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## ABSTRACT

Children deprived of their liberty by the state are, as a result of state officials' action or inaction, at the risk of death, torture, and ill treatment. Three types of places of detention are discussed, namely prisons, police cells, and child and youth care centres. The Chapter accepts the UN Convention against Torture (CAT) as the legal anchor point and proceeds to give a more detailed description of rights violations against children in detention, focussing on deaths in custody; torture and assaults; harsh conditions of detention; solitary confinement and detention incommunicado; illegal and inappropriate means of maintaining discipline; separation of categories of detainees; trafficking. The Chapter concludes with a number of recommendations focussing on improving the collection of data pertaining to children in custody; the criminalisation of torture; the need for comprehensive and continuous staff training; the regular review of policies, procedures and practices; promoting transparency and establishing independent oversight; establishing effective complaints mechanisms; the need for prompt and impartial investigations; and obtaining effective redress.

**Keywords:** children, prisons, deprivation of liberty, torture and ill treatment, oversight

## INTRODUCTION

This Chapter focuses on children deprived of their liberty by the state and who, as a result of state officials' action or inaction, suffer deaths, torture, ill treatment or the risk thereof. Three types of places of detention will be discussed, namely prisons, police cells, and child and youth care centres (CYCC). The term 'child and youth care centre' covers the institutions formerly known as reformatories (or reform schools), schools of industries, and secure care facilities. The deprivation of liberty, according to Rule 11(b) of the UN Rules for the Protection of Juveniles Deprived of their Liberty "means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority".

Once a person, adult or child, is deprived of his/her liberty he/she is in a relationship of total dependence to the official(s) in charge. A person in custody cannot leave when the situation becomes threatening, he/she cannot pick up the phone and call for assistance and must therefore seek assistance from the officials in charge. It is this dependency that makes detainees vulnerable to torture, ill treatment and other forms of coercion and victimisation. Nowak and McArthur (2006), in discussing the distinction between torture and ill treatment, concluded that

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“it is the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure. That is why such pressure must be considered as directly interfering with the dignity of the person concerned and is, therefore, not subject to any proportionality test” (Nowak & McArthur, 2006, p. 151). When the state places a person in custody, the state does so with the understanding that it accepts responsibility for that person’s safety and care. This duty cannot be derogated from; the state cannot blame other actors, such as fellow prisoners, for the harm done to a particular prisoner. The point of departure is, and must be, that if the state could have prevented the harm caused, it should have done so. This requires that the state must put in place the necessary mechanisms to proactively monitor and manage risks. It is for this reason that the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which South Africa ratified in 1998, clearly places the obligation on states in Article 2(1), to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. Moreover, Article 2(2) confirms the absolute prohibition of torture as peremptory norm in customary international law, stating that “No exceptional circumstances, whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” (Nowak & McArthur, 2008, p. 118). Moreover, Article 16 of CAT extends the absolute prohibition of torture to other forms of ill treatment that do not amount to torture as defined in Article 1. This Chapter will, therefore:

- a. Accept CAT as the legal anchor point and proceed to give a more detailed analysis of rights violations against children deprived of their liberty in South Africa.

### Articles 1 and 16 of the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

Article 1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 16(1) Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

- b. The recommendations made at the end of the Chapter are derived from the obligations placed on states parties to the CAT.

In line with the definition of torture in CAT, this Chapter accepts that torture and other ill treatment include any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, and are therefore within the scope of the discussion. Moreover, and in line with Nowak and McArthur’s interpretation, any form of pressure on an individual whilst deprived of his or her liberty should be regarded as an attack on that individual’s dignity. Children deprived of their liberty are even

more vulnerable than adults due to their age, physical stature, intellectual abilities and lack of knowledge about their rights.

### THE LEGAL FRAMEWORK

Together with CAT must also be read the UN Convention on the Rights of the Child which echoes the absolute prohibition of torture and ill treatment in Article 37(a) and Article 37(c) gives more detail on conditions of detention:

“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances”.

### Prisons

At the domestic level, the Constitution in section 28(1)(g) is clear that children may only be detained as a measure of last resort and then for the “shortest appropriate period of time”. In respect of children in prison as sentenced and unsentenced prisoners, the Correctional Services Act (111 of 1998) places a general duty in section 2 on the Department of Correctional Services (DCS) to detain “all prisoners in safe custody whilst ensuring their human dignity”. As from 1 April 2010, when the Child Justice Act of 2008 come into operation, only children 14 years and older may be detained in a prison, either as sentenced or unsentenced prisoners. The detention of children as awaiting trial prisoners is a practice that should be avoided at all costs and there have been calls for its prohibition in other jurisdictions (National Juvenile Detention Association, 2005). The drafters of the Correctional Services Act were mindful of the special needs of children and section

19 deals with these. Importantly, the Act stipulates in section 7(2)(c) that children must be separated from adults and detained in accommodation “appropriate to their age”, although it is unclear what this means in practice. This is in addition to the general rules of separation of sentenced and unsentenced, and separation of genders. A further important feature of the Correctional Services Act is the fact that all prisoners, children included, have access to the Independent Correctional Centre Visitors (ICCV) of the Judicial Inspectorate for Correctional Services (JICS). The ICCVs are independent persons mandated to report on conditions of detention and record complaints from prisoners. The aim is to resolve these through discussions with the Head of Centre. If this fails, the complaint may be taken to regional level, or in the case of serious and urgent matters, be referred directly to the Inspecting Judge. The Correctional Services Act (as amended) also requires the head of a correctional centre to report to the Inspecting Judge all deaths of prisoners and all instances of use of force.

### Police cells

The Criminal Procedure Act (section 50) enables the police to detain a person for up to 48 hours prior to that person’s first court appearance in the event that the person was not released on police bail. The South African Police Service (SAPS) Standing Orders (SAPS, 2003) describe the procedures pertaining to the handling of persons in their custody. Amongst all government policies and procedures it is singular in adopting a definition of torture almost identical to that of the definition of torture in Article 1 of CAT. Paragraph 8 of the Standing Orders deals with ‘Special groups’, which is understood to also mean vulnerable groups. Reference is made to, amongst others, children. Paragraph 13 deals in more detail with safe custody with reference to separation of categories, the conditions of detention, the condition of detention facilities, reading material, visits to cells, restraining measures, clothing,

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drinking water and food, and some general issues. The Standing Orders require, amongst others that children must be held separate from adults and only detained as a measure of last resort. It is furthermore required that cells must have adequate lighting and ventilation; reasonable means to rest (e.g., chair and or benches); detainees must be issued with mattresses or sleeping mats which are clean and in good order; cells must be clean, and detainees must have access to adequate toilet and washing facilities with hot and cold water. Paragraph 13(6) of the Standing Orders states that ordinary persons in custody must be visited at least every hour and persons insensible from liquor or another cause, every 30 minutes and roused unless he/she is breathing normally. Persons under restraint must also be visited every hour and the restraints removed as soon as his or her condition or behaviour justifies it. The Standing Orders are silent on a number of issues that would assist in improving the safety of detainees. It does not describe what 'safe custody' is and what possible threats there may be to detainees' health and safety. This is a sore omission as it leaves officials at operational level to come to their own interpretation of what 'safe custody' is and what possible threats to it may be.

The definition of torture provided in the Standing Orders is obviously based on Article 1 of CAT but no mention is made of CAT, nor do the Standing Orders communicate the absolute prohibition of torture, cruel, inhuman and degrading treatment or punishment. It also fails to explain the very important duty placed on all officials to act when they are aware of a possible violation of CAT and that failure through 'consent or acquiescence' may make them liable for the violation(s). The Standing Orders also make no mention of the Article 2(3), stating that superior orders cannot be invoked as a justification of torture or the ill treatment of detained persons. Furthermore there is no requirement in the Standing Orders to conduct an assessment with a view to

classification and separation of detainees; these categories are predetermined. It is furthermore noticeable that the purpose of separation is not explained in the Standing Orders. The overall impression is thus that the Standing Orders, from the outset, gloss over the requirements set in the Constitution and international law; they do not explain in detail what these obligations are, nor do they explain the responsibility resting on every police officer when working with people deprived of their liberty. In view of this shortcoming, it is evident that the Standing Orders do not foster awareness with police officials regarding the absolute prohibition of torture and inter-detainee violence. Instead the Standing Orders deal with the treatment of detainees in a perfunctory manner and do little to encourage the proactive management of risk situations.

### Child and youth care centres

Child and Youth Care Centres (CYCC) now incorporates what were formally known as places of safety, schools of industries, reformatories and secure care facilities and are defined in the Children's Amendment Act (41 of 2007) as "a facility for the provision of residential care to more than six children outside the child's family environment in accordance with a residential care programme suited for the children in the facility", but excludes a number of other known facility types. These are: partial care facility; a drop-in centre; a boarding school; a school hostel or other residential facility attached to a school; a prison; or any other establishment which is maintained mainly for the tuition or training of children other than an establishment which is maintained for children ordered by a court to receive tuition or training.

In order to distinguish between one CYCC and another one must have regard to whether the facility in question has a residential care programme suited for the child in question. Importantly CYCC are now known as a single concept even though they may offer programmes for children in need of care and

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protection; children awaiting trial; children awaiting sentence or sentenced children. The provisions in the Children's Act apply to all CYCCs irrespective of the category of children they may house. There is no differentiation between the procedures applying to CYCC on the basis of the children housed in them, and all procedures apply equally to all children irrespective of whether they are children in need of care and protection or children sentenced to a CYCC in terms of the child justice system. Children can be committed by a court to a CYCC under the Child Justice Act as a sentenced child (section 76) or unsentenced child (section 29).

The Children's Amendment Act requires in section 294 that national norms and standards applicable to CYCC be developed and issued as regulations. Importantly, these must include national norms and standards relating to 'protection from abuse and neglect'. The draft regulations to the Children's Act, available at the time of writing, specifically state that children in CYCC have the right:

- To be free from physical punishment and other degrading treatment.
- To positive discipline appropriate to his or her level of development.
- To protection from all forms of emotional, physical, sexual and verbal abuse (Department of Social Development [DSD], 2009, p. 91).

The Draft Regulations also deal in a fair amount of detail with behaviour management and prohibited practices in this regard (e.g., corporal punishment) and also prescribe what reportable incidents are. The latter adds detail to a general obligation placed on employees and officials working with children or coming into contact with children, created in the Children's Act (section 110), to report to the police or the DSD if there are reasonable grounds to believe that a child has been abused or is being neglected. Of concern in respect of the Children's Act, Draft Regulations and the draft norms and

standards, is the lack of independent oversight, the weak complaints mechanisms, and the weak regime set out in law in respect of allegations of torture and other ill treatment. The Children's Act did not establish an independent oversight mechanism similar to the JICS, nor does the Act or the Draft Regulations empower the management board of the CYCC to conduct announced and unannounced inspections. The Draft Regulations make provision for a 'written complaints procedure' that is managed by the staff of the CYCC, but it is unlikely that this will be perceived as legitimate if there are serious rights violations. Lastly, if an employee or official has reported to the Department or police that he has reasonable grounds to believe that a child has been abused or is being neglected, this will be investigated by the Department and the police. There is, however, no mechanism to ensure that this investigation is indeed done, followed through and acted upon. While the Act (section 211) makes provision for a quality assurance process to be undertaken by an independent and multi-disciplinary team, the frequency with which this will be undertaken (every three years) is not sufficient to ensure a tangible sense of transparency and protection.

### **DIMENSIONS OF ILL TREATMENT OF CHILDREN IN CUSTODIAL SETTINGS**

#### **Lack of accurate information**

The overwhelming majority of children coming into conflict with the law are charged with minor offences and pose a limited risk to the interests of justice and the safety of community (Pinheiro, 2006). There are an estimated 102 000 children arrested annually in South Africa (Muntingh, 2007), but it is unknown how many of them are detained by the police and for how long. In respect of children in prison, more reliable data is available and it is a major positive development that their numbers have declined from more than 4300 in 2003 (Muntingh, 2007) to less than 850 by February 2011 (Judicial Inspectorate for Correctional Services,

**Table 1. Indicators of violence against children deprived of their liberty**

Indicator		Definition
<b>Quantitative indicators</b>		
1	Children in detention	Number of children in detention per 100,000 child population
2	Child deaths in detention	Number of child deaths in detention during a 12 month period, per 1,000 children detained
3	Self-harm	Percentage of children in detention who are victims of self-harm during a 12 month period
4	Sexual abuse	Percentage of children in detention who are victims of sexual abuse during a 12 month period
5	Separation from adults	Percentage of children in detention not wholly separated from adults
6	Closed or solitary confinement	Percentage of children in detention who have experienced closed or solitary confinement at least once during a 12 month period
7	Contact with parents and family	Percentage of children in detention who have been visited by, or visited, parents, guardians or an adult family member in the last 3 months
8	Exit interviews	Percentage of children released from detention receiving confidential exit interviews by an independent authority
<b>Policy Indicators</b>		
9	Regular independent inspections	<ul style="list-style-type: none"> <li>— Existence of a system guaranteeing regular independent inspection of places of detention</li> <li>— Percentage of places of detention that have received an independent inspection visit in the last 12 months</li> </ul>
10	Complaints mechanisms	<ul style="list-style-type: none"> <li>— Existence of a complaints system for children in detention</li> <li>— Percentage of places of detention operating a complaints system</li> </ul>
11	Limitations of physical restraint and use of force	<ul style="list-style-type: none"> <li>— Existence of specialised standards and norms concerning recourse by personnel to physical restraint and use of force with respect to children deprived of liberty</li> <li>— Percentage of children in detention who have experienced the use of restraint or force by staff at least once during a 12 month period</li> </ul>
12	Specialised disciplinary measures and procedures	<ul style="list-style-type: none"> <li>— Existence of specialised standards and norms concerning disciplinary measures and procedures with respect to children deprived of liberty</li> <li>— Percentage of children in detention who have experienced a disciplinary measure at least once during a 12 month period</li> </ul>

2011). The most recently available figures indicate that in February 2006 there were 1556 children detained in CYCC (Muntingh, 2007).

Accurate data on the extent of violence committed against and injuries sustained by children in custodial settings is by and large absent. There exists no centralised database where this is recorded in respect of prisons, police cells and CYCC. Information

that does emerge is frequently the result of media reports and/or litigation. Information made available through departmental annual reports (e.g., DCS) may indicate the number of reported assaults but this is not disaggregated in any manner and merely presents a total. Reports from the existing oversight structures (the JICS and the Independent Complaints Directorate) also do not present disaggregated data in respect of children. Annual reports from

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the DoE and DSD do not report any information pertaining to deaths and injuries of children in their facilities. Consequently, it must be accepted that our understanding of the scope and extent of the problem is limited. What is certain is that children in detention facilities are subjected to various forms of torture and ill treatment through the action or inaction of officials. Collecting information on the indicators set out in Table 1 below will enable the development of accurate data that will enable a better understanding of the problem and also

assist in monitoring trends. The indicators listed in Table 1 are extracted from the full list of child justice indicators developed by UNICEF and UNODC, pertaining to those that are relevant to injury and violence against children in detention.

### Deaths in custody cases

**Case 1:** M died in the Knysna police cells on 10 March 2001. M had been arrested on Friday 9 March 2001 on a charge of housebreaking and theft. He was detained and placed in a cell at the Knysna Police Station. Initially he was alone in the cell, but in the early hours of the morning of Saturday 10 March 2000, another detainee aged 18 years, was placed in the same cell. He was charged with drunkenness, resisting arrest, attempting to escape and refusing to furnish a police officer with his name and address. At about 03h05 on 10 March 2000, police officers found the cell covered in blood. M had apparently been battered to death. His 18-year-old cell-mate was charged with murder (Parliamentary Monitoring Group, 2002).

**Case 2:** A 16-year-old youth, who was arrested and taken from his home without the knowledge of his parents, died in the cells at Mara Police station, where he was locked up with adult inmates who were awaiting trial on charges of serious and violent crimes (Van Der Merwe, 2005).

**Case 3:** Mkhuhlu - Mpumalanga authorities are investigating a possible police cover-up after a teenager accused of shoplifting died in custody. Walter Mhlanga, aged 14, died on June 12 after allegedly repeatedly bashing his head into the wall of a police cell in Skukuza, in the Kruger National Park. The youth was arrested after stealing two bottles of cooking oil and two tins of fish from a spaza shop in his home village of Cunningmore, near Hazyview. Mhlanga, from Cunningmore, near Hazyview, was arrested on May 3 and released on R250 bail after appearing in the Mkhuhlu Magistrate's Court on May 5, charged with shoplifting (Mhlanga, 2009).

### Deaths in custody and self-harm

The Independent Complaints Directorate reported in its 2008/9 annual report that 912 cases of deaths in police custody and as a result of police action were referred to it, but it is not specified how many of these victims were children. There are, however, several media reports of children who have died in police custody, either as a result of an assault by fellow detainees, police officers or suicide.

The deaths of children in facilities operated by the DSD and the Department of Education (DoE) do not appear to be reported in the national and provincial annual reports. The only reliable system-wide information in respect of deaths of children in custody is available from the DCS and is presented in Table 2. The deaths recorded are for both natural and unnatural causes (murders, suicides and accidents). The distinction between natural and unnatural deaths is also problematic. For example, a prisoner may become HIV-positive after a sexual assault. If he ultimately dies of AIDS, the death will be recorded as natural. A death may also be the result of poor medical care, but will be noted as due to natural causes. These figures are also subject to questioning as the category 15-19 years of age include 19-year old individuals who are legally adults. Despite these limitations, it does appear that there is a downward

**Table 2. Deaths in custody; prisons 2000 to 2008**

AGES	2000	2001	2002	2003	2004	2005	2006	2007	2008
10 - 14 Years	3	0	0	0	0	0	0	0	1
15 - 19 Years	28	31	38	29	36	26	16	8	12
<b>Total</b>	<b>31</b>	<b>31</b>	<b>38</b>	<b>29</b>	<b>36</b>	<b>26</b>	<b>16</b>	<b>8</b>	<b>13</b>

trend since 2004. This trend correlates with the number of deaths in the total prison population. Accurate information on lethal and non-lethal self-harm is not available but from the available information there is reason to believe that this happens on such a scale that there is reason for concern, as noted in the case of the George Hofmeyer School discussed below. A study conducted in New Mexico found amongst 64 respondents, aged 11 to 18 years, at the Bernalillo County Juvenile Detention Centre that 46% reported suicide ideation and 32% has already attempted suicide (Smith, 1998).

### **Torture and assaults**

Children in various custodial settings are occasionally the victims of direct assaults by officials. Such instances meet the requirements of torture as defined in Article 1 of CAT. Events at the Ethokomala Reform School (Mpumalanga) in 2007 attest to the assault of children by employees and the police (Centre for Child Law v MEC for Education Mpumalanga, 2007). The case came to light as a result of legal action by the Centre for Child Law on behalf of a group of children after a psychologist at the school reported the situation to Childline. The founding affidavit describes a situation where children at the reform school were 'beaten up' on a regular basis by persons employed as child care workers, although there was reason to believe that they were not qualified as such. One of the boys, who were assaulted after he was in a fight with another boy, described it as follows: "They hit me with a lock, plank and their fists. They tied a belt around the lock and then they hit me with it. The mark where they hit with the lock is still on my face." Another boy described his experiences as follows: "The first time they beat [me] was for smoking. They were first hitting other children and then they came to me into my room and they began hitting me. They hit me with their fists, they kicked me and they hit me with a 'flat hand' on my bare back. They were four adult men hitting me. First two began hitting

me, [and] then the other joined in". Both boys were reportedly denied medical attention following the assaults. One of the boys was so traumatised by the assault that he was refusing to eat for fear that the 'child care workers' may poison his food. The boys' descriptions of the assaults are confirmed in a statement by the psychologist to Childline: "She says the children were beaten with different kinds of weapons; the children were bleeding with open wounds on their heads and [their] faces are swollen and bruised; their bodies are bruised all over." Following the assault of the first two boys, a group of nine boys were arrested at the school and in the process reportedly assaulted by the police and the 'child care workers'. The police were reportedly called in to "conduct a raid" at the school and an exchange of insults ensued between the police and the children. The boys were all charged with assault and taken to Bethal prison.

From the events described above, it appears that the assaults were motivated by the intention to inflict punishment and therefore meets the requirements in the definition of torture. The assaults were committed by public officials; they were intentional; severe physical and/or mental harm was caused and the injuries were not the result of a lawful action. Further, the fact that objects (locks, belts and planks) were used to commit the assaults adds to the severity of the crimes committed. It is perhaps a small miracle that no fatal injuries were sustained by the children. It is regrettably the situation that South Africa is yet to criminalise torture in domestic legislation as required by Article 4 of CAT. The danger created by the lack of oversight and effective investigations is also demonstrated throughout this case. There was no independent body of persons who would visit the school announced and unannounced and hear complaints from the children in confidence. The consequence was that the staff acted with impunity and believed themselves to be above the law.



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Assaults are, however, not only committed by officials but also by fellow detainees; be they adults or other children. While it can be argued that such assaults are not committed by state officials and therefore fall outside the definition of torture, it is equally true that by omitting to maintain safe custody, the state remains liable for the harm caused. If an official knows there is a risk that an assault by a fellow detainee may happen, but does nothing to prevent such an assault, the state and the official remain liable by omission. This would also apply, according to the UN Special Rapporteur on Torture, to inter-prisoner violence (UN Special Rapporteur on Torture, 2010). In the prison environment violence is often associated with the prison gangs, although care should be taken not to ascribe all inter-prisoner violence to the gangs.

### Harsh conditions of detention

Conditions of detention are important because they affect the overall experience of the particular detention environment. Conditions of detention are the result of a complex interaction between physical features (the infrastructure) and more dynamic variables such as human resources capacity and the willingness to address problems. Poor conditions of detention are firstly a violation of the right to dignity and may hold severe consequences for personal health and well-being, as has been confirmed by the European Court of Human Rights in *Kalashnikov v Russia* (ECtHR Application 47095/99, para 102). Further, poor conditions lead to frustration amongst both detainees and staff, increasing the potential for violent confrontations. In South Africa's prisons, overcrowding has remained a persistent problem for decades and there is little doubt that this has affected the detention conditions of children. Fortunately the number of children detained in prisons (sentenced and unsentenced) has declined rapidly as noted above. Despite this, conditions of detention vary greatly between prisons and a 1997 report on children in prison reflects as much (Community Law

Centre, 1997). For example, while the Correctional Services Act Regulations are clear that every prisoner must have a bed, the Judicial Inspectorate found that children at Kimberley prison were not provided with beds due to overcrowding (Office of the Inspecting Judge of Prisons, 2008). There are perhaps few police stations across South Africa that provide conditions of detention consonant with human dignity and appropriate to children. Police cells are typically bare, with few amenities and little along the line of child-appropriate features. For a child to be detained in such facilities for up to 48 hours whilst barely supervised may indeed amount to ill treatment.

Harsh conditions of detention were the subject of a case brought against the Member of the Executive Council (MEC) for Education (Gauteng Provincial Government) concerning children detained at the Luckhof High School, a school of industries. The court described the conditions of detention as follows:

“All three hostels are in varying degrees of physical deterioration. Most dormitories have no windows. The floors are in poor condition and there are no cubicles to provide privacy in the showers and in some instances no doors to toilets. There are broken windows and broken ceiling boards in the dormitories, meaning essentially that children are exposed to inclement weather in their sleeping quarters.

At this time of the year (June), and especially at the present moment, Gauteng experiences a windy season and a particularly cold snap, with temperatures dropping after sunset to zero degrees and less. There appears to be no heating in the dormitories at all, and in some instances there is no electricity. The children's beds consist of old dirty foam mattresses on old bed stands. Some of the beds examined

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had sheets and one blanket, others had two blankets. The blankets are thin and grey, such as those used in the prisons. The bedding looks old and dirty. . . . Some of the children do not have proper clothing, because they sell their clothes to outsiders to obtain money for drugs. . . . It would seem, therefore, that the first applicant is correct in its submission that these children removed from their parents and made wards of the state, are now living in conditions which may be poorer than the conditions they were removed from” (Centre for Child Law and Others v MEC for Education, Gauteng (1)SA 223 (T), 2008).

The applicants pointed out that these conditions infringe the children’s rights guaranteed by section 28 of the Bill of Rights, as well as their rights to human dignity in section 10, and the right not be subjected to cruel, inhuman and degrading treatment in section 12. In order to remedy the situation, the Centre for Child Law asked the court, inter alia, to order the MEC for Education to immediately provide each child with a sleeping bag as protection from the extreme cold (Muntingh, 2008).

### **Solitary confinement and detention *incommunicado***

Solitary confinement of children is prohibited under Rule 67 of the UNJDLS. The UN Committee against Torture has recommended its abolition in respect of all people deprived of their liberty (Nowak & McArthur, 2008). It can therefore be accepted that any form of solitary confinement, unless at own request, is undesirable in respect of adults and particularly in the case of children. Prior to the 2008 amendment of the Correctional Services Act, provision was made for solitary confinement as a disciplinary sanction, but required that it must be confirmed by the Inspecting Judge before being implemented. No distinction is made between adults and children in this regard. The Act also

provided for ‘segregation’ intended as a short-term measure used by Heads of Correctional Centres to stabilise a volatile or violent situation. There is, however, reason to believe that this was abused and effectively resulted in solitary confinement without the requisite procedural safeguards, such as being reported to the Inspecting Judge. The 2008 amendment repealed the section dealing with solitary confinement; solitary confinement is now euphemistically referred to as ‘segregation with loss of amenities’ under a general provision on segregation. The amendment still makes no distinction between adults and children.

In respect of CYCC, the draft regulations to the Children’s Act prohibits ‘isolation’ unless for medical or immediate safety concerns. The National Norms and Standards for CYCC provides additional detail stating that isolation can be used only if the child “cannot be managed and is deemed a danger to him or herself or other” and then for no longer than two hours. Events at the Ethokomala Reform School, illustrates that solitary confinement was used and the resident psychologist described it as follows (Centre for Child Law v MEC for Education Mpumalanga, 2007):

“As I stated above the children were locked in the isolation room after the assault. The isolation room is a filthy room, which although it has windows is dark. The room has no working toilets and the stench makes the children sick” (para 7)  
“. . . I would like to elaborate on the use of the isolation rooms as punishment. The children are also locked in dark rooms, called isolation rooms. More than one child may be locked in the room at a time. The children are locked in the isolation room from between one and three days. It depends on which shift locks them up. If a child is locked in on a Friday they will stay there the whole weekend until a new shift starts on the Monday” (para 28).

*Incommunicado* detention must be distinguished from solitary confinement, as nobody, apart from the officials, has contact with the detainee (Nowak & McArthur, 2008). There is no justification for preventing children from communicating with their families while being detained, yet this appears to be utilised as a means of maintaining discipline. Investigations at the George Hofmeyer School, a school of industries for girls, found an institution violating children's rights in a number of ways. One of which was to restrict children's access to their families if they had been found guilty of disciplinary transgressions. The *curator ad litem* report describes it as follows: "The 5<sup>th</sup> to 11<sup>th</sup> Applicants are starved of contact with their families. Unlike the other hostels, the girls in Lowenburg [the punishment hostel] are not allowed to make outgoing calls. They are in study sessions from 6.30 till 9.00 at night, and cannot take calls during this time" (Curator Ad Litem, 2005, p. 10). Although a direct link cannot be drawn with *incommunicado* detention, it was reported from the same school that self-harm in the form of cutting was common amongst the girls detained there and was one of the 'transgressions' for which they were placed in the punishment hostel (Curator Ad Litem, 2005, p. 11).

### **Illegal and inappropriate means of maintaining discipline**

It is frequently children with behavioural problems who end up in places of detention and consequently pose significant challenges to the staff in maintaining order and discipline (Smith, 1998, p. 63). Moreover, there is a strong link between children in conflict with the law and family problems, learning disabilities, abuse and neglect (Smith, 1998). Little attention is also paid to the mental health of children in detention and this may contribute to disciplinary problems, self-harm and aggression (Calvert, 2004; Smith, 1998). Without proper guidance and training, staff may resort to a variety of inappropriate and illegal means to maintain discipline. While some of these techniques may involve physical punishment,

others may not, but both undoubtedly create an environment conducive to the violation of children's rights. It is therefore with good reason that the Children's Act, Draft Regulations and National Norms and Standards pay particular attention to discipline and prohibits a range of "behaviour management actions" such as physical punishment, group punishment and physical restraint (DSD, 2009). The use of corporal punishment in state institutions remains a persistent problem despite it being illegal and outlawed (Waterhouse, 2007). One form of punishment reported from the George Hofmeyer School was described as follows: "... several of the Applicants made allegations that the Principal used to order other girls to sit on each of their arms and legs, and he would then force them to talk or give him information" (Curator Ad Litem, 2005, p. 13). The use of restraint must be a measure of absolute last resort and research findings indicate that children who have been physically restrained experience it as an anger-invoking incident and that staff are also adversely affected by restraint incidents (Smith & Bowman, 2009).

A variety of illegal practices at the George Hofmeyer School were reported by the *curator ad litem* which included physical punishments (hitting and banging of heads); humiliation or ridicule (including being required to strip in front of others and being called whores once their underwear was revealed); deprivation of access to parents and family; being placed in the punishment hostel for being in a lesbian relationship; and frequent verbal abuse, which included swearing and ridicule (Curator Ad Litem, 2005).

When staff members at institutions feel that they are not able to handle the children, calling the police in to arrest the children is another option: "In that instance, the seven girls [names] were arrested on 14 February 2005 because they had been sitting on the roof and spent four days in police cells. They were released back to the School on 18 February

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after the attorneys began the process towards a High Court application” (Curator Ad Litem, 2005, p. 10). In the above it was also noted that the Ethokomala Reform School also called the police in when some of the boys were involved in a fight and they were reportedly assaulted by the police.

### Separation of categories

International instruments dealing with detention (e.g., the UNJDs and the UN Standard Minimum Rules for the Treatment of Prisoners) require that children must be detained separately from adults and domestic legislation and policy (e.g., the Constitution, Correctional Services Act and the SAPS Standing Orders) confirm this. Further separations in respect of sentenced and unsentenced, male and female, and risk category are also provided for in law. The separation of different categories of detainees is required to promote safe custody and especially in the case of children, this is critically important. In reality, however, this is not always adhered to as some young adults may appear to be under the age of 18 years or vice versa. This has been noted as a problem in South African prisons due to problems with age determination in the criminal justice system (Community Law Centre, 1997). Placing young adults with children in police cells have also been noted to occur, often with tragic consequences. A case from the Westville prison attests to the results of not strictly enforcing the separation of children from adults:

“An internal investigation will be launched at Westville Prison following rape allegations of a 15-year-old boy who is awaiting trial. The boy was allegedly repeatedly raped by an inmate. He was arrested for shoplifting a pair of trousers and released into his parent’s custody. But he failed to appear for a court hearing and was rearrested. Correctional Services spokesman Manelisi Wolela said the boy was arrested last month and kept at the juvenile section. “He reportedly fell sick the next day and was admitted to the hospital section at Medium B where a single

offender allegedly abused him.” Wolela said the perpetrator was positively identified. A criminal case had been opened against him and he would face internal disciplinary action” (Memela, 2008, p. 19).

Assaults and sexual assaults inflicted by fellow detainees are not uncommon and there is thus a special duty on staff members to be vigilant, even when legally required separations are adhered to. There is evidence that sexual victimisation in prisons is profile-driven and inmates displaying certain characteristics are more vulnerable to aggression, making them more likely to be ‘turned’ into the feminine character (Cronan, 2008). Targets are usually those who are least able to defend themselves, who lack credibility with prison staff or are disliked by inmates and staff and those who are easily ostracised (Dumond, 2006). Lack of knowledge of the prison and gang system, youthfulness, economic circumstances, weaker physical attributes, reluctance to engage in violence, conviction for a crime lacking the element of violence, and aesthetically pleasing looks, are all factors which contribute to a prisoner’s risk profile and possible assignment to the female gender. Research on victimisation by fellow detainees in CYCC does not appear to be readily available, but it can be safely assumed that there will be commonalities between the drivers of violence in prisons and in CYCC.

### Trafficking

The extent to which children fall prey to trafficking in places of detention is uncertain. The only reliable information on this emanates from the Jali Commission’s investigations into prison corruption and the treatment of prisoners (Jali Commission, 2006). The screening on national television of a prisoner-made video at Grootvlei prison showed how a prison warder procured the sexual services of a juvenile prisoner for an older inmate. The Jali Commission found ample evidence of warders involved directly in raping young prisoners and being complicit in trafficking juvenile prisoners (Jali

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Commission, 2006). The extent to which the DCS and any of the other responsible departments are able to utilise the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 to deal with sexual violence in custodial settings is uncertain and will require further research.

### RECOMMENDATIONS

The above has shown that there are significant gaps in the recording of deaths and injuries of children in places of detention. The responsible departments need to report disaggregated data on how many children die and are injured, the results of investigations, and steps taken to prevent recurrences. While official data is important, there is also the need to undertake victimisation surveys with children deprived of their liberty to measure the accuracy of official data. It is recommended that data in this regard is collected according to the twelve indicators on violence against children deprived of their liberty developed by UNICEF and the UNODC and set out in Table 1.

#### Preventive measures under CAT

**Art. 10** (1) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. (2) Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

**Art. 11** Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

The absence of legislation criminalising torture in South Africa remains a critical shortcoming as common law offences such as assault and assault with intent to cause grievous bodily harm are insufficient to prosecute perpetrators of torture. An important consequence of this legal shortcoming is that staff working with detained persons, including children, are not trained regarding the prohibition of torture and ill treatment, as is required by Article 10 of CAT. In the case of staff working with children this is of particular importance. The enactment of comprehensive legislation dealing with torture is urgently needed.

Rigorous and comprehensive staff training must be undertaken to ensure that all staff working with children in detention facilities are able to perform their duties properly and to ensure that unsuitable and/or unqualified staff are not permitted to work with children. In addition to training regarding the absolute prohibition of torture and ill treatment, the following are regarded as key recommendations to ensure suitable and qualified personnel:

- All staff should oppose and report corruption.
- Staff should ensure the full protection of children's physical and mental health.
- Staff should respect children's right to privacy and safeguard confidential matters.
- Training on child welfare and children's rights should be provided and ongoing.
- The staff ratio should be sufficient and consistent across all facilities where children are detained (Martynowicz, 2009, p. 91).

Article 11 of CAT requires the regular review of rules, instructions, methods and practices as well as arrangements for the custody of all detained persons. Having appropriate and relevant policies and procedures in place is essential to ensure the safe custody of all prisoners and children in particular. The above cases have demonstrated several instances of policy gaps as well as policy vagueness

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and uncertainty. Such policies and procedures must be informed by emerging knowledge as well as incidents where children were harmed with a view to prevent a recurrence of such incidents. The importance of regular policy and procedure review was also confirmed in an extensive review of child detention in the Republic of Ireland and concluded that:

“All detention facilities should have up-to-date child protection policies and procedures in place, made available to staff, children and their parents or guardians. There must be a child friendly version made available to all children on admission” (Martynowicz, 2009, p. 90).

While the JICS has achieved much to promote transparency and establish oversight in the prison system through its ICCV, police cells and CYCC remain without similar oversight mechanisms. Years of research and experience in the prevention of torture in other jurisdictions have demonstrated that visiting and monitoring places of detention is the most effective mechanism in preventing torture and ill-treatment (Ludwidge, 2006). Independent oversight mechanisms need to be established for especially police cells and CYCC.

The promotion of transparency should be seen within the context of the duty placed on states parties by Art. 13 of CAT to ensure that any individual who alleges that he or she has been subjected to torture and ill treatment has the right to complain to and have the case promptly and impartially examined by its competent authorities. Moreover, the complainant and witnesses must be protected against ill treatment and intimidation.

Art. 12 of CAT places a duty on states to investigate complaints of torture and other ill treatment. Whenever there are ‘reasonable grounds’ to believe that torture and/or other ill treatment has taken

place, the state has a duty to ensure that this is promptly investigated by competent authorities in an impartial manner. The threshold of ‘reasonable grounds’ for initiating an investigation is important, as it does not require a complaint to be lodged by the victim. Victims often do not report victimisation for fear of reprisal, or they are not able to complain. For the purposes of initiating an investigation, it really does not matter where the suspicion comes from (Burgers & Danelius, 1988). Undertaking investigations promptly is equally important. There are, however, no international guidelines as to what ‘prompt’ means but it has been interpreted to require an investigation “in the immediate aftermath of the incident, when memories are fresh” (Assenov and Others vs Bulgaria, 1999, p. 23). A high premium is furthermore placed on the impartiality of the investigation, as this is central to its credibility remaining intact. The term ‘impartiality’ means free from undue bias and is conceptually different from ‘independence’, which suggests that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators. The

### The right to complain, the duty to investigate and the right to redress under CAT

**Art. 13** Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

**Art. 14** (1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

two notions are, however, closely interlinked, as a lack of independence is commonly seen as an indicator of partiality (Redress Trust, 2004).

### Key messages

- All institutions dealing with children deprived of their liberty must fully acknowledge in policy and practice the risks posed to children through the deprivation of liberty and draw on the wealth information and experience developed internationally in the prevention of torture and other ill treatment in custodial settings.
- Information systems must be in place to collect accurate and up to date data on the treatment and conditions of detention of children under any form of detention.
- South Africa's obligations under the UN Convention against Torture must be actively promoted with all government departments, individual institutions, professional bodies and non-governmental organisations working with children deprived of their liberty. The obligations under the Convention and measures to prevent torture and other ill treatment must be part of the training curricula of staff working with children in detention situations.
- All places where children are detained must be subject to independent oversight in the form of regular announced and unannounced inspections by independent persons.
- Whenever there is reason to believe that a child in detention has been subjected to any form of torture or other ill treatment, this must be thoroughly investigated and, if necessary, criminal charges be laid against the alleged perpetrators.

Art. 14 of CAT ensures the right of victims of torture to obtain redress. The nature and scope of redress is guided by *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2006). Redress should address the following: restitution, compensation, rehabilitation, and guarantees of non-repetition.

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