Are the rights of children paramount in prison legislation?

LUKAS MUNTINGH* AND CLARE BALLARD**

ABSTRACT

The principle, the rights of the child shall be of paramount importance in all decisions affecting the child, is established firmly in international law and, accordingly, reflected in the Constitution. Constitutional jurisprudence acknowledges the notion that children are physically and psychologically more vulnerable than adults and thus require treatment that is different from adults when they come into conflict with the law. It is this differentiation that lies at the heart of the Child Justice Act 75 of 2008, the legislation that sets out the criminal procedure specific to the needs of children, as well as the principle that children's exposure to the criminal justice system should be limited wherever possible.

The Correctional Services Act 111 of 1998 predates the Child Justice Act by approximately ten years – a period when legislators were perhaps less attuned to the needs of children in conflict with the law. When examined against the requirements of s 28(2) of the Constitution, there are, unfortunately, a number of shortcomings in the Correctional Services Act in relation to sentence administration and remand detention. These are discussed according to the following themes: (1) remand detention of children and how this is regulated by the Correctional Services Act and the Child Justice Act; (2) sentence administration with specific reference to the parole regime; (3) conditions of detention with reference to the privilege system and access to services.

1. Introduction

1.1 Constitutional framework and jurisprudence

Section 28(2) of the Constitution of the Republic of South Africa, 1996, states that a child's best interests are of paramount importance in all matters concerning him or her. The Constitution also affords children a specific set of rights aimed at their protection and care, an acknowledgement that children are more vulnerable than adults. This means, fundamentally, that children must be treated differently from

* BA (Stell), Hons (Stell), M Soc (Stell), PhD (UWC). Associate professor at the Community Law Centre (Civil Society Prison Reform Initiative), University of the Western Cape.

** BA (UCT), LLB (UCT), LLM (Cornell University). Currently a researcher at the Community Law Centre (Civil Society Prison Reform Initiative), University of the Western Cape.

adults. When it comes to detention and imprisonment, the Constitution is clear: children should only be detained as a measure of last resort and for the shortest period of time.[1] In addition, children must be detained separately from adults and be 'treated in a manner, and kept in conditions that take account of his or her age'.[2] Prior to the enactment of the Child Justice Act 75 of 2008, courts, generally speaking, led the way when it came to child-centred decisions regarding children in conflict with the law.[3] In *Centre for Child Law v Minister of Justice and others*[4] the Constitutional Court considered whether children should be subjected to minimum sentencing legislation. Cameron J, writing for the majority, held that given the prescripts contained in the child-specific provisions of the Constitution, they should not. He stated:[5]

> 'We recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.

1.2 The Child Justice Act

The Child Justice Act 75 of 2008 (in this part referred to as 'the Act'), which came into effect on 1 April 2010, established a set of processes regulating the manner in which children in conflict with the law should be treated.[6] It is thus a far more detailed account than the Constitution of the rights to which children are entitled when they come into contact with the criminal justice system. The Act deals, specifically, with the applicable procedures from the moment of arrest through to sentencing. The objects and guiding principles of the Act make it clear that children should be protected from the harsh consequences of the criminal justice system at all costs. Moreover, they should benefit from rehabilitative, individualised treatment and, if at all possible, should

---

1 Section 28(1)*(g)*.

2 Section 28(1)*(g)*(i) and (ii).

3 See for example S v *Z en Vier Ander Sake* 1999 (1) SACR 427 (E); *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC); *S v Kwalase* 2000 (2) SACR 135 (C); *Mocumi v S* (unreported case number (CASR 2/05), (30 May 2006) (NC)); *Director of Public Prosecutions, Kwa-Zulu Natal v P* 2006 (1) SACR 243 (SCA).

4 2009 (2) SACR 477 (CC).

5 At para 28.

6 In June 1995 the South African government ratified the United Nations Convention on the Rights of the Child (CRC). One of the requirements of the CRC (art 40(3)) is that state parties 'promote the establishment of laws, procedures, and institutions specifically applicable to children' in conflict with the law.

serve their sentences in circumstances involving the family and the community.[7]

It is worth noting at this juncture a recent study by Doyle and Aizer that examines two groups of children that committed similar offences. One of the groups was sentenced to imprisonment as a result of these offences; the other group was sentenced to a form of home-based probation.[8] Doyle and Aizer found that children sentenced to imprisonment were 13 per cent less likely to finish high school than their non-imprisoned peers and 39 per cent less likely to finish school than children who had not entered the criminal justice system at all. In addition, children that had been imprisoned were 67 per cent more likely to re-enter prison by the age of 25 than children that had offended but remained out of prison.[9] It is also important to note that the children from the 'imprisoned' group were 'much more likely to have recidivated' for serious crimes, such as drug crimes and homicide.[10]

The Act stops short of dealing with certain aspects of the implementation of sentences of imprisonment, namely, the parole and privilege system. The Correctional Services Act 111 of 1998 (Correctional Services Act) is thus applicable to these issues. When it comes to the actual time spent in remand detention in prison the Child Justice Act does not say much. Rather, and perhaps understandably, it places greater emphasis on avoiding a child's placement in prison while awaiting trial. It requires that certain criteria be met[11] and that the presiding officer take into account a number of factors as well as any recommendations from a probation officer before making such a placement.[12] It must therefore be an informed decision. In addition, subsequent to an order directing that a child await trial in prison, that child must then appear before a presiding officer every 14 days for the purpose of having that order reconsidered.[13] Importantly, however, there is no custody time limit or mandatory release procedure in the Child Justice Act. Again, the actual period of time that children spend in remand detention is determined by the Correctional Services Act.

---

7 See ss 2 and 3 of the Act.

8 See Aizer A and Doyle J *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges* (2013), available at *http://nber.org/papers/w19102#navDiv=6*, accessed 20 February 2014.

9 Op cit (n8) at 22.

10 Op cit (n8) at 23.

11 See s 30(1) and (2) of the Act.

12 Section 30(3) of the Act.

13 Section 30(4) of the Act.

1.3 The Correctional Services Act 111 of 1998

The Correctional Services Act came into force on 31 October 2004.[14] It is a comprehensive piece of legislation that, in many ways, amounts to an 'acknowledgment that the prison system should ensure the safety and the protection and fulfilment of the rights of inmates and promote the "social responsibility and human development" of all sentenced inmates.'[15] It thus also represents a fundamental shift in focus from its predecessor, the Correctional Services Act 8 of 1959 (the 1959 Act). The 1959 Act was concerned primarily with the administration of the prison system and said very little about the rights of inmates.[16] When it comes to the implementation of custodial sentences imposed on children it is clear that they have additional rights, which include but also go beyond those enjoyed by all detained persons in terms of the Constitution and chapter 3 of Correctional Services Act. The Correctional Services Act provides specifically that children detained in prison are entitled to educational and recreational programmes, social and psychological services, religious care, and, where practicable, additional visitation opportunities.[17] Specific accommodation and nutritional requirements must also be met.[18] To the extent that the Correctional Services Act deals with remand detention, parole and privileges in prison, it does not differentiate between adults and children. This, in our opinion, is deeply unfortunate. For not only does it amount to a failure to adhere to the principles set out in the Constitution and the Child Justice Act, but it means that children may spend longer in prison than is necessary and in conditions which, in certain respects, may not take into account their age.

Before embarking on a discussion of the provisions of the Correctional Services Act, these authors wish to set out briefly the profile of children in prison as well as illustrate the extent to which certain provisions in the Child Justice Act and the child-specific provisions in the Correctional Services Act are being implemented successfully.

---

[14] A number of chapters were promulgated at various earlier times, but by October 2004 the entire Act had been promulgated.

[15] C Ballard 'Prisons, the law and overcrowding' (2014) 4 *New South Africa Review* 278 at 279, quoting s 2*(c)* of the Correctional Services Act.

[16] K Zysk, F Dunkel and D van Zyl Smit *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* 2ed (2001) 77.

[17] Section 19 of the Correctional Services Act.

[18] Section 7 of the Correctional Services Act and reg 4(1)*(c)* of the Correctional Services Regulations *GG* 266626 2004/7/30.

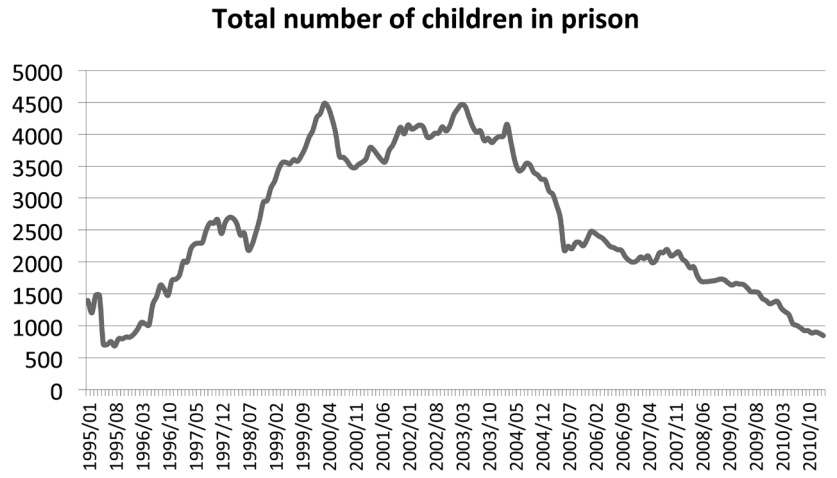
2. Children in prison

The information in this section is based on a report by the authors of this piece, entitled *Report on Children in Prison in South Africa* (the '2012 Report').[19] The 2012 Report is a comprehensive situational analysis of children in prison based on data collected at 41 prisons where children were held, and statistics sourced from the Department of Correctional Services and the Judicial Inspectorate for Correctional Services.

2.1 Profile of children in prison

Following the coming into operation of the Child Justice Act, the minimum age of imprisonment for sentenced and unsentenced children is 14 years.[20] Prior to this, the minimum age for placing an unsentenced child in prison awaiting trial was also 14 years,[21] but the minimum age for a sentence of imprisonment was the applicable age of criminal capacity at the time, namely seven years. The total number of children in South African prisons increased drastically between the mid-1990s and 2003. This increase became one of the driving factors behind the reformation of the child justice legislation in South Africa. From 2003 the numbers began to decline gradually (see Figure 1 below). As of March 2011, 64 per cent of children in prison had been sentenced and 36 per cent were awaiting trial.

Figure 1[22]



[19] L Muntingh and C Ballard *Report on children in prison in South Africa* (2012) (available at *http://www.cspri.org.za/publications/research-reports/report-on-children-in-prison-in-south-africa/view*, accessed 20 February 2014.

[20] See s 77(1)*(a)* of the Act.

[21] Section 29 of the Correctional Services Act 1959.

[22] Muntingh and Ballard op cit (n19) 13.

Over time, the offence profile of children in prisons (both sentenced and unsentenced) has changed. There has been a proportional increase of children charged with or convicted of aggressive and sexual crimes, but a steady decline of children charged with or convicted of property offences. This, we believe, is a positive development, for it indicates that courts are less likely to detain children in prison or impose custodial sentences for less serious crimes. Very few female children are detained in prison; roughly 2.5 per cent on average of the child population.

Children spend a considerable time in custody awaiting trial: an average of 120 days (and a median of 70 days). Although these figures compare favourably with those of adults awaiting trial, two months is nevertheless a lengthy period for a 14-year-old. The duration of pre-trial detention increases significantly when children are charged with more serious offences. When it comes to children charged with attempted murder, for example, the amount of time awaiting trial can be in excess of six months.[23] The authors note in their report that there has been a small decrease in the proportional share of sentences less than twelve months whilst the proportional share of longer sentences has increased slightly; with the three to five year category showing the most marked increase (4.5 per cent). In March 2011 one third of children in custody were serving sentences of between three and five years and a further 21 per cent were serving sentences of longer than seven years. These trends can be ascribed to the general increase in sentence tariffs as well as the increase in sentencing jurisdiction of the district and regional courts.[24]

2.2 Children in prison and legislative compliance

A significant shortcoming in respect of the treatment of children in prison is the inconsistency with which services are rendered, the nature of their accommodation and compliance with statutory requirements. The 2012 Report states that,:[25]

> '… the policies in respect of the services and activities available to children across the centres surveyed are varied and inconsistent. These include, but are not limited to, the information provided at admission, the orientation of new admissions, conditions of detention, the segregation of children from adults, access to education, access to recreation and preparation for release.'

---

[23] Muntingh and Ballard op cit (n19) 20 report on seven children charged with attempted murder who had already been in custody for 217 days without their cases having been being completed.

[24] See, in general, C Giffard and L Muntingh *The Effect of Sentencing on the Size of the Prison Population* (2006).

[25] Muntingh and Ballard op cit (n19) 3.

Inconsistencies amongst the various prisons were recorded in relation to almost every aspect of prison life. Some centres were well-run with competent staff that had a good relationship with the children in their care.[26] At other centres it was evident that the staff had little interest in children and were unaware of what it was that the law required of them. The survey indicated that children in remand detention fare the worst, for such children are generally being denied the benefit of educational programmes, recreational activities and adequate accommodation. One of the main concerns flowing from the findings of the 2012 Report is that the relevant legislation does not appear to determine the performance of the requisite state institutions, but rather the attitude and willingness of certain individual officials. This is unfortunate, given the clear objectives set out in the Child Justice Act and the detailed requirements regarding the treatment of children listed in the Correctional Services Act.

2.3 Children and community corrections

The term 'community corrections' refers to two broad categories of monitoring, namely parole and correctional supervision.[27] These are utilised in different ways depending on the sentence status of parolee or probationer as the case may be. Firstly, a sentenced prisoner may be released on parole after he or she has served the required minimum period as provided for in the Correctional Services Act.[28] Second, an unsentenced prisoner may be released under correctional supervision under such conditions that a court may specify.[29] Such a release is regarded as a form of bail and may be combined with monetary bail.[30] Third, a person convicted of a crime may be sentenced to correctional supervision and such a sentence may be combined with a custodial component.[31] Depending on certain criteria, a custodial sentence may also be converted to correctional supervision.[32] The current legal framework therefore provides for a non-custodial regime that is flexible and able to accommodate both sentenced and unsentenced persons.

The Correctional Services Act requires that when a child is subject to community corrections he or she may be required to attend

---

[26] The Brandvlei Youth Correctional Centre stands out in this regard. See Muntingh and Ballard op cit (n19) 3, 37, 69.

[27] Section 51 of the Correctional Services Act 111 of 1998.

[28] Section 73 of the Correctional Services Act.

[29] Section 62*(f)* of the Criminal Procedure Act 51 of 1977.

[30] See ss 60 and 62 of the Criminal Procedure Act.

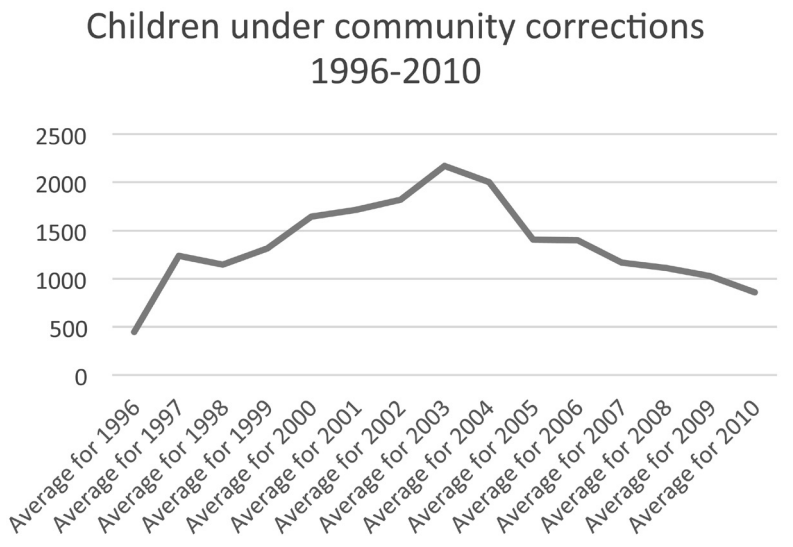
[31] Section 276(1)*(i)* of the Criminal Procedure Act.

[32] Section 276A of the Criminal Procedure Act.

educational programmes regardless of whether that child is subject to compulsory education.[33] In addition, where a child is subject to correctional supervision, the National Commissioner must, in addition to any programmes which the child '… may be required to take part in, ensure that if the child requires support he or she has access to adequate social work services, religious care, recreational programmes and psychological services.'[34]

According to available data from the aforementioned 2012 annual report, p 54, a relatively low number of children are subject to community corrections (see Figure 2 below).

Figure 2



While the number of children under community corrections has been in decline and thus do not present a growing client population for the Department of Community Corrections, there is also nothing reported in the Department's annual reports indicating that this target group receives any specialised attention. Moreover, the Department of Correctional Services' performance indicators make no mention of children or of the type of services that both children and adults under community corrections should have access.[35] Thus, while the legislation is clear regarding what the required performance is in respect of children, the Department makes no attempt to meet this requirement.

[33] Section 69(1) of the Correctional Services Act.

[34] Section 69(2) of the Correctional Services Act.

[35] Department of Correctional Services *Annual Report 2012/13* (2013).

3. Remand detention

The Correctional Matters Amendment Act 5 of 2011 (the 'Amendment Act') incorporated a number of new provisions into the Correctional Services Act. Several of these provisions seek to address remand detention and the concerns of remand detainees.[36] The Amendment Act thus establishes certain standards relating to the care and management of remand detainees and particular sub-groups in the remand detention population, namely, pregnant women, disabled persons, mentally-ill persons and the aged. It is peculiar, however, that when addressing the concerns of vulnerable detainees, the Amendment Act overlooks the needs of children in remand detention. Of particular importance, however, is the amended section 49G of the Correctional Services Act, which requires that a remand detainee may not be detained in custody for more than 24 months 'without such matter having been brought to the attention of a court … .'[37] Given the extent to which many remand detainees are compelled to spend unnecessary lengthy periods of time awaiting trial, the intention behind the provision is laudable.[38] The provision is weakened, however, by the fact that it compels the Department of Correctional Services to bring cases to the attention of the courts without directing the courts to follow a particular course of action. Nevertheless, section 49G makes no distinction between children remand detainees and adult remand detainees. There are two ways in which the Child Justice Act alleviates the plight of children in remand detention in prison. The first is through the fortnightly review by a court of its decision to detain the child in prison.[39] The second is the requirement that if a child is being detained in prison, the matter may not be postponed for more than 14 days at a time.[40] There is no time limit, mandatory or other, however, regarding children in remand detention. Certainly, the imposition of a substantially shorter time limit on pre-trial detention for children would be a more principled

---

[36] Prior to the commencement of the Amendment Act, the Correctional Services Act did not address the concerns peculiar to remand detainees in any meaningful way. Chapter Five of the Correctional Services Act, entitled 'Management, Safe Custody, and Well-Being of Remand Detainees', is now devoted to these particular concerns.

[37] Section 49G(1) of the Correctional Services Act.

[38] C Ballard notes the following in 'A statute of liberty? The right to bail and a case for legislative reform' (2012) 25 *SACJ* 24, 25: 'On 31 March 2010, more than one third of remand detainees had spent three to six months in custody approximately 5000 had spent six to nine months in custody, almost 3000 had spent 12 – 15 months in custody, and just less than 2000 had been in remand detention for more than two years. Literally thousands of people in South Africa spend long stretches of their lives in conditions frequently described as "inhumane" and without access to educational or rehabilitative programs.'

[39] Section 30(4) of the Child Justice Act.

[40] Section 66(2)*(a)* of the Child Justice Act.

approach to the implementation of the international law and statutory requirement that children, when detained in prison, be so for the shortest appropriate period of time possible.[41]

4. The calculation of sentences and parole administration

4.1 Prisons

The Child Justice Act goes to great lengths to ensure that a presiding officer sentences a child to imprisonment in very select circumstances.[42] Once a child has received such a sentence, however, there is little distinction between adults and children when it comes to the length and form of the sentence. (One important exception to this is their exclusion from the provisions of the minimum sentencing legislation.[43]) This means that children sentenced to prison become eligible for parole, generally speaking, after having served one half of their sentence if sentenced to a determinate term longer than 24 months.[44] It is unclear why children sentenced to imprisonment are excluded from any type of specific parole or sentence administration. Indeed, the absence of any child-specific legislation regarding parole or early release is disappointing given the Child Justice Act's implicit acknowledgement that the formal criminal justice system and prisons are deeply inappropriate and potentially damaging environments for children.[45] Moreover, the Child Justice Act does make it clear that children are to be treated differently from adults: they must be detained for the shortest period of time. The Correctional Services Act does not act on this distinction regarding the periods of imprisonment of children.

---

[41] See Preamble to the Child Justice Act. See also art 37*(b)* of the Convention on the Rights of the Child, which states: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'

[42] Section 77 of the Child Justice Act.

[43] The Criminal Law Amendment Act 105 of 1997, in the form that it was originally adopted, and which incorporated minimum sentences into the South African sentencing regime, exempted children under 16 years of age from its application. On 31 December 2007, the Criminal Law (Sentencing) Amendment Act 38 of 2007 expressly made the minimum sentencing legislation applicable to 16 and 17 year olds. Shortly thereafter, the constitutionality of this amendment was challenged in *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC). Cameron J, writing for the majority of the Court, declared the amendment unconstitutional, finding that the minimum sentencing regime was 'very far from the approach to sentencing that the Bill of Rights demands for children'.

[44] Section 73(6)*(a)* of the Correctional Services Act.

[45] See s 2*(d)* of the Child Justice Act.

4.2 Child and youth care centres

A Child and Youth Care Centre is a facility providing[46] residential care to children outside of the family environment. These centres serve a number of categories of children, including those in need of care and protection[47] or in need of specialised therapeutic programmes. Certain centres are designated for the 'the reception, development and secure care of children awaiting trial or sentence.'[48] They are thus secure care facilities designed to be an alternative to imprisonment. As we explain below, child and youth care centres, when functioning as alternatives to imprisonment, are regulated by legislation that is incomplete in its protection of children.

The Child Justice Act does not provide for any form of early release for children sentenced to child and youth care centres. Rather, a child may be sentenced to a centre for a period of no more than five years or until the child reaches the age of 21, whichever occurs first.[49] If a child is sentenced to a term of five years' imprisonment, however, he or she becomes eligible for parole after having served one half of the sentence (i e, two and a half years).[50] Certainly, the child and youth care centre environment is less harsh than that of prisons,[51] but children in these centres are still deprived of their liberty and must remain there for the full term of the sentence, whereas children sentenced to imprisonment may be released considerably earlier and serve the remainder of the sentence in the community.

Moreover, there is a significant lacuna in the legislation regulating child and youth care centres: the absence of an independent oversight and monitoring body. By contrast, the Judicial Inspectorate for Correctional Services (the Inspectorate) is required by legislation to monitor, by means of Independent Correctional Centre Visitors and an

---

46 Section 191(1) of the Children's Act 38 of 2005.

47 Ch 9 of the Children's Act.

48 Section 191(2)*(b)* of the Children's Act.

49 Section 73(1) and (2) of the Child Justice Act.

50 Section 73(6)*(a)* of the Correctional Services Act states that a prisoner may not be released earlier than after serving half the sentence. There are variation on this, for example prisoners sentenced prior to October 2004 to which a one third rule applies, or prisoners sentenced under specific provisions requiring that they serve one sixth or one quarter of the sentence in prison and the remainder under correctional supervision.

51 The relevant norms and standards are contained in the regulations to the Children's Act 38 of 2005 (Part V of Annexure B). They contain comprehensive requirements in relation to the following: care programmes, therapeutic programmes, developmental programmes, permanency plans for children, individual developmental plans, temporary safe care, protection from abuse and neglect, assessment, family reunification and reintegration, aftercare, access to and provision of adequate health care, access to schooling, education and early childhood development and security measures.

Inspectorate, the conditions of detention in prisons and investigate the complaints of inmates.[52] The Inspectorate and the Visitors thus play a vital role in the protection of children in prison, for not only does it provide an independent and external platform for the processing of complaints, but contributes to a more open and transparent prison administration. Without any form of independent evaluation the successful implementation of the applicable norms and standards in the centres is severely compromised. This, in turn, compromises the 'best interests of the child' standard.

5. Conditions of detention

The Correctional Services Act states that children must be '… detained in accommodation appropriate to their age.'[53] The term 'appropriate accommodation' is not explained in any further detail in the Correctional Services Act, the Child Justice Act or any of their regulations. The Correctional Services Act does, however, specify the following in respect of children in prison:

1. separate accommodation from the adult population;[54]
2. specific nutritional requirements;[55]
3. access to education for all children of compulsory school-going age and, where practicable, educational programmes for all children that are not of compulsory school-going age;[56]
4. social work services, religious care, recreational programmes and psychological services; and[57]
5. where practicable, maintaining contact with their families through additional visits and by other means.[58]

Although these provision are no doubt important, the Correctional Services Act says little more regarding the care and protection of children in prison. Moreover, and perhaps more importantly, it fails

---

[52] Sections 85(2) and 90(2) of the Correctional Services Act.

[53] Section 7(2)(*c*) of the Correctional Services Act.

[54] Section 7(2)(*c*) of the Correctional Services Act.

[55] Section 8(2) of the Correctional Services Act and reg 4(1)(*c*) of the Correctional Services Regulations GN R914, *GG* 26626, 2004/07/30.

[56] Section 19(1)(*a*) and (*b*) of the Correctional Services Act.

[57] Section 19(2) of the Correctional Services Act. See also Muntingh and Ballard op cit (n19) 22, noting that, in general, sentenced children had access to social workers but that unsentenced children faced considerable obstacles in accessing social work services. The authors conclude that this is a result, at least in part, of the Department of Correctional Services having lagged behind in their acceptance of remand detainees as a part of their mandate.

[58] Section 19(3) of the Correctional Services Act.

to differentiate between children and adults in relation to access to amenities, segregation and disciplinary procedures and sentence plans.

5.1 Disciplinary procedures, segregation and access to amenities

There are a range of disciplinary infringements listed in the Correctional Services Act.[59] Allegations against prisoners, including children, are subject to disciplinary proceedings which can be conducted either formally[60] or informally.[61] The latter process precludes the right to legal representation. Neither of the processes, however, provide for any independent procedural or psychological assistance for children. An adversarial process, no matter how informal, remains an overwhelming experience for a child. This is undoubtedly the reason for the Child Justice Act's emphasis on ensuring that child justice court proceedings are 'not unduly hostile and are appropriate to the age and understanding of the child'[62] and the requirement that a child suspect be assured the assistance of a parent, appropriate adult or guardian during the trial.[63]

The nature of the penalties is also a concern. When found to have committed a disciplinary infringement, both the informal and formal processes make provision for the imposition of the penalty 'restriction of amenities' for a period of time.[64] Amenities are defined by the Correctional Services Act as 'recreational and other activities, diversions or privileges which are granted to inmates … and includes exercise, contact with the community, reading material, recreation and incentive schemes'.[65] It is important to reiterate that the provisions in the Correctional Services Act regarding health care, exercise and reading material do not differentiate between adults and children. Again, the exclusion of child-specific provisions is curious given the importance of such services and activities in a child's developmental path[66] and the consistent reminders in both the Constitution and Child Justice Act that children should be treated differently from adults. The

---

59 Sections 23(1)*(a)-(t)*.

60 Section 24(4) of the Correctional Services Act.

61 Section 24(2) of the Correctional Services Act.

62 Section 63(4)*(b)* of the Child Justice Act.

63 Section 64 of the Child Justice Act.

64 See sections 24(3)*(c)* and 24(5)*(c)* of the Correctional Services Act.

65 Section 1 of the Correctional Services Act.

66 The Convention on the Rights of the Child, to which the South African government is a state party, requires that states 'recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty also emphasises the right to health (see arts H49-55).

fact that the Correctional Services Act permits the potential restriction of amenities in relation to children almost certainly amounts to a failure of the state to fulfil the constitutional requirement to respect, protect, promote and fulfil the rights of children.[67]

Where there have been 'serious or repeated infringements', the formal disciplinary process provides for 'segregation in order to undergo specific programmes aimed at correcting … behaviour' as a penalty.[68] Segregation, as defined by the Correctional Services Act, may include detention in a single cell.[69] In addition to punishment, segregation may, amongst other reasons, also be imposed 'when an inmate displays violence' or 'if at the request of the South African Police Service, the Head of the Correctional Centre considers that it is in the interests of the administration of justice.[70] Importantly, the norms and standards pertaining to child and youth care centres state the following in respect of segregation:

> '[I]solation, except for medical reasons, from service providers or other children admitted to the place of care, other than for the immediate safety of those children or those service providers only after all other possibilities have been exhausted and then under strict adherence to policy, procedure, monitoring and documentation … is prohibited.'[71]

As the norms and standards indicate, segregation involving isolation may, at times, be justified. They make it clear, however, that it should only be implemented under strict conditions and after having exhausted other possibilities, and then only for the 'immediate safety' of those in contact with the child being segregated. The Correctional Services Act does require that certain reporting and monitoring procedures be followed when an inmate has been segregated. However, the fact that these procedures make no distintion between adults and children and are far more generous in their deference to the prison administration, means that children may be subject to isolation in circumstances that simply do not take into account their needs. Solitary confinement has been found by the African Commission on Human and People's Rights to amount, in certain circumstances, to infringements of the prohibition against torture and other cruel, inhuman or degrading treatment or

---

67 Section 7(2) of the Constitution states: 'The state must respect, protect and promote and fultil the rights in the Bill of Rights.'

68 Section 24(5)*(d)* of the Correctional Services Act.

69 Section 30(1) of the Correctional Services Act.

70 Sections 30(1)*(d)* and *(f)*. The other less problematic grounds for the imposition of segregation include prescription by the correctional medical practitioner on medical grounds, at the request of an inmate and if, after having been recaptured from an escape, there is reason to suspect the inmate will attempt to escape again.

71 Regulation 76(2)*(h)* of the Children's Act Regulations, GN R261 in *GG* 33076 of 1 April 2010.

punishment.[72] If the effects of isolation are as grave as the case law suggests, it is more than safe to assume that the effects are far worse for children. Moreover, and importantly, the African Charter on the Rights and Welfare of the Child requires that state parties must 'ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment.'[73]

5.2 Sentence plans

Once an offender has been admitted to a correctional centre, he or she must be assessed for the purposes of determining the following:

(a) security classification for purposes of safe custody;
(b) health needs;
(c) educational needs;
(d) social and psychological needs;
(e) religious needs;
(f) specific development programme needs;
(g) work allocation;
(h) allocation to a specific correctional centre;
(i) needs regarding reintegration into the community;
(j) restorative justice requirements; and
(k) vulnerability to sexual violence and exploitation.[74]

Once an offender has been assessed, the Case Management Committee must compile a 'correctional sentence plan' addressing the concerns listed above, as well as:

i. contain the proposed intervention aimed at addressing the risks and needs of the sentenced offender, as identified during an in-depth risk assessment, to correct the offending behaviour;

---

[72] Article 5 of the African Charter on Human and People's Rights states that, 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'. See Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) / Malawi 1995 ACmHPR Communication 64/92-68/92-78/92_8AR; Malawi African Association, Amnesty International, MsSarrDiop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme / Mauritania 2000 ACmHPR Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98.

[73] Article 17(2)*(a)* of the African Charter on the Rights and Welfare of the Child.

[74] Section 38(1) of the Correctional Services Act.

ii. spell out what services and programmes are required to target offending behaviour and to help the sentenced offender develop skills to handle the socio-economic conditions that led to criminality;
iii. spell out services and programmes needed to enhance the sentenced offender's social functioning; and
iv. set time frames and specify responsibilities to ensure that the intended services and programmes are offered to the sentenced offender.[75]

Making no distinction between adult offenders and child offenders, the Correctional Services Act stipulates that correctional sentence plans be applied to offenders sentenced to a period of incarceration for longer than 24 months. The findings of the 2012 Report note that just over 25 per cent of sentenced children are serving sentences of less than two years and are thus excluded from the benefit of a sentence plan.[76] This makes little sense given the Child Justice Act's recognition of the need for 'the effective rehabilitation and reintegration of children.'[77]

6. Conclusion

There appears to be somewhat of a disjunture between the ideals expressed in the Child Justice Act and the Constitution, and the provisions of the Correctional Services Act. The result of this is a marked decrease in the protection and care of children that are in prison and thus under the administration of the Department of Correctional Services. This decrease renders the provisons of the Correctional Services Act substandard in their reflection of the child's best interests and the principle that children be detained in prison as a last resort and for the shortest possible period of time.

It is unclear why the legislature seems to have considered closely the rights of children in relation to criminal procedure and crime control, yet failed children in respect of prison administration and certain aspects of detention in child and youth care centres. Perhaps when the Correctional Services Act was drafted (approximately ten years prior to the coming into effect of the Child Justice Act), the legislature was less attuned to the needs of children. Alternatively, perhaps it was thought that the Correctional Services Act was more than adequate in its protection of children. However, the Correctional Service Act is in general not sensitive to the needs of vulnerable groups and the largely non-gendered approach of the Act reflects this. The authors'

[75] Section 38(1A) of the Correctional Services Act.
[76] See Muntingh and Ballard op cit (n19) 32, for the period 2004 to 2011.
[77] Preamble, Child Justice Act.

hope, however, is that the relevant legislation is amended as soon as possible so as to protect sufficiently the rights of children in conflict with the law and to better promote the best interests of children. The Child Justice Act required a review of its implementation and a similar review of the Correctional Services Act may indeed be necessary.