field.”¹³

The Disability Convention signifies a shift in approach towards disability from the medical model to the social model.

3.2. *Comments on the current definition*

- 3.2.1. The definition ought to focus on the person and not the disability. The language of the definition needs to reflect disability sensitive language. A more sensitive manner to refer to such persons is to use the term **‘person/prisoner/inmate with mental disability’**. Language is important in countering social stigma. It is important from a human rights perspective that the person is first recognised and then the disability.
- 3.2.2. Dumbness is a term that is not used in disability sensitive environments. The term is regarded as outdated, derogatory and demeaning. It infringes the dignity of the person who is called by this name. More appropriate terms would be hearing and speech impaired.
- 3.2.3. The term ‘mental condition’ does not reflect that persons with mental disability cover a vast spectrum. The definition needs to give recognition to this. The definition should include the broad spectrum of groups of person who are persons with mental disabilities. These groups include:

¹² This definition was inserted by s. 1 (e) of Act No. 32 of 2001.

¹³ Ibid note 8 above at article 2

- Intellectual and/or cognitive impairments (Down Syndrome, foetal alcohol, older persons who suffer from diminished mental capacity, Alzheimer’s disease, and AIDS related dementia)
- Psychiatric (anxiety (post traumatic stress disorder) and depressive disorders (depression, bipolar mood disorders and schizophrenia)
- Neurological (epilepsy, autism, strokes and other brain conditions)

These categories are recognized within internationally recognised diagnostic tools such as the DSM IV and the ICD9. Mental health care practitioners use these diagnostic tools and they would thus find the definition compatible with their understandings of mental disability.

3.3. *Suggested definition*

“prisoner/inmate with disability” means a prisoner/inmate with a physical or mental illness or condition which prevents such person from operating in an environment developed for persons without such an impairment, and includes-

- (g) Hearing and speech impediments;
- (h) paraplegia;
- (i) quadriplegia;
- (j) persons with a positive diagnosis of a non-certifiable mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis, and includes intellectual and/or cognitive, neurological, and psychiatric disabilities, conditions and illnesses.
- (k) blindness or extreme impairment of vision.

4. **Additional comments**

- 4.1. The Amendment Bill introduces a number of terminology changes, such as ‘correctional center’ for ‘prison’; ‘inmate, offender and unsentenced offender’ for ‘prisoner’¹⁴. The Commission notes that opposition to these changes have been voiced. In the Commissions’ view, it is of greater concern the manner in which prisoners are treated than the terminology which is used to refer to them. There is merit in the argument that many international instruments and the Constitution refers to prisoners and that it could cause confusion to move away from this term.
- 4.2. The Commission welcomes the amendment that provides for: “community organisations and religious denominations or organisations to interact with inmates in order to facilitate the rehabilitation and integration of the inmates in the community”¹⁵.
- 4.3. The change in terminology from ‘solitary confinement’ to ‘detention in single cell’ is of concern.¹⁶ Solitary confinement is a penalty whereas detention in a single cell may well be considered a privilege by some prisoners. There is thus a need to guard against blurring these two distinct types of incarceration.
- 4.4. The Commission does not support the amendment that increases the category of prisoners excluded from benefiting from a correctional sentencing plan from 12 to 24 months.¹⁷ This amendment would be contrary to the vision and intentions of the Departments White Paper.

¹⁴ Clause 1 of the Amendment Bill

¹⁵ Clause 13 of the Amendment Bill

¹⁶ Clause 25 of the Amendment Bill

¹⁷ Clause 36(b) of the Amendment Bill

- 4.5. The amendment to section 31 whereby prisoners may no longer be brought before a court in handcuffs or leg irons unless authorised by the court is welcomed.¹⁸

¹⁸ Clause 30 of the Amendment Bill



The impact of imprisonment on women and children.

Are we acting in children's' best interests?

SAHRC Briefing to Correctional Services Portfolio Committee, 25 August 2006

1. Introduction

The SAHRC welcomes the invitation extended to it by the Correctional Services Portfolio Committee to address it concerning the impact of imprisonment on women and children in prison and to discuss possible solutions and recommendations. Women prisoners currently constitute 2,25% and children 1,4% of the total prison population in South Africa. Most often and in keeping with international trends as well, the imprisonment of men, by virtue of their constituting the largest portion of the prisoner population in all countries, occupies the vast domain in any discussions concerning prisoners. It is important however that women and children as small and vulnerable groups within the prison system are discussed in order that legislative frameworks, policies and programmes address their specific needs and thereby ensure that their rights are protected and that their dignity is respected. In so doing, we will ensure more effective rehabilitation and reintegration of prisoners into society.

2. Women and children in prison

According to March 2006 statistics there are 3 551 women prisoners and 2 207 children in prison. Based on the overall number of prisoners in South Africa, women comprise 2,25% and children 1,4% of the total prison population. It must be further remembered that the 2 207 children are made up of 1 069 sentenced and 1 138 unsentenced prisonersⁱ. The women prisoners are accommodated in 8 women-only correctional facilities and 72 correctional services facilities for men and women throughout the country. There are 13 youth corrective facilitiesⁱⁱ.

When we refer to women and children in prison we refer to the following three categories of persons:

- Children in prison
- Women and Children (Infants) in prison
- Women in prison

It must not however be forgotten that there is also the category of children of mothers in prison whose lives are impacted on by their mothers incarceration. For the purpose of this discussion this group of children will be considered within the discussion on women in prison.

3. Outline of presentation

This presentation will seek to consider the impact of imprisonment on children whose mothers are in prison or who are with their mothers in prison. The presentation will also consider some recent international developments that may assist South Africa in the future in responding to the human rights issues that are raised. At the end of the presentation, we will propose suggestions and solutions that seek to ensure that policies and programmes promote the best interests of the child principle.

Regarding children in prison, this presentation will address a matter of concern to the commission, namely education of children in prison. We will also make recommendations at the end of the presentation.

It is however necessary to mention that in relation to children in prison more generally the Child Justice Bill needs to be processed in order to more effectively ensure that we have fewer children in prison and that there is an adequate legislative framework that will address appropriate measures concerning children in conflict with the law and adequate alternatives to incarceration.

4. International Constitutional, legislative and policy framework

4.1. International

There is a broad and comprehensive body of international instruments that address human rights and imprisonment. Some of the more relevant international instruments include:

- International Convention on Civil and Political Rights
- International Convention on Economic, Social and Cultural rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Rights of the Child
- The UN Standard Minimum Rules for the Treatment of Prisoners, 1955
- Convention on the Rights of the Child
- The United Nations Standard Minimum Rules For Non-Custodial Measures (The Tokyo Rules).
- Basic Principles For The Treatment Of Offenders.
- The United Nations Guidelines For The Prevention Of Juvenile Delinquency (The Riyadh Guidelines).
- The United Nations Rules For The Protection Of Juveniles Deprived Of Their Liberty.
- African Charter on the Rights and Welfare of the Child (Article 30)

It should be pointed out that international instruments such as the UN Standard Minimum Rules are now quite dated and that there have been vast advances in understanding gender issues related to the imprisonment of

women. Also, because women constitute a small minority of prisoners throughout the world generic instruments tend not to take into considerations gendered issues concerning women in prison.

4.2. The constitution

Any discussion concerning prisoners must bear the following rights contained in our constitutionⁱⁱⁱ in mind:

- Equality (Section 9)
- Human dignity (Section 10)
- Children's rights (Section 28^{iv}), the right to family care or parental, or to appropriate alternative care when removed from the family environment etc....
- Arrested, detained and accused persons (Section 35)

The constitution also guarantees the right to basic education (Section 29)^v.

4.3. Legislation

- Correctional Services Act 111/98

In the Preamble to the Act international principles on correctional matters are recognized. This would include the United Nations Standard Minimum Rules for the Treatment of Prisoners.

Chapter 3 (Custody of all prisoners under conditions of human dignity) makes specific reference to children (Section 19) and mothers of young children (section 20).

Chapter 4 (Sentenced prisoners) refers specifically to women in section 41 concerning treatment, development and support services. In particular section 41(7) states that: " Programmes must be responsive to the special needs of women and they must ensure that women are not disadvantaged." Section 13 (Contact with community)(section 13(6)(c)) imposes a duty on the Commissioner to notify the appropriate state authorities who have a statutory responsibility for the education and welfare of children.

Chapter VI (Community Corrections) has a section setting out Additional conditions for children (section 69).

4.4. Policy

- Correctional Services, White Paper, March 2005
- Strategic Plan and Budget of the Department

The Departments White Paper refers to international human rights standards that seek to promote the rights of prisoners:

"13.12.2 In the light of this, it is of immense importance that the Department should include the following UN standards and norms, instruments and resolutions as part of its foreign policy for implementation within the Department:

- The United Nations Standard Minimum Rules For The Treatment Of Offenders.
- The United Nations Standard Minimum Rules For Non-Custodial Measures (The Tokyo Rules).

- Basic Principles For The Treatment Of Offenders.
- The United Nations Guidelines For The Prevention Of Juvenile Delinquency (The Riyadh Guidelines).
- The United Nations Rules For The Protection Of Juveniles Deprived Of Their Liberty....^{vi}

5. Children in prison with their mothers

Prisons are not ideal environments in which to bring up young children. However, there is a double-edged sword in that it is also far from ideal to ever separate a child from her mother. “There are no simple solutions but the complexity of the situation cannot be an excuse for failing to protect the rights of children who have a parent in prison”^{vii}

5.1. Current situation

Section 20 of the Correctional Services Act provides that female prisoners may be permitted to have her child with her until the child reaches the age of five years and that during the time that the child is in prison that the Department is responsible for food, clothing, health care and facilities for the sound development of the child. In the White Paper the Department sets out that ideally “Mother and Child Units” should be established in correctional centers with the focus on the “normalization of the environment” and that the interest of the child “should be put at the forefront in any policy development regarding babies of offenders.”^{viii} In reality, children only stay with their mothers in prison until they reach two years of age. In 1995, there were 192 infants and toddlers in prison with their mothers.^{ix}

5.2. International developments

Increasingly at an international level and in particular through the UN mechanisms, such as the committee which monitors the Convention on the Rights of the Child, more and more questions are being asked about the rights of children who are in prison with their mothers.

Issues that have been identified as needing more attention include:

- “how the child’s rights are considered in sentencing a mother;
- how decisions are taken about whether babies and young children accompany their mother into prison (or pre trial detention);
- the impact of imprisonment on the child;
- the facilities to be provided;
- how any later separation of the child from the mother should be handled; and
- alternatives to, and different forms of, imprisonment that better support motherhood and child development.”^x

6. Children whose mothers are in prison

In all countries around the world the majority of women prisoners are mothers. In South Africa 84% of women who are imprisoned are mothers^{xi}. There has been an increase in the number of female offenders and also the average length of sentences imposed by courts in the past 10 years (5 yrs 3 mnths to 7yrs).^{xii} According to 2004 statistical data 6,5% of women prisoners are in prison because they cannot pay fines imposed by the court and approximately a third of all women prisoners are convicted of economic offences^{xiii}. The latter

statistic highlights the linkages between poverty and crime and that the social economic context within which crime occurs needs to be understood and addressed.

6.1. *The impact of the mothers' imprisonment on children*

From a child rights perspective, a major concern is the impact of imprisonment upon the child and how this impacts on the rights of the child. Increasingly, more and more attention is starting to be focused on these children and in particular how the imprisonment of their mothers impacts upon them. What is clear however, is that research indicates that "the loss of a mother is much more significant and may be more immediately traumatic than the loss of a father."^{xiv}

The mother's imprisonment affects the child in many ways including:

- **Change in caregiver.** Children possibly experience an unexpected change in caregiver, neighborhood as well as possible separation from siblings. Many of these children come from disrupted family backgrounds where and there are absent fathers.^{xv}
- **Emotional and Behavioral impact.** The children are affected emotionally and behaviorally.^{xvi} Emotions and behaviors experienced by these children included: sadness, withdrawal, low self-esteem, excessive crying, depression, diminished school performance, truancy, disciplinary problems, alcohol and other drug use, running away, and aggressive behaviour.^{xvii}
- The impact of imprisonment on children differs according to the child's age and maturity.
 - Research indicates that two- to six-year-old children are the most impacted by separation from their mothers.
 - The development of autonomy and initiative in children aged two to six may be compromised by the trauma of witnessing parental arrest and the loss of a parent due to incarceration.
 - Children aged six to twelve...may justify her [their mother's] behaviour and believe instead that the "system" chose to pick on her. Left unaddressed, these attitudes can eventually result in anti-social rationales for their own criminal behaviour.
 - Children aged six to twelve may experience aggression, difficulty concentrating, multiple absences and even school avoidance.^{xviii}
- **Additional responsibilities.** Children are forced to take on adult responsibilities.^{xix}
- **Social stigma.** There is great social stigma attached to having a parent in prison. Children often make up cover stories to explain their mother's absence and this hampers the development of friendships.
- **Become children in conflict with the law.** There are also long term implications for children whose mothers are imprisoned. For example, children of incarcerated mothers are more likely to engage in lawbreaking and to be arrested than other children.^{xx}

The enormous impact on children whose mothers are in prison are further exacerbated by challenges that are faced in maintaining a relationship with the mother.

- Visiting the mother in prison is often difficult and unpleasant: There are not as many prisons for women as there are men and this can lead to increased travel costs. For other children, these costs may even be prohibitive.^{xxi}
- Visiting time is short and the environment is often child-unfriendly, hampering meaningful contact. There are no activities or basic play areas for mothers to spend quality fun-time with their children.^{xxii}
- Parent-child visitation for children living separate from their mothers is important to children's emotional adjustment, well-being, and reduced behaviour problems^{xxiii}

6.2. *Children of women who kill their partner*

Because of high levels of domestic violence in South Africa there are a number of children whose mothers are currently incarcerated for the murder of their father who was the abuser. Research indicates that these children face additional difficulties.

"By imprisoning [the mothers], we punish not only the killer, but the innocent children who lose both parents suddenly, traumatically, and simultaneously. The children's fate is dire."^{xxiv}

Children are impacted upon emotionally (ambivalence, relief, fear, confusion, and deep anger that occur when one parent has been killed by another in the context of domestic violence). In addition, many are never able to fully come to terms with the ambivalent feelings they have for both their abusive fathers and their mothers who killed them.

The children are affected by the conflict that the murder has caused in their immediate nuclear and extended family. Conflict between kin is common and affects the care children receive. The carer's own response to the violent death of the father is going to influence the way they respond to the children. Often, the children feel that they do not belong with their new care giver and do not feel completely accepted into their new home. Paternal relatives sometimes try to alienate the children from their mothers and children are often directly or indirectly blamed them for their father's death.^{xxv}

Finally, living with the stigma of having their mother labelled as a murderer means these children's social and community supports are often minimal.^{xxvi}

The research indicates clearly that these children need to be dealt with within a caring environment that caters for their specific social, emotional and developmental needs. This needs to take place within a rights based framework that gives effect to these children's rights.

6.3. *Recent international developments*

At an international level the UN Committee on the Rights of the Child has proposed that 'Guidelines for Children Deprived of Parental Care' should be developed^{xxvii}. The draft Guidelines are currently in the process of being

finalized and are entitled “UN Guidelines for the protection and alternative care of children without parental care”.^{xxviii}

The latest May 2006, draft states Clause 46 of the draft states:

“When the child’s sole or main carer may be the subject of deprivation of liberty as a result of remand or sentencing decisions, the best interests of the child should be a primary consideration. Non-custodial sentences and remand measures should be used wherever possible. States should take into account the best interests of the child when deciding whether to remove children born in prison and children living in prison with a parent. The removal of such children should be treated in the same way as other instances where such separation is considered. For younger children, especially those under the age of three years, such removal should in principle not take place against the will of the parent. Best efforts should be made to ensure that a child remaining in custody with his/her parent benefits from adequate care and protection.”

7. Education for children in prison

7.1. The right to basic education

Section 29 of the constitution guarantees the right to basic education. The South African constitution specifically excludes this socio economic right from progressive realization. It is therefore an immediate right that all citizens are entitled to. Within this context it is difficult to understand or justify that children who are awaiting trial and who are sentenced to less than 12 months are imprisonment do not receive education.

In terms of section 3 of the South African Schools Act it is compulsory for learners in Grade R through to Grade 9 or from age seven (7) through to fifteen (15), whichever happens first to attend school and receive education. Whilst primary education is the most important component of basic education it is not synonymous. The right to basic education includes fundamental education which would include education for children who are older than 15 years and whose fundamental education needs have not been met.

Unless specifically provided for in the sentence that is handed down, rights enshrined in the constitution should generally not be limited by incarceration. This is a well established and recognized principle when dealing with prisoners rights.

Where it is not possible for the parent or caregiver to ensure their child’s attendance at a school, then it is arguable that the responsibility to ensure compulsory attendance is placed on the State who is incarcerating the child. It is due to the State’s actions of placing the child in prison that education no longer becomes accessible. Thus the right to basic education is being violated.

7.2. Our courts approach

The following comment from the *August* constitutional court case (prisoners right to vote case, 1999) gives an indication of the courts approach towards

rights of prisoners being respected and the ability of the Department to ensure that prisoners can exercise their rights:

“There are a variety of ways in which enfranchisement of prisoners could be achieved in practice. Polling stations could be set up in prisons or special votes could be provided to prisoners. Prisoners are literally a captive population, living in a disciplined and closely monitored environment, regularly being counted and recounted. The Commission should have little difficulty in ensuring that those who are eligible to vote are registered and given the opportunity to vote, and that the objective of achieving an easily managed poll on election day is accomplished.”^{xxix}

The court was of the view that prisons are places where there is a population which is relatively easy to control and to make arrangements for. They are not fraught with the difficulties and complexities that are encountered with making practical arrangements within the community.

Similarities in approach can also be seen in the recent decision emanating from the Westville prison cases in which the court has emphasized that there is a duty on prison authorities to make access to health care available for prisoners.

8. Solutions and Recommendations

8.1. More information and research is needed

There is a need for ongoing analysis of the prisoner population and research in order that a better understanding of the impact of imprisonment on children.

For example, it is important to know and/or understand:

- How many women prisoners are mothers
- The extent to which courts adequately consider the impact of imprisoning a mother on the child
- The impact on parenting when a mother is imprisoned
- The impact on the child of the removal of a mother
- The levels of education of women and child prisoners and suitable education programmes
- Who is looking after the children of mothers in prison and whether they are accessing social services that are available
- The accessibility of prisons to children and challenges that are faced in maintaining relationships between mothers in prison and their children
- Comparative research and models used in other countries need to be studied and considered

Another possible recommendation is that a gender critique of current legislation and policies is undertaken. The European Prison Rules for example have been subjected to a gender critique^{xxx}. This would assist implementers in understanding and recognizing the gender implications of imprisonment on women.

8.2. Greater use of non custodial sentences

8.2.1. Women who are mothers

The greater use of non-custodial sentences needs to be emphasized. It is recognized by the Department in their White Paper, that many women in prison are sentenced to short-term sentences and that there is thus a “greater potential for successful rehabilitation through alternative sentences.”^{xxxix} Short-term sentences indicate that the crimes that have been committed are not of a severe nature and it thus begs the questions whether there are not more appropriate non-custodial sentences that ought to be used.

Whilst it is recognized that the DCS does not play a role in determining sentences, it is important that the Department actively engages with the Justice Department (Justice College) and in particular the prosecuting authorities and magistrates to encourage greater awareness on the impact of imprisonment on mothers. The judiciary also needs to be brought on board and greater awareness created.

The ‘best interests of the child’ principle enshrined in our constitution needs to play a larger role during sentencing in ensuring that sentences handed down to women who are mothers do not violate this principle. Where the ‘best interests of the child’ is not considered adequately by the court, the child effectively becomes punished for her or his mothers crime.

There is ample international support for this approach and it would be in line with South Africa’s international human rights law obligations. The Committee on the Rights of the Child is increasingly stating in its Concluding Observations on reports submitted by State parties (of which South Africa is one having ratified the Convention on 16 June 1995) comments of the following nature:

“Where the defendant has child caring responsibilities, the Committee recommends that the principle of the best interests of the child (article 3) is carefully and independently considered by competent professionals and taken in to account in all decisions related to detention, including pre-trial detention and sentencing, and decisions concerning the placement of the child.”^{xxxix}

There is even recognized support by our constitutional court that mothers can be considered differently to others who are sentenced and that this can be fair discrimination. In *Hugo v the President of the Republic of South Africa and Another*, the constitutional court case in which unfair discrimination was alleged against the President by a male prisoner after the President exercised his constitutional prerogative and released women with children below 11 years as part of an amnesty programme, the court stated:

“Not all discrimination was unfair and the president was substantially influenced by the concern of family life and nurturing and care which mothers normally provide for their children.”^{xxxix}

8.2.2. Where there are no alternatives to direct imprisonment of mothers

There ought to be a clear obligation in law that government agencies take responsibility in ensuring that there is adequate protection and care for children whose mothers are sentenced to imprisonment.

A possible suggestion would be to consider amending the Correctional Services Act by adding an additional section similar to section 13(6)(c)(i) that would place a duty on correctional officials to notify education and welfare state authorities that a child's mother is in prison. This in turn ought to set in motion a process whereby the State would ensure that the child is being adequately cared for and is attending school. This could also lay a basis for more cooperation between relevant government departments in setting up programmes that would support the relationship between mothers in prison and their children. Programmes are also needed to educate mothers in prison on how to communicate with their children and explain their imprisonment in a manner that seeks to reduce the negative impacts on children.

8.3. Education in prison

The SAHRC recommends that the Department of Correctional Services in conjunction with the Department of Education urgently ensures that adequate arrangements are made to ensure that all children in prison regardless of the length of their term of imprisonment and also awaiting trial children receive education.

8.4. Focal point for women and children in DCS

The DCS does recognize and address vulnerable groups within the prison system. However, there needs to be greater emphasis on vulnerable groups.

The Department needs to address issues related to

- creating child friendly visiting areas in prisons,
- ensuring that as many prisons as possible can accommodate women in order that women prisoners will be closer to their children who live outside the prison and
- ensure that child friendly environments are created within the prison and that children remain with their parents until the age of five years.

8.5. Current review of women prisoners

Parole boards should be educated specifically upon the impact on children who have mothers in prison or who are with their mothers in prison. This would create greater awareness and more informed decisions when it comes to considering parole for this category of prisoners. The Parole Boards could be innovative in converting sentences to correctional services.

The Department should consider fast tracking the parole of mothers in prison.

9. Conclusions

The impact of imprisonment on children is an area, which is receiving growing international attention. The government in its legislation and policy documents has made a firm commitment to following and implementing international norms and standards that seek to protect the rights of prisoners. There is clearly an acknowledged need to begin considering and implementing the 'best interests' of the child' principle within this area. This principle and the rights of the children affected by their mothers who are in prison are enshrined in our constitution and it is clearly an area that needs more focus and attention.

Notes

ⁱ CSPRI Newsletter, No 18., 2006

ⁱⁱ DCS website as at 21/08/06

ⁱⁱⁱ Act 108/1996

^{iv} Section 28 Children

(1) Every child has the right -

(a) to a name and a nationality from birth;

(b) to family care, parental care, or appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services, and social services;

(d) to be protected from maltreatment, neglect, abuse, or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that -

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interest is of paramount importance in every matter concerning the child.

(3) In this section, "child" means a person under the age of 18 years.

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Section 29 Education

(1) Everyone has the right -
(a) to a basic education, including adult basic education; and

^{vi} DCS, White Paper, March 2005

^{vii} Townhead, L, "Women in Prison and Children of Imprisoned Mothers, Recent Developments within the United Nations Human Rights System", , Quaker United Nations Office, April 2006

^{viii} DCS White Paper, March 2005, par 11.4.3., p78

^{ix} CSPRI Newsletter, no 9, February 2005

^x Ibid 8

^{xi} CSPRI Newsletter, no. 9, February, 2005

^{xii} Ibid

^{xiii} "Women in South African Prisons", IJP, 2005

^{xiv} Hendricks, JH, Black, D and Kaplan, T, *When Father Kills Mother: Guiding Children Through Trauma and Grief*. London: Routledge (1993) as quoted in *Now we have Nothing: Exploring the impact of maternal imprisonment on children whose mothers killed an abusive partner* by Kailash Bhana and Tessa Hochfeld for Centre for the Study of Violence and Reconciliation, 2001.

^{xv} Woodrow, 1996; NACRO, 1994 in Bhana and Hochfeld, 2001.

^{xvi} Bhana and Hochfeld, 2001.

^{xvii} Sack et al., 1976; Fritsch and Burkhead, 1981; Johnston, 1995b quoted in *Children and the environment: Young people's participation in social change* by Sandra Meucci, Michael Schwab in *Social Justice*. San Francisco: Fall 1997. Vol.24, Iss. 3.

^{xviii} Alison Cunningham and Linda Baker, *Invisible Victims: The Children of Women in Prison*, Centre for Children and Families in the Justice System, December 2004. Available at www.voicesforchildren.ca.

^{xix} Howard League for Penal Reform *The Voice of a Child: The Impact on Children of their Mother's Imprisonment*. UK: Howard League, 1991, in Bhana and Hochfeld, 2001.

^{xx} Parke and Clark-Stewart.

^{xxi} Bhana and Hochfeld, 2001

^{xxii} Ibid.

^{xxiii} Hess, 1987; Kelmer & Clifford, 1962, Johnston 1995d quoted in *Children of Incarcerated Mothers* Barbara J. Myers, Tina M. Smarsh, Kristine Amlund-Hagen and Suzanne Kennon in *Journal of Child and Family Studies*, Volume 8, Number 1 / March, 1999.

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- ^{xxiv} Hendricks, JH, Black, D and Kaplan, T.
- ^{xxv} Bhana and Hochfeld, 2001.
- ^{xxvi} Robertson, M and Donaldson, M *No place like home: Family murder: The child victims', in Crime and Conflict*, 1997 in Bhana and Hochfeld, 2001
- ^{xxvii} Townhead op cit, 9
- ^{xxviii} see
<http://www.mj.gov.br/sedh/ct/spdca/cuidados%20parentais/Draft%20Guidelines%2030.06.06.doc>
- ^{xxix} CCT 8/00 Par 28 *August Case*
- ^{xxx} see Wetton, C "The European Prison Rules: A Gender Critique", Quaker Council for European Affairs March 2006 http://www.quaker.org/qcea/prison/gencrit%20EPR_2006.pdf#search=%22standard%20minimum%20rules%20treatment%20prisoners%20commentary%20gender%22
- ^{xxxi} DCS White Paper, par 11.4.2., p78
- ^{xxxii} e.g. Consideration of the Reports Submitted by State Parties under Article 44 of the Convention on the Rights of the Child, Concluding Observations: Thailand, CRC/C/THA/CO/2, paragraph 48.
- ^{xxxiii} *Hugo v the President of the Republic of South Africa and Another*, 1996 (4) SA 1012 (D)