

**The rights of children born in prison or living with a parent in
prison: a child centred approach**

by

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ABSTRACT

Section 28(2) of the Constitution provides that the child's best interests are of paramount importance in every matter concerning the child. This constitutional injunction has brought a new twist in the criminal justice system leading to the courts considering the interests of the child before sentencing a primary caregiver. The research explores how the best interest principle, as discussed by the courts in criminal law, can be applied in developing a child centred approach to the rights of children born or living with a parent in a correctional facility. The international law provisions and regulations that are applicable in developing a child centred approach to the rights of children in correctional facilities are also discussed. National legislative provisions and regulations addressing the rights of children in general children are also discussed in assessing the legitimacy of the protection of children in prisons with parents. The author argues how the best interest principle can be applied in policies of the Department of Social Development and Department of Correctional Services as a guideline to protect the rights of these children when they are living in the correctional facility. The best interest principle should also be applied when the children born or living in correctional facilities are placed in alternative care. Remarks and recommendations on how best the child centred approach can be developed in the DCS and DSD when they deal with these children born or living in a correctional facility are made in conclusion.

SAMEVATTING

Artikel 28(2) van die Grondwet voorsien dat die kind se beste belang van die allergrootste belang is in elke aangeleentheid rakende die kind. Hierdie grondwetlike bevel het nuwe wending in die kriminele regstelsel ingebring wat daartoe gelei het dat die howe die belange van die kind oorweeg voordat 'n primêre versorger gevonniss word. Die navorser het ondersoek ingestel na hoe die beginsel van beste belang, soos deur die howe in kriminele reg bespreek, toegepas kan word ter ontwikkeling van 'n kindgesentreerde benadering tot die regte van kinders wat in 'n korrektiewe fasiliteit gebore word of daar woon. Die bepalings en regulasies van internasionale reg wat toepaslik is vir 'n kindgesentreerde benadering tot die regte van kinders in korrektiewe fasiliteite word ook bespreek. Nasionale wetgewende bepalings en regulasies wat die regte van kinders in die algemeen onder die loep neem, word ook bespreek tydens die assessering van die legitimiteit van die beskerming van kinders in gevangnisse met ouers. Die outeur redeneer hoe die beginsel van beste belang in beleide van die Departement van Sosiale Ontwikkeling en die Departement van Korrektiewe Dienste toegepas kan word as 'n riglyn om die regte van hierdie kinders te beskerm terwyl hulle in die korrektiewe fasiliteit woon. Die beginsel van beste belang moet ook toegepas word wanneer die kinders wat in die korrektiewe fasiliteite woon of daar gebore word, in alternatiewe sorg geplaas word. Ter afsluiting word opmerkings en aanbevelings gemaak oor hoe die kindgesentreerde benadering ten beste ontwikkel word in die DKD en DSO wanneer hulle met hierdie kinders wat in 'n korrektiewe fasiliteit gebore word of daar woon.

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights of the Child
CRC	Convention on the Rights of the Child
CCR	Constitutional Court Review
CSPRI	Civil Society Prison Reform Initiative
DSD	Department of Social Development
DCS	Department of Correctional Services
IJCR	International Journal of Children's Rights
MJRL	Michigan Journal of Race and Law
PSILR	Penn State International Law Review
PER/PELJ	Potchefstroom Electronic Law Journal
SACJ	South African Journal of Criminal Justice
SAJCR	South African Journal of Criminal Justice
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Journal of Public Law
Stell LR	Stellenbosch Law Review
UN	United Nations

1 Introduction

Section 28 of the *Constitution of the Republic of South Africa, 1996*¹ is a special provision in the Bill of Rights that sets out the rights of children and has been internationally hailed as a good example of a provision advancing the rights of children and for its protection thereof.² Section 28(1)(b) and (c) of the Constitution provides respectively that “every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment” and “every child has the right to basic nutrition, shelter, basic health care services and social services”. Section 28(2) further states that “a child's best interests are of paramount importance in every matter concerning the child”.

Section 20 of the *Correctional Services Act*³ permitted infants and young children to remain with their incarcerated mothers up to the age of five.⁴ As a result of the controversial nature of keeping infants and young children behind bars⁵ the *Correctional Services Amendment Act*⁶ amended section 20 of the *Correctional Services Act* and now provides that a female inmate may have her child with her until the child is two years of age, or “until such time as the child can be appropriately placed, taking into consideration the best interests

1 *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution).

2 Skelton A “Constitutional protection of children’s rights” in Boezaart T (eds) *Child law in South Africa* (Juta Cape Town 2009) 265.

3 *Correctional Services Act* 111 of 1998 (hereafter *Correctional Services Act*).

4 Dissel A “Correctional Services Act: a survey of the latest amendments” August 2008 *CSPRI Newsletter* <http://www.csvr.org.za/docs/cspri27.pdf> [date of use 2 April 2012].

5 A report by Humanitarian news and Analysis “Innocents in jail” 22/3/2010 IRIN <http://www.irinnews.org/Report/88509/SOUTH-AFRICA-Innocents-in-jail> [date of use 18 April 2012] describes a situation where toddler has spent the first 27 months of her life in the women's section of Westville Prison, near the port city of Durban, South Africa. She was still in the womb when her mother, was sentenced to an eight-year jail term for identity fraud. The toddler and her mother share a cell. Other children in similar situations ages range from new-born to about three years old; some were born in prison, others arrived with their mothers. The mothers are awaiting trial or serving prison terms for such crimes as murder, attempted murder, fraud, corruption and theft. Similar stories have been reported by Makhaye “Liberating babies from jail” 25/4/2010 *City Press* <http://www.citypress.co.za/SouthAfrica/Features/Liberating-babies-from-jail-20100424> [date of use 19 April 2012] and Curnow R “Babies behind bars” 5/5/2011 Wits Justice Project (CNN) <http://www.journalism.co.za/babies-behind-bars-doing-time-with-mom-cnn.html> [date of use 2 April 2012].

6 *Correctional Services Amendment Act* 25 of 2008.

of the child”.⁷ But, also in response to some comments⁸ regarding preparation for the care of the child after removal from the mother, the amended section 20 now provides that on admission, the Department of Social Development⁹ (hereafter the DSD) must, immediately, and in conjunction with the Department of Correctional Services (hereafter the DCS) take steps to facilitate the process of proper placement of the child.¹⁰ Section 20(3) provides that “where practicable the National Commissioner must insure that a mother and child unit is available for the accommodation of female inmates and the children whom they may be permitted to have with them”.

The right of the child to parental care and the best interest principle are also entrenched in the Convention on the Rights of the Child¹¹ (see inter alia articles 3¹², 9(1)¹³ and 9(4)¹⁴). Guideline 48 of the UN Guidelines for the Protection and Alternative Care of Children without Parental Care (2010)¹⁵ recommends that

States should take into account the *best interests of the child* when deciding whether to remove children born in prison and children living in prison with a parent. The removal of such children should be treated in the same way as other

7 S 20(a) of the *Correctional Services Amendment Act*.

8 Dissel A “Correctional Services Act: a survey of the latest amendments” August 2008 *CSPRI Newsletter* <http://www.csvr.org.za/docs/cspri27.pdf> [date of use 2 April 2012].

9 Hereafter DCS.

10 S 20(b) *Correctional Services Amendment Act*.

11 Convention on the Rights of the Child (hereafter CRC).

12 A 3: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

13 A 9(1): “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”.

14 A 9(4): “Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned”.

15 UN General Assembly *UN Guidelines on the Alternative Care of Children 2009* (hereafter referred to as UN Guidelines Protection and Alternative Care of Children).

instances where separation is considered. Best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community.¹⁶

Currently in South Africa, children that are born of incarcerated pregnant mothers or babies accompanying the mother to prison because they cannot due to their tender age be weaned¹⁷ may remain with their mother until these children are 24 months old.¹⁸ The children are then placed with the family member of the offender or placed in foster care through the DSD if a suitable family member cannot be found. In a recent address the Minister of Correctional Services, Mapisa-Nqakula expressed concerns about “the fact that our centres do not necessarily provide the best environment for the proper upbringing of children”.¹⁹

Although legislation provides that a children born or living with their mothers in correctional facilities should stay with their mother for the first two years, the absence of the necessary legislation and or policy setting standards and principles to ensure that prison environments are conducive to the proper upbringing of the child in the first two year of their life remains problematic.²⁰ A further matter of concern is the placement of these children in alternative care when reaching the age of two years old in the absence of an individualised child centred approach by the DSD and DCS when every child’s placement is considered. In the absence of an individualised child centred approach a

16 Emphasis provided.

17 As inserted by s 14 of the *Correctional Services Amendment Act* 25 of 2008.

18 The Department of Correctional Services launched the *Imbeleko* Project (women and children in correctional facilities) in March 2010 where it seeks to provide a home-like environment in centres for children below the age of two. It also seeks to place children of two years of age and above outside correctional facilities with sustainable family structures. The strategy of *Imbeleko* places babies out of correctional facilities and into the care of relatives or willing community members and improves the conditions of those living in correctional facilities by converting the "prison" environment into a child-friendly environment where babies are accommodated with their mothers. (DCS “Key departmental projects and programmes” <http://www.babiesbehindbars.com/About%20Us/Imbeleko-Project.html> [date of use 3 April 2012]).

19 Mapisa-Nqakula “Address by the Minister of Correctional Services at the DSD conference on early childhood development” East London 28/03/2012 <http://www.polity.org.za/article/sa-mapisa-nqakula-address-by-the-minister-of-correctional-services-at-the-dsd-conference-on-early-childhood-development-east-london-28032012-2012-03-28> [date of use 3 April 2012].

20 Section 20 (1) of the Correctional Services Act.

series of problems/questions may arise. For example, will it be in the best interest of a child to be placed in foster care where an incarcerated mother has a six months sentence left? Will it be in the best interest of a child to place a child in a home where no family members can be reached or are willing to take care of the child or in cases where foster care is not available?

In *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)*²¹ Sachs J emphasises that each child must be looked at as an individual, not as an abstraction. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned. Skelton²² recommends that

The determination will depend on the circumstances of each case, and this is not a weakness, but strength. A truly child-centred approach requires an in-depth consideration of the needs and rights of the particular child in the 'precise real-life situation' he or she is in. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child.

In *S v M*²³ Sachs J remarks that no constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. He further emphasises that foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.²⁴ A truly child centred requires an in-depth consideration of the needs and rights of a particular child in a real life situation when determining the best interests of the child.²⁵

21 *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 3 SA 183 (CC) para 55.

22 Skelton "Severing the umbilical cord: a subtle jurisprudential shift regarding children and their primary caregivers" 2008 CCR 359.

23 *S v M* 2008 3 SA (CC) para 20 (hereafter *S v M*).

24 *S v M* para 21.

25 *S v M* para 24.

The dissertation focuses on the question how the best interest of the child principle should be interpreted and used as a guideline in a child centred approach to guide decisions taken in respect of children born in prison or living with their mothers in prison. In the following sections, the rights of these children in terms of section 28 of the Bill of Rights and the South African Constitution as a whole will be analysed. The research will question whether the current policies and regulations are in the best interests of children born in prison or living with their mothers in prison. In addition to constitutional provisions, international law, the Convention on the Rights of the Child (hereafter CRC), the UN Guidelines Protection and Alternative Care of Children and other relevant international and supra-national measures will also form part of the discussion. Thereafter national legislation and national policies used by the Correctional Services Department will also be discussed. In conclusion, case law will be analysed and discussed in a bid to ascertain the impact of the court's decisions in developing a child centred approach to the rights of children born or living in prisons with a parent. Remarks and recommendations on how best the child centred approach can be developed given at the end.

2 International law

The requirement that child should be entitled to special legal protection originated from international law. The best interest principle is an internationally recognised principle that is to be applied each time a decision that would affect a child is to be made. This section will analyse the protection of children living behind bars with their mothers at international and regional level and the instrument to be analysed include the CRC, African Charter on the Rights and Welfare of the Child (hereafter ACRWC) and UN Guidelines Protection and Alternative Care of Children.

2.1 *The Convention on the Rights of the Child (CRC)*

Article 3 of the CRC provides that in all actions concerning children, the best interests of the child shall be a primary consideration, even for the children of incarcerated parents. The Committee for the Rights of the Child has

recommends that where the defendant has child caring responsibilities, the principle of the best interests of the child should be carefully and independently considered by independent professionals and taken into account in all decisions related to detention, including pre-trial detention and sentencing, and decisions concerning the placement of the child.²⁶ Children whose parents had been implicated by the criminal justice system have equal rights to all other children. The best interest principle implies that even when the courts of law are passing sentences on the primary care giver, the best interests of the child have to be considered. The legislature and administrative authorities when they make laws and policies should also consider the best interests of the child each time they are to enact a law regulating the stay of mothers and children in correctional facilities.

The Preamble of the CRC acknowledges that a child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. Safeguarding the child through appropriate legal protection starts when the state acts upon its obligation to make legislative and other measures to protect the rights of children. It is my view that these legislative measures also include making policies and regulations aimed at protecting the best interests of the child who is born or living in correctional facility with their parent.

In addition, the CRC in its preamble recognises that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. Although it does not provide specifically for children living with imprisoned mothers, there are several provisions that are useful in the protection of children in such a situation. For the CRC to really advance the rights and wellbeing of the children of the incarcerated, children's rights provided for in

26 Consideration of Reports submitted by States Parties under Article 44 of the Convention. Concluding Observations, Thailand, 17th March 2006, CRC/C/THA/CO/2 48.

the convention need to be applied by everyone who is directly or indirectly concerned with a parent's involvement with the criminal justice system.²⁷

Article 9 of the CRC provides that state parties shall ensure that a child shall not be separated from his or her parents against their will except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. The article also provides that when a child is separated from one or both parents contact with the separated parent should be maintained on a regular basis, except if it is contrary to the child's best interests.²⁸ Article 16(1) of the CRC provides that

No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, or to unlawful attacks on his or her honour and reputation.

Furthermore, when a child is temporarily or permanently removed from the family environment, because of the best interest of that child, the child is eligible to receive special protection and assistance from the state.²⁹ These provisions highlight the ideal environment where a child should grow up with unhindered access to all parents. When the child is to be removed from the family environment alternative care that is suitable for giving the child a suitable environment should be provided. The right to family care, parental care or to appropriate alternative care when removed from the family environment is also constitutionally provided for by section 28(1) (b) of the Constitution and this will be discussed later.

The right of the child to grow up in a family environment should also be considered in light of the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.³⁰ Article 27(2) provides that parents or others responsible for child should have the primary responsibility to secure within their abilities and financial capabilities, the conditions of living necessary for the child's development. This places an

27 Mason-White H and Kearney HF *Children of (Alleged) Offenders: Revised Draft Framework for Decision Making* (Quaker United Nations Office March 2012) 5.

28 A 9(3) of the CRC.

29 A 20(1) of the CRC.

30 A 27(1) of the CRC.

obligation on the state to ensure that the children living with their imprisoned mothers should get the adequate resources to create the necessary family environment needed for the development of the child's physical, mental, spiritual, moral and social development. Facilities for children living in prison should be child-friendly, clean and hygienic, designed with their development and safety in mind. The duty of the state arises from two aspects; firstly the state has a duty to provide for these children when their parent is in prison as the state is responsible for all the people in correctional facilities. Secondly these children are in the correctional facilities because of their parent's crimes and they should be treated as innocent as they are and should not be deprived of their needs necessary for a proper development.

In addition to the right of keeping the child in a family environment, article 24 of the CRC recognises the child's right to the highest attainable standard of health and to facilities for the health care for the treatment of illness and rehabilitation of health.³¹ Article 24(2)(c) further provides that states parties shall ensure the implementation of the child's right to access to health services and take appropriate measures to ensure appropriate pre-natal and post-natal health care for mothers. This right gives protection to the unborn child by stipulating that pregnant mothers should have pre-natal health care services and implies that female prison facilities should provide an effecting nursing facility that protects the pregnant mother, the unborn and the newly born child and the infant in early years. Children have particular and specific health needs which may not be easily met in prison and most likely to be a health risk, particularly in situations of overcrowding or inadequate nutrition.³²

The child's right to live in an environment conducive for the physical, mental, spiritual, moral and social development cannot be separated from the child's right to access to right to health care, adequate nutrition³³ and to be protected

31 A 24(1) of the CRC.

32 Robertson Collateral Convicts: *Children of incarcerated parents: Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion* 2011 23.

33 A 27 of the CRC.

against environmental dangers and risk.³⁴ It is my submission therefore that these two articles are interconnected in that, for a child to be able to acquire the spiritual, moral and physical development of their health, daily diet should be at its best to allow proper development. This then makes it an obligation at international law for states to provide children of incarcerated mothers with their basic socio-economic needs.

In as much as the state parties have an obligation to provide socio-economic rights to children without parental care, international law has provided limitations curtailing the availability of socio-economic rights. The CRC in article 4 as read with the General Comments 5 of 2003³⁵ creates an obligation on states to take legislative, administrative and other steps to give effect to all rights contained in the Convention and to fulfil socio-economic rights in accordance with the maximum available resources. However the lack of resources seems to have provided some form of justification for states' failure to provide socio-economic rights. Where a state argues that it lacks available resources it should still be able to prove within their own national budget that it took all the measures necessary to realise a child's rights, with specific relevance to vulnerable children.³⁶ Even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.³⁷

Although article 37 of the CRC does not directly address children born or living with incarcerated mothers the right provided for in this article is also applicable to children born to incarcerated mothers.³⁸ These children are likewise deprived of their liberty because they are in the care with of

34 A 24 of the CRC.

35 General Measures of Implementation of the Convention on the Rights of the Child CRC/GC/2003/5.

36 Stewart L "Resource constraints and a child's right to legal representation in civil matter at state expense in South Africa" 2011 *IJCR* 302.

37 The CRC Committee (General Comment No. 5 (2003) 5.

38 A 37 "States Parties shall ensure that: (b) no child shall be deprived of his or her liberty unlawfully or arbitrarily... (c) 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".

imprisoned mothers. Accordingly, children staying with their imprisoned mothers should similarly be treated with humanity and inherent dignity in a manner that is consistent with the child's age. It should also be considered that just as incarceration of a child should be considered as a last resort, the incarceration of a primary care giver where it would result in the child having to stay with the parent in prison should be considered as a last resort as well.³⁹

2.2 The African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC as a regional law or supra-international law specifically applicable on Africa was passed in 1990 to address African children's unique problems including traditional barriers to development, armed conflicts, hunger, socio-economic rights, to mention but a few. The ACRWC in its preamble just like the CRC recognises the need for a child to grow up in a family environment and an atmosphere of happiness, love and understanding. The Charter unlike the CRC addresses the needs of children of imprisoned mothers explicitly because in most part of the African continent mothers are predominantly the primary caregivers of a child.⁴⁰ Another striking aspect within the African continent is that according to Viljoen children are more likely to be suffering from human rights violations than adults and more likely victims than children on the other continents.⁴¹

The ACRWC requires state parties to provide special treatment to expectant mothers and to mothers of infants and young children who have been

39 The courts in a number of cases have clearly addressed the issue of the incarceration of a primary caregiver; In *S v Howells* (1999 1 SACR 675 (C) 682) the judge argued that it would appear that the real risk that, should the appellant be imprisoned, her children will have to be taken into care and this makes it obviously highly regrettable and makes the Court reluctant to condemn appellant to imprisonment. In *S v M* the judge argued that in as much as the constitutional provision that a child should be detained as a last resort is mostly applicable to child offenders, there can still be a change in the mind-set that takes appropriately equivalent account of the new constitutional vision in relation to children of incarcerated parents.

40 Chirwa D "The merits and demerits of the African Charter on the Rights and Welfare of the Child" 2002 *IJCR* 157.

41 Viljoen F "The African Charter on the Rights and Welfare of the Child" in Boezaart *Child Law in South Africa* 332.

accused or found guilty of infringing the penal law and ensure that a non-custodial sentence will always be preferable.⁴² Article 30(1) (d) provides that state parties should ensure that mothers are not imprisoned with their children though the article fails to address the situation where a child is a baby at an age where they cannot be separated from their mother. The framework of article 30 of the ACRWC provides for the consideration of alternatives to custody to ensure that deprivation of liberty is only as a last resort as apprehension of a pregnant mother and a mother with a child is a serious violation of the rights of the child. State parties will be under a duty to consider non-custodial sentences, to develop alternatives to institutional confinement and where that is not possible, to develop special alternative institutions for confined mothers.⁴³ Both the CRC and the ACRWC permit imprisonment of a mother and the child as the measure of last resort. Article 4 of the ACRWC provides that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

However, the reality of correctional facilities design is based on models that do not provide for an environment conducive for the raising of children especially units for mother and baby. Most correctional centres are over populated and creating special units for children is out of reach for many states as they are expensive.⁴⁴ Furthermore, state parties should promote measures of alternative to institutional confinement for the treatment of such mothers and establish special institutions for holding such.⁴⁵

2.3 UN Guidelines Protection and Alternative Care of Children

The CRC⁴⁶ and the ACRWC⁴⁷ provide that when a child is removed from their family environment they should be provided with alternative care. It is therefore necessary to analyse the UN Guidelines Protection and Alternative

42 A 30(1)(a) of the ACRWC.

43 Van Bueren *The International Law on the Rights and Welfare of the Child* (Kluwer Law the Hague 1998) 227.

44 Schoeman 2011 *Child Abuse Research in South Africa* 77.

45 A 30(1) (b) and (c).

46 A 20(1) (2).

47 A 25 of the ACRWC.

Care of Children mentioned above.⁴⁸ Although this document is not legally binding it provides valuable guidelines for international and domestic jurisdictions concerning the care and treatment of children to be taken into account when alternative care has to be considered.

The UN General Assembly adopted a resolution on the 24th of February 2010 on the Guidelines for Alternative Care of Children. The purpose of the Guidelines is to enhance the implementation of the CRC and the relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care. Furthermore the guidelines are designed to support efforts of keeping children in the care of their family and if it is not in the best interests of the child, the most suitable forms of alternative care are identified and provided.⁴⁹ The Guidelines can be used by competent authorities including hospitals, boarding schools, hospitals, and centres for children with special needs and other places which may be responsible for the care of children.⁵⁰ The Guidelines therefore should be applicable to children living in correctional facilities and relevant authorities dealing with imprisoned mothers should consider and apply these guidelines as valuable international directives. It is recommended when the Department of Social Development has to place a child in alternative care when a child reaches the age of two years, these guidelines may provide the department with assistance when determining placement of a child.

In terms of the Guidelines the family is recognised as the fundamental unit of society and the natural environment for the growth, well-being and protection of the children and efforts should primarily be directed at enabling the children remain in the care of their parents.⁵¹ Where the family is unable to provide adequate care to the child, the state is responsible for protecting the rights of

48 See Introduction.

49 Guideline 1, 2(a) of the UN Guidelines Protection and Alternative Care of Children.

50 Guideline 31 of the UN Guidelines Protection and Alternative Care of Children.

51 Guidelines 3 and 4 of the UN Guidelines Protection and Alternative Care of Children.

the child and ensuring appropriate alternative care with or through competent local authorities and child authorised civil society organisations.⁵²

The best interests of the child shall be a determinant factor in identifying courses of action for children deprived of parental care. When that determination is made the needs and the rights of the child should be taken into account considering the child's right to be heard, the child's safety and security as well as full and personal development of their rights and family. The best interest of the child principle, which is a universally accepted principle, covers all the areas where decisions concerning the child is to be made and the principle contain the essence of children's rights. Guideline 14 states that the removal of a child from the family care should be seen as a last resort and should be done in the best interests of the child as a way of protecting and respecting the family unit and environment. States have an obligation to develop family-oriented policies designed to strengthen parents' ability to care for their children.⁵³ These provisions that emanate from the view that the family is the best environment that provides the effective and recommended means for proper child development.

When alternative care is considered the following should be taken into account, firstly the child should be as close to the habitual residence as possible to encourage potential reintegration with their family.⁵⁴ Secondly, children must be treated with dignity and respect at all times and must benefit from effective protection from abuse.⁵⁵ In my opinion, children who have been placed in alternative care should have all their rights safeguarded including access to education, health and other basic services, the right to identity, freedom of religion and belief, protection of property to mention but a few.

Guideline 48 is specifically relevant for the research question posed because it addresses the scenario where a primary care giver is the subject of deprivation of liberty as a result of detention. The guideline provides that when

52 Guideline 5 of the UN Guidelines Protection and Alternative Care of Children.

53 Guideline 33 of the UN Guidelines Protection and Alternative Care of Children.

54 Guidelines 11 and 12 of the UN Guidelines Protection and Alternative Care of Children.

55 Guideline 13 of the UN Guidelines Protection and Alternative Care of Children.

a child's sole or main caregiver may be subject to the deprivation of liberty as a result of preventative detention or sentencing decisions, non-custodial sentences or remand measures should be taken if possible.

The best interests of the child should be given due consideration when deciding whether to remove children born in prison and the children living in prison facilities with an incarcerated primary caregiver. Guideline 48 has the same provisions as article 30 of the ACRWC which provides that non-custodial sentence will always be the first to be considered and ensure that children shall not be imprisoned with their mothers. Where non-custodial sentences or remand is not an option, children remaining in custody with their parents are entitled to adequate care and protection and their status as free individuals with access to activities in the community should be guaranteed.⁵⁶ This provision therefore implies that states should make sure that those children living in prisons are afforded the necessary resources to enable them to have a childhood similar to those children living outside a correctional facility.

2.4 Standard Minimum Rules for the Treatment of Prisoners 1957

The Standard Minimum Rules for the Treatment of Prisoners 1957 are worth noting as they also address the issue of women prisoners and their children. The first United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955 adopted these rules and the Economic Council approved it in terms of resolution 663 (XXIV) of the 31st of July 1957. The rules have no legally binding effect. It sets out what is generally accepted as being a good principle and practice in the treatment of prisoners and have been accepted by the United Nations as a good practice.

Rule 23 provides that women prisoners' institutions should have facilities required for all the necessary pre-natal and post natal care and treatment.⁵⁷

56 Guideline 48 of the UN Guidelines Protection and Alternative Care of Children.

57 Rule 23: "(1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate. (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall

The rule sets out that arrangements should be made wherever practical for children to be born in a hospital outside the institution and if the child is to be born in prison it should not be mentioned in the birth certificate. Rule 23(1) has two elements that are in the best interests of the child; firstly it ensures that the child should get the best natal care even at birth that is equal to any child by being born in a hospital outside the prison facility. Secondly there should not be any form or trace of the child being born in a correctional facility as mentioning it on the birth certificate amounts to discrimination that sticks to the child for life. Rule 23(2) provides that where the regulations of the correctional facility permit female inmates to remain with their children, special provision shall be made for a nursery staffed by qualified persons, when the child is not in the care of the mother. This provision seems to imply that there is an instance where a child has to be separated from the mother and placed in the care of nursing staff. It has to be noted that such separation at a stage of infancy which should be a bonding stage of the mother and the child is not in the best interests of the child. Incarcerated parents should be able to benefit from all opportunities to bond with their infant, immediately after birth and beyond.⁵⁸ It should be noted that the Minimum Rules only make mention of nursing infants and not older children.⁵⁹

2.5 Conclusion

International law provides for the rights of children living in correctional facilities with their mothers in a number of binding and non-binding instruments. Most of the conventions provide for the protection of child offenders in correctional facilities. It is recommended that the provisions are equally applicable to the rights of children born or living in correctional facilities with their mothers. Moreover, it is the state's obligation to provide children who do not have parental care or when it is lacking with socio-economic needs. Incarcerated parents cannot provide proper care to their

be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers”.

58 Robertson Collateral Convicts: *Children of incarcerated parents: Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011* 27.

59 Schoeman *Child Abuse Research in South Africa* 79.

children hence the need for the state to intervene and provide for these children especially considering their vulnerability. Furthermore the state has an obligation to provide the socio-economic rights on the basis of availability of resources, measures should be taken to realise the rights of these vulnerable children.⁶⁰

3 Constitutional provisions, statutory and policy framework relevant for the protection of children

3.1 Introduction

The Constitution contains specific rights for children resembling those articulated by the CRC. It has been hailed internationally as a constitution providing the protection and advancement of children's rights.⁶¹ Children are highly dependent and vulnerable and as a result of their vulnerability they require special protection and recognition of their rights and autonomy as individuals. Section 28 embodies a dedicated commitment to children's rights containing rights that are explicitly drawn from the provisions of the CRC and the lists the rights afforded to children. Section 28 guarantees children's socio-economic rights⁶², defines a child⁶³, determines that a child's best interests are of paramount importance in every matter concerning the child⁶⁴ and provides for the right to protection and family care.⁶⁵ This discussion will however focus on the rights provided for in section 28(1)(b), (c), (d), (g) and 28(2) because of the relevance of these sections to the research question.

60 Skelton "Constitutional Protection of Children's Rights" 245.

61 Alston and Tobin *Laying the Foundations for Children's Rights* 2005 7; Skelton A "Constitutional Protection of Children's Rights" in Boezaart T (ed) *Child law in South Africa* (Juta Cape Town 2009) 265.

62 S 28(1)(c) provides for the right to basic nutrition, shelter, basic health care services and social services;

63 S 28(3) provides that for purposes of section 28 'child' means a person under the age of 18 years.

64 S 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child.

65 S 28(1)(b): "Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment" and S 28(1)(d) states that "[e]very child has the right to be protected from maltreatment, neglect, abuse or degradation".

3.1.1 The right to family care or parental care

Section 28(1)(b) provides that a child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. The section aims to protect children from legal or administrative action where children may be separate from their caregivers and to ensure that children are adequately cared for.⁶⁶ The right to family care or parental care is aimed at preserving a healthy parent-child environment and guards against intrusions of the family environment by unwarranted executive, administrative and legislative acts from a child centred and not a parent centred perspective.⁶⁷ When sentencing a primary caregiver, a sentencing court has a responsibility to consider the effect that imprisonment will have on the children's right to parental care and make possible efforts to avoid any breakdown of family that may put children's life at risk.⁶⁸

It is submitted that the right to family or parental care places emphasis on the child's best interests and not the parents' interest thus imposing a duty on parents to protect, care and support children from abuses and attack through the most important unit in every society, family. Parenting from prison has its difficulties and may hinder the development of the parent child relationship. The imprisoned mother is often the only caregiver of the child and as such she cannot entirely fulfil her parental responsibilities and are depended on the state to provide the necessary support.⁶⁹ The right to family or parental care is not restricted to biological or adoptive parents but may also be provided by the extended family or in terms of alternative care.⁷⁰ The courts should therefore be vigilant when considering the sentencing of a primary caregiver as this affects the child and puts them in a vulnerable position.⁷¹

66 Skelton "Constitutional Protection of Children's Rights" 285.

67 Friedman A, Pantazis A, Skelton A "Children's Rights" in Woolman S , Roux T, Bishop M *Constitutional Law of South Africa* 2nd ed (Juta Cape Town 2009) 47-8.

68 *S v M* para 20.

69 Alejos M *Babies and small children residing in prisons* (Quaker, United Nations Office, 2005) 15.

70 Friedman, Pantazis ,Skelton *Children's Rights* 47-5.

71 Skelton "Constitutional Protection of Children's Rights" 285; *S v M* para 7.

The Constitutional Court in the *Government of the Republic of South Africa and Others v Grootboom and Others*⁷² held that

Subsection (1)(b) defines those responsible for giving care while subsection (1)(c) lists various aspects of the care entitlement.⁷³

This implies that in circumstances where parental care lacks, the state has a duty to ensure that children's rights are protected especially when the children are placed in alternative care or in state institutions.⁷⁴ When a parent is living with their child in a correctional facility, the state is directly responsible for the incarcerated parent. The parent is not in the best position to provide the proper care they could have been providing had they not been in prison. Thus imposing a duty on the state to ensure adequate care is given to children born or living in a correctional facility with their children.

Section 2 of the *Children's Act* 38 of 2005⁷⁵ also addresses the issue of family care. Section 2(b) provides that the Act's objectives are to give effect to the constitutional rights provided for in section 28 of the Constitution. It is one of the objectives of the *Children's Act* to strengthen and support families and recognising that the best place for a child to grow up in is a family environment.⁷⁶ In as much as the state cannot ensure that every child has a family, it is possible for the state to facilitate environments that nurture and support child's relationships. Therefore steps can be taken to ensure that the

72 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) (hereafter *Grootboom*).

73 *Grootboom* para 76. Mrs Grootboom and other respondents applied to the High court for and order requiring government to provide them with adequate basic shelter or housing until the obtained permanent accommodation or granted certain relief. These respondents were rendered homeless as a result of their eviction from their informal homes situated on private land ear marked for formal low cost housing. The appellants who represented all spheres of the government were ordered to provide respondents with shelter. The respondents had made an application in the High Court asking the appellant to meet its constitutional obligation to provide temporary accommodation after their shacks and belongings were bulldozed when they had sheltered on private land. They went and sheltered on Wallecedene sports field under such shelters they could muster. After the winter rains the respondents made an urgent application to the High Court praying that the municipality could meet its obligation of providing accommodation. The High Court granted them the order and the appellants appealed against that order.

74 *Grootboom* para 79.

75 *Children's Act* 38 of 2005 (hereafter the *Children's Act*).

76 Bosman-Sadie and Corrie *Practical Approach to the new Children's Act* (LexisNexis Durban 2010) 15.

babies born of incarcerated mothers can enjoy a family environment whilst they are with their mothers in the correctional facilities and when it is time for the child to be placed in alternative care, the proper and adequate family environment should be available.

3.1.2 Alternative Care

The second part of section 28(1)(b) provides for the right to alternative care where parental or family care is lacking. A child is in alternative care if he or she has been placed in foster care, in temporary safe care and in the care of a child or youth care centre following a court order.⁷⁷ The right to alternative care also includes the right of a child to adoptive, foster or institutional care.⁷⁸ When the time arises for children to be removed from their mothers in correctional facilities it is preferable that the child is placed in the father's care or close family's care. It is worth noting that there are instances when it is not in the child's best interests to be placed in the father or family's care and in such circumstances the child may be placed in alternative care.

The best interests of the child play a valuable role when placement of a child in alternative care is considered. The place where the child has to stay before the mother is released from prison should provide the child with the proper family environment that the child needs for normal growth and development. Sachs J argues that foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.⁷⁹

3.1.3 The right to basic nutrition, shelter, basic health care services and social services

The Constitution guarantees children a wide range of socio-economic rights, which include the right to basic nutrition, shelter, basic health care services

⁷⁷ S 168 of the *Children's Act* 38 of 2005.

⁷⁸ Mosikatsana "Children's rights and family autonomy in the South African context: A comment on children's rights under the final Constitution" 1998 *MJRL* 381.

⁷⁹ *S v M* para 22.

and social services.⁸⁰ Children's socio-economic rights provided for by section 28(1)(c) do not have an internal limitation clause similar to the limitation for everyone's socio-economic rights in section 26 and 27 of the Constitution. This implies that children's socio-economic should be given priority by the state.⁸¹ It has been argued that in the absence of an internal limitation, these basic socio-economic rights of children place a direct and immediate duty on the state to provide children with basic social services.⁸² The rights of children has given rise to the implementation that children should have a priority claim on state resources for the prompt delivery of a basic minimum level of socio-economic goods and services.⁸³

The Court differentiates between children with parents and children without parents. According to the court, the primary responsibility to provide children with socio-economic needs vests in the parents and responsibility only shifts to the state when parental care is lacking.⁸⁴ It may be argued that the Court gives preferential treatment to children without parents by implying that these children have a direct and immediate claim to the rights in section 28(1)(c). This distinction given by the court between children with parents and children without parents is typical of the private law/public law dichotomy. In *Grootboom*, the Constitutional Court declined to interpret the rights of children to basic nutrition, shelter, basic health care and social services. The court held that children only have a direct enforceable claim against the state when they are in the care of the state, in alternative care or abandoned⁸⁵ though it does not translate that the state incurs no obligation in relation to children who are being cared for by their parents.⁸⁶ In the absence of an internal limitation clause in section 28, the general limitation clause will be applicable when a limitation of a section 28 right needs to be justified. Section 36(1) states

80 S 28 (1)(c) of the Constitution.

81 Proudlock "Children's socio-economic rights" in Boezaart (ed) *Child law in South Africa* (Juta Cape Town 2009) 292.

82 Stewart "*Interpreting and limiting socio-economic rights of children in cases where they overlap socio-economic rights of others*" 2008 SAJHR 478.

83 Proudlock "Children's Socio-economic Rights" 292.

84 *Grootboom* para 77.

85 *Grootboom* para 79.

86 *Grootboom* para 78.

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

However, the Constitutional Court has employed the reasonableness test in terms of section 27(2) that qualifies the obligation on the state to realise socio-economic rights by way of reasonable legislative and other measures progressively, within available resources. The requirement of reasonableness for purposes of socio-economic rights has become more stringent over time.⁸⁷ When considering reasonableness the court does not inquire about whether other or more desirable measures adopted by the courts are favourable.⁸⁸ Reasonableness has been used as the review standard that the Constitutional Court has developed to determine whether state efforts to realise qualified socio-economic rights are constitutionally sound.⁸⁹ The court derives its reasonableness standard from the state's duty to take reasonable legislative and other measures, within the available resources, to achieve progressive realisation of socio-economic rights.⁹⁰

Furthermore, when making an enquiry on the reasonableness of the programme the court will assess whether the programme has been reasonably conceptualised and coordinated.⁹¹ There must be appropriate financial and human resources allocated for the programme and the programme must be reasonably implemented.⁹² Lastly the programme must be transparent to the public and the programme must be balanced for short term and long term needs.⁹³ In addition, a reasonable programme must be one that is balanced and flexible, it must pay attention to short, medium and

87 Stewart "Adjudicating Socio-economic Rights Under a Transformative Constitution" 2010 *Penn State International Law Review* 508.

88 *Grootboom* para 42.

89 Brand and Heyns *Socio-economic Rights in South Africa* (PULP Pretoria 2005) 5

90 Brand and Heyns *Socio-economic Rights in South Africa* 45.

91 *Grootboom* para 40

92 *Grootboom* para 30.

93 *Grootboom* para 42.

long term needs and must not exclude a significant sector of society.⁹⁴ The reasonableness test was also applied in *Minister of Health v Treatment Action Campaign and Others* case where the court noted that a court must take account of the degree and extent of the denial of the right that the government is meant to realise.⁹⁵

However, children born or living in prison are the state's responsibility by virtue of being in a state institution as well as being children of prisoners who are also under the state's care.⁹⁶ In *EN and Others v The Government of RSA and Others*⁹⁷ the issue before the court was whether the Westville Correctional Services was bound to provide access to antiretroviral treatments at an accredited public health facility to its prisoners. The judge ruled that it was trite that the state bears the obligation to fulfil the constitutional rights of prisoners set out in section 35(2)(e) of the Constitution.⁹⁸ The judge remarked that prisoners are vulnerable and relied on the mercy of prison officials.⁹⁹ In my opinion, the fact that prisoners are vulnerable people living at the mercy of prison officials places the children of the offenders at a more vulnerable position as the parents who are supposed to protect the children are not capable of protecting them in the same manner that parents who are not incarcerated can do.

Taking into consideration the vulnerability of children born or living in correctional facilities with their mothers, their access to socio-economic needs

94 Bilchitz D "Towards a reasonable Approach to the Minimum Core : Laying the Foundation for the future Socio-Economic Rights Jurisprudence" 2003 *SAJHR* 5.

95 2002 5 SA 703 (CC) para 78, Hereafter *TAC* case. In the case the court was dealing with pregnant mothers and their unborn and newly born babies' access to PMTCT to prevent HIV transmission from mother to baby during birth. The majority of the mothers could not afford private health care for themselves and their babies and were therefore dependant on the state for the provision of the health care. The court found that the State policy was inflexible and unreasonable within the meaning of section 27(2) of the Constitution and was therefore in 'breach of the State's obligations under section 27(2) read with section 27(1) (a)'. The court stated that, in order for the State's policy to be in line with the Constitution, it must be reformulated to meet the 'constitutional requirement of providing reasonable measures within available resources for the progressive realization of the rights' of women and new-born children.

96 *Grootboom* para 79.

97 2007 1 BCLR 84 D.

98 *EN and Others v The Government of RSA and Others* para 17.

99 *EN and Others v The Government of RSA and Others* para 29.

should not be limited such that they do not lack any of their basic needs required for proper growth and development. The state has an immediate and direct duty to provide these children of children born of incarcerated mothers and those they bring with them in prison when they are arrested with their basic needs.¹⁰⁰ The obligation therefore implies that a duty is placed upon the state to make a specific budget allocation for these children doing time with their mothers in correctional facilities. There should be food, medical services, medicines, education and leisure activities for these children including the diet for breast feeding mothers should be in consideration of the feeding child as well.

3.1.4 The right to be protected from maltreatment, neglect, abuse, or degradation

Section 28(1)(d) grants children the right to be protected from maltreatment, neglect and abuse or degradation and stipulates that protection should be from parents, legal guardians or anyone who has a child in their care. In the case of women who are in prison with their children, the children have to be protected from abuse by the mothers themselves as well as well as the prison officials. In the case where the child has been separated from their mothers and placed in alternative care, the children have to be protected from emotional and psychological abuse and any form of ridicule or even constantly reminding the child about the crime done by the parent amounts to abuse and degradation.

The protection of a child from maltreatment, neglect and abuse is one of the objectives of the *Children's Act*.¹⁰¹ Care is defined in the *Children's Act* as protection from maltreatment, abuse or degradation, discrimination, exploitation and other physical, emotional or moral harm or hazards. Protection of children from any harm caused by being subjected to maltreatment, neglect or abuse is also a factor to be taken into account when considering the best interests of the child.¹⁰² A person even without parental

100 To be discussed when s 20(2) of the *Correctional Services Act* is explained below.

101 S 2(f) of the *Children's Act* 35 of 2005.

102 S 7(1)(l) of the *Children's Act*.

responsibilities and rights, taking voluntarily care of a child, is also obliged by the *Children's Act*, to protect the child from any discrimination, maltreatment, abuse and neglect.¹⁰³

The Children's Act lists certain circumstances which, if found inherent in the child's case, render the child in need of care and protection.¹⁰⁴ A child is in need of care and protection if, the child lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being.¹⁰⁵ Furthermore when a primary care giver is incarcerated then the child is certainly without visible means of care and support.¹⁰⁶ For children in prisons, they need protection from the harsh prison environment which rarely contains valuable practices of care, assistance and protection that are in the best interests of the child.

3.1.5 The right to not to be detained except as a measure of last resort

Section 28(1)(g) provides that every child has the right to not to be detained except as a measure of last resort. The section directly addresses children who are in conflict with the law although it may also be relevant for the innocent children who are incarcerated with their mothers. A child born in prison or living with a mother in a correctional facility as a result of mother's incarceration amounts to deprivation of liberty. This provision therefore implies that the detaining of a primary caregiver where it results in them taking children or giving birth in prison should be considered as a last measure or for a shortest period of time.¹⁰⁷

3.1.5 The best interests principle

103 S 32(1)(b) of the *Children's Act*.

104 S 150(1) of the *Children's Act*.

105 S 150(1)(f) of the *Children's Act*.

106 The child whose parent has primary caregiver has been incarcerated will definitely fit into the definition of S 150(1)(a) of a child in need of care as there will not be anyone to provide the child with their basic needs.

107 *S v M* para 16 Sachs J argues that section 28(1)(g) implies to children who are directly in trouble with the law and should be applied as such although what can be carried over is the parallel change in mind-set that takes appropriately equivalent account of the new constitutional vision.

Section 28(2) provides that the child's best interests are of paramount importance in every matter concerning a child and implies that each time decisions are to be made by caregivers, judicial authorities, or any administrative authorities, the decision to be taken has to be based on the best option for the child. In the South African legal history, the best interests' principle has always been applied in several cases concerning children in custody and maintenance but the new constitutional order has developed the principle in many aspects.¹⁰⁸ Skelton argues that section 28(2) should not be regarded merely as a principle in the interpretation of children's right but should be considered as an independent right in itself.¹⁰⁹ This was confirmed by the Constitutional Court in *Minister of Welfare and Population Development v Fitzpatrick and Others*¹¹⁰ which held that section 28(2) does not refer to the rights provided in section 28(1) or as guiding principle but is a right in itself.

Skelton submits that section 28(2) has an "all-encompassing reach" and that the best interests of the child must be of paramount importance, not just in family matters, but in all matters concerning the child.¹¹¹ The best interests principle applies in "every matter concerning a child and is not only limited to the rights provided for in section 28(1) of the Constitution."¹¹² It is therefore submitted that the ambit of the best interests the child has to be applied the moment a primary care giver is arrested, applies for bail, stands trial and sentenced so as to protect the child from any infringement of the children's rights. It is further submitted that the best interest principle should apply to children born to incarcerated mothers and children living in prisons with their mothers and when decisions are to be made about when the child has to be moved to alternative care or how long the child has to be in a correctional facility with the primary caregiver.

108 *S v M* para 12.

109 Skelton "Constitutional Protection of Children's Rights" 280.

110 *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) para 18.

111 Skelton 2008 *CCR* 359.

112 Friedman A, Pantazis, Skelton "A Children's Rights" 47-40.

Section 28(2) as in the case of all other rights may still be limited by the limitation clause as discussed above.¹¹³ The Constitutional Court addressed the possible limitation of section 28(2) in a number of cases.¹¹⁴ In *De Reuck* the Constitutional Court held that the word “paramount” in section 28(2) did not imply that other rights could never limit the children’s best interests.¹¹⁵ The court argued that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system.

The courts when sentencing a primary caregiver or a pregnant woman should always consider the principle. However, the best interests of the child cannot undermine other competing interests and it does not imply the offenders who deserve custodial sentences should not be incarcerated because they are primary care givers. In *S v M* the Constitutional Court held that no constitutional injunction could in itself isolate children from the shocks and perils of harsh family life.¹¹⁶ Be that as it may, where children might end up having to accompany incarcerated parents to a correctional facility, regulations and policies should be made and implemented in the correctional facilities while ensuring that the best interests of the child are the paramount consideration. Those children who have to stay with their mothers in prison they should be made to enjoy their childhood in the best possible manner as any child outside a correctional facility would do.

3.1.6 Section 35(2)(e)

In addition to the above section 35(2)(e) of the Constitution provides that everyone detained has the right to conditions that are consistent with human dignity, including exercise and provision of adequate accommodation, nutrition, reading material and medical treatment at the state’s expense. This right should equally apply to children that are born to incarcerated mothers as they are also in detention with their parents. These children behind bars

113 See para 3.1.4 above.

114 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 1 SA 406 (CC); *Jooste v Botha* 2000 2 SA 199 (T) 210C-D/E; *S v M* 2008 3 SA 232 (CC) para 12.

115 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* para 55.

116 *S v M* para 22.

should be provided with accommodation, nutrition and a diet that is consistent with the child's needs at the state's expense. The correctional service system was never designed for childrearing purposes¹¹⁷ and the state therefore has an obligation to provide the children of those in custody with their basic needs necessary for the proper growth and development.

3.2 Correctional Services Act

The Correctional Services Act 111 of 1998¹¹⁸ was assented to on 19 November 1998. The Act provides for the functions and control of the DCS, the conditions of human dignity and rights of inmates with special emphasis on the rights of women and children in correctional facilities. Section 20 of the *Correctional Services Act* was amended several times in a bid to protect the interests of the children born or living behind bars with their mothers. The Act also has provisions that provide for the rights of pregnant women, babies, children in a correctional facility with regards to their accommodation, nutrition and health. Although section 20 deals in detail with the rights of children born to incarcerated mothers and those children incarcerated mothers are permitted to bring with them, other sections addressing rights of children who are inmates are equally applicable to the innocent children in correctional facilities as they fit into the definition of inmates.¹¹⁹

3.2.1 Accommodation

Prior to the *Correctional Services Amendment Act*, incarcerated mothers were allowed to keep their children up to the age of five. The current legal position only allows that children of female prisoners stay with their mothers from birth until two years of age or until such a time when the child can be appropriately

117 Mapisa-Nqakula "Address by the Minister of Correctional Services at the DSD conference on early childhood development" East London 28/03/2012 (28/03/2012) <http://www.polity.org.za/article/sa-mapisa-nqakula-address-by-the-minister-of-correctional-services-at-the-dsd-conference-on-early-childhood-development-east-london-28032012-2012-03-28> [date of use 18/07/12]

118 Hereafter the *Correctional Services Act*.

119 'inmate' means any person, whether convicted or not, who is detained in custody in any correctional centre or remand detention facility or who is being transferred in custody or is en route from one correctional centre or remand detention facility to another correctional centre or remand detention facility; [Definition of 'inmate' inserted in the Act by s. 1 (j) of Act 25 of 2008 and substituted by s. 1 (a) of Act 5 of 2011.]

placed into the care of family or foster care taking into account the best interests of the child.¹²⁰ It is submitted that there may be instances where a child who has already reached the age of two years should be allowed to stay with the mother until the authorities are able to make a decision guided by a child centred approach on the placement of the child. The process of sending the child to their mothers' families or placing them under foster care may take time resulting in the child having to exceed the set age of two years with their mum behind bars.¹²¹ During the parent's incarceration children's rights should be protected while bearing in mind that these children are innocent and they are in jail as a result of a parent's incarceration. Section 20(1) and 20(1A) of the *Correctional Services Act* is a clear indication that the state recognises that the correctional facilities are never intended for children to be raised in them and ensuring that these infants are reintegrated back into society whilst still at an early and formative stage, so that they can still undergo socialization within a proper and natural environment.¹²²

Moreover, children born to incarcerated mothers are kept in mother and child units which were established with the aim of addressing the plight of children behind bars.¹²³ The mother child unit contains a medical facility, a kitchen where mothers can prepare baby friendly meals, a nursery and an outdoor play area. These units are beneficial to both the child and the mother as they create a family environment as they allow mothers to give their children all the attention they need without interference of other inmates in a free environment and secondly the child gets time to bond with the mother in an environment that provides for the basic needs for the child's development.

120 S 20(1) of the *Correctional Services Act* 111 of 1998.

121 Makhaye Liberating babies from jail www.citypress.co.za/southafrica/features/liberating_babiesfromjail_20100424# [date of use 20/07/12] A child who is above two years can be staying behind bars with their parents as it may take time for the DCS and the DSD to place the child with their family members outside prisons or foster care

122 Keynote address by Correctional Services deputy Minister, Honourable Ms Hlengiwe Mkhize, MP, during the launch of the Imbeleko Project, East London Correctional Centre, Westbank 24 Aug 2009 www.info.gov.za/speech/DynamicAction?pageid=461&sid... [date of use 25/07/12]

123 The 'mother and child unit' means a unit within a correctional centre where provision is made for separate sleeping accommodation for mother and child, as well as a crèche facility, and where the focus is on the normalisation of the environment in order to promote the child's physical and emotional development and care (as defined by the *Correctional Services Act*).

These units are beneficial for healthy child development because children separated from their mothers due to maternal incarceration are more likely to develop emotional disorders.¹²⁴

However, the wording of section 20(3) of the *Correctional Services Act* leaves scope for the possibility that mother and child units are not available in every correctional because they can only be available where it is practical.¹²⁵ It is therefore argued that the wording “available where it is practical” leaves room for the Department to justify its failure to provide the units basing on the practicality of providing every baby in a correctional facility with a mother and child unit thereby infringing upon the children’s socio-economic rights. The mother and child units, in terms of section 20(3), are available where it is practicable while the separation of child offenders from the adult offenders is compulsory in terms of section 7(2)(c) of the *Correctional Services Act*.¹²⁶ This therefore gives the impression that child offenders have better protection than children born or living in a correctional facility with a parent. Prisoner’s rights to adequate accommodation are not qualified by the term access as prisoners are by their very circumstances, charges of the state and thus entitled to accommodation at the state’s expense.¹²⁷ The Constitutional Court in *Grootboom* in essence held that parents bore the primary obligation to provide shelter for their children and only alternatively on the state.¹²⁸ This implies that the state, in the case where parents are imprisoned, bears the duty to provide accommodation for these children they have in correctional facilities as the parents are not in a position to provide for their children. It is submitted that children in a correctional facility with a parent need adequate accommodation that is consistent with human dignity and consistent with the children’s ages.

124 Ford, Allison. “Bonding Behind Bars: Do Prison Nurseries Help or Hinder Parenting?” 2010 14 <http://www.divinecaroline.com/22354/100800-bonding-bars-doprison-nurseries> [date of use 25/07/12].

125 Section 20(2) of the *Correctional Services Act* provides that “where practicable”, the National Commissioner must ensure that a mother and child unit is available for the accommodation of female inmates and the children whom they may be permitted to have with them.

126 S 7(c) of the *Correctional Services Act*. Inmates who are children must be kept separate from adult inmates and in accommodation appropriate to their age.

127 Brand and Heyns *Socio-economic rights in South Africa* 106.

128 *Grootboom* para 71.

3.2.2 Health

The right to health care of every inmate is provided for by section 12 of the *Correctional Services Act* which provides that the Department must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every inmate to lead a healthy life.¹²⁹ In addition, section 20 provides that DCS is responsible for food, clothing, health care as contemplated in section 12 and facilities for the sound development of the child for the period that such child remains in correctional centre. The Act therefore places the health rights of children staying with their mothers in correctional facilities in the same ambit as the right to health care of every other inmate. Qualifying the right to health in the correctional facilities on the availability of resources has serious implications to the human rights and dignity of children born or living in correctional facilities with their mothers. The constitutional provision of the socio-economic rights in section 28(2) provides that children have the right to basic health care and this right is not subject to the availability of resources.

However, the Court in *B and Others v Minister of Correctional Services and Others*¹³⁰ defined what the right to adequate health care services for prisoners in terms of section 35(2)(c) of the Constitution means. The judge argues that what is "adequate medical treatment" cannot be determined in vacuo but with regard to what state can afford.¹³¹ If prison officials would raise a defence that due to budgetary constraints they cannot afford particular treatment or the provision of the treatment would make an unwarranted burden on the state, the court may decide that the less effective medical treatment which is affordable to the state must in the circumstances be accepted as sufficient or adequate.¹³² This implies that at all times prisoners should be provided with

129 S 12(1) of the *Correctional Services Act*.

130 1997 6 BCLR 789 (C). The applicants, 3 prisoners, all HIV positive sought a declaratory order declaring that HIV positive prisoners have a right to proper and adequate medical attention, care and treatment on their grounds of their HIV status and the right to be seen by HIV specialists in Peninsula. The court ruled that with reference to medical care, nutrition and accommodation in terms of section 35(2) (e) prisoners had a fundamental right to these socio-economic rights.

131 *B and Others v Minister of Correctional Services and Others* para 49.

132 *B and Others v Minister of Correctional Services and Others* para 49.

the basic needs they require and this should be equally applicable to their children whom they reside with in prison.

3.2.3 Nutrition

Section 8 of the *Correctional Services Act* provides that each inmate must be provided with an adequate diet to promote good health, as prescribed in the regulations and such diet must make provision for the nutritional requirements of children, pregnant women and any other category of inmates whose physical condition requires a special diet. Furthermore, the minister may make regulations regarding the diet of inmates with special provision for children, pregnant women.¹³³ Children require adequate nutrition, milk formulas and food stuffs that are child friendly as they are still developing physically and failure to provide them with such may affect their growth and potential to develop properly.

The omission of the phrase “within available resources” in the right to sufficient food is for children and detained persons implies that these rights are not subject to the reasonableness scrutiny is with the socio-economic rights of everyone in section 27 of the Constitution.¹³⁴ The absence of express mention of a limitation clause in the to the right to health of prisoners and children as well as the right to sufficient food is a clear indication, in my opinion, that there is a guarantee of the justiciability of the rights and ensuring that some of them are capable being enforced and enjoyed by the beneficiaries. This does not leave children living in correctional facilities out of the equation as children’s rights to nutrition have no limitation clause and now considering that when they are living in a correctional facility with a parent their vulnerability is greater hence the need for a good diet. The state’s efforts to protect and to promote and fulfil the nutritional rights of children and of

133 S 134(1)(i) of the *Correctional Services Act*.

134 Brand and Heyns *Socio-economic rights in South Africa* 161; Section 28(1)(c) of the Constitution determines that ‘[e]very child has the right ... (c) to basic nutrition ...’ and section 35(2) (e), which deals with conditions of detention determines, amongst other things, that detained persons are entitled to the ‘provision, at state expense, of adequate ... nutrition’.

prisoners are subject to a higher standard of scrutiny than its efforts to do the same in respect of the right of everyone to adequate food.¹³⁵

3.3 The White Paper on the Correctional Services

The White Paper was released in 2005 by the DCS in order to provide a policy framework to bring the treatment of offenders in line with the relevant human rights standards. The DCS's policies should include international norms, instruments and standards and resolutions as part of its foreign policy for implementation within the department.¹³⁶ Children born or living in correctional facilities with their mothers were also addressed in the paper. The paper provides that the best interests of the child shall be put at the foreground in any policy development regarding babies of offenders accommodated in a correctional facility.¹³⁷ In relation to mother child units, the focus should be on the normalisation of the environment in order to promote the child's physical and emotional development and care.¹³⁸ Over and above the mother and child units, incarcerated mothers of small children who are not in a correctional centre with their mothers, require particular access to their mothers as a necessary step to reduce the negative effect of the separation from the mother that may occur and to prepare for the eventual release of the mother.¹³⁹

3.4 Conclusion

The legislative and policy framework in South Africa has indeed been developed to protect the rights of the child in general and those born or living in correctional facilities with their mothers. Section 28 of the Constitution, provides for rights that protect these children in correctional facilities with their parents. It includes the right to family or parental care, protection from maltreatment and abuse, the best interests of the child to mention but a few.

135 Brand and Heyns *Socio-economic rights in South Africa* 163.

136 White Paper on Correctional Facilities in South Africa. www.info.gov.za/view/DownloadFileAction?id=68870 [date accessed 11/11/12].

137 White Paper on Correctional Facilities in South Africa para 11.4.3.

In addition, sections 19 and 20 of the *Correctional Services Act* also provide that the child in prison should not stay for more than two years or until such a time when alternative accommodation is found. The DCS is further tasked with providing children in the correctional facilities with their basic socio-economic rights to ensure the sound development of the child for the period that such a child remains in correctional centre.

The mere stipulation of these rights in legislation and policy is insufficient in the absence of proper implementation and delivery of these rights through proper channels of application as well as interpreting legislations in a way that grants the rights to those they were intended for through a child centred approach. What makes the implementation difficult is that these children live at the mercy of the prison officials, the officials responsible for providing the parents with the support and resources needed to look after their children whom they have in prison with them.¹⁴⁰

The Judicial Inspectorate for Correctional Services reports that most correctional centres are not adequately capacitated with professional staff such as social workers, psychiatrists, psychologists and criminologists thereby leading to the case management of inmates to be placed on parole to take longer than usual.¹⁴¹ When children born or living in correctional facility need to be placed in alternative care, the lack of adequate personnel may cause delays thus resulting in the children having to stay longer in a correctional facility. The Head of a Correctional Centre is not actively involved in the complaints process and delegates to officials of lower levels thereby making the process susceptible to abuse.¹⁴² In addition, there is a shortage of medical personnel and usually no doctor on stand-by for emergencies.¹⁴³ This is a major challenge to the right to health of prisoners and their children they live within the correctional facilities and it becomes more complicated when a pregnant woman has to give birth and there is no doctor or mid-wife on stand-

140 *EN and Others v The Government of RSA and Others* para 29.

141 Annual Report of the Judicial Inspectorate for Correctional Services (2011/2012) <http://judicialinsp.pwv.gov.za> [date accessed on 03 November 2012].

142 Annual Report of the Judicial Inspectorate for Correctional Services 2011/2012 39.

143 Annual Report of the Judicial Inspectorate for Correctional Services 2011/2012 46.

by. Judge Tshabalala established a special project focusing on children and juveniles in conflict with the law in a bid to contribute to the way the DCS deals with the vulnerability of children and juveniles.¹⁴⁴ Although the project is a good initiative, it does not include children born or living in correctional facilities with their parents.

4 Developing a child-centred approach

4.1 Introduction

The constitutional injunction of the paramountcy of the best interest principle in all matters concerning the child has brought a new twist to South African criminal jurisprudence although the best interests' principle is not a foreign concept to the courts. The best interests' principle has been employed in custody and maintenance cases before the principle became a constitutionally enshrined principle and right.¹⁴⁵ Provision of the principle as a constitutionally enshrined right requires that when a decision affecting a child has to be made the best interests of the child should be carefully deliberated by courts, and all other state and non-state institutions dealing with children. Where a decision needs be taken on the placement or other needs of a child born or living in a correctional facility with the mother the courts and other responsible authorities are compelled to consider the best interest of that child.

A child-centred approach implies that the courts and other responsible authorities always consider the best interest of that child and the paramount importance of this principle. A child-centred approach is only possible when courts interpret the Constitution in a manner that benefits and recognises the importance and vulnerability of children. This section begins with an analysis of the cases where the courts considered the interests of the child during the sentencing of a primary caregiver and includes the opinions and scholarly comments on the application of child's interests when sentencing a primary caregiver. The relevance of considering the sentencing of a primary caregiver

144 *Annual Report of the Judicial Inspectorate for Correctional Services* 2011/2012 71.

145 Skelton A *Constitutional Protection of Children's Rights* 280

in the development of a child-centred approach to the rights of children born or living in a correctional facility will be discussed in conclusion of the chapter.

4.2 The best interest principle as interpreted by the courts

As indicated above the best interests of the child principle has been employed in family law. It also played an important role in other areas of the criminal justice system, such as the 1994 decision of the President to grant a special remission of sentence to certain categories of prisoners including all mothers imprisoned on 10 May 1994, who had minor children under the age of 12 years.¹⁴⁶ The President's decision also contributed to the legal history of the recognition of children's rights in the criminal justice system as well as the sentencing of parents. Before handing down a sentence, there are several factors which should guide and influence the courts in determining appropriate sentence as well as weight to be attached to each factor and children's right have of late been added to the list. To minimise the incarceration of pregnant women and mothers who are in lactation it is important to consider the effects of incarceration of the primary caregiver on the child. The court cases to be analysed are *S v M*, *S v Howells*¹⁴⁷ and *S v S*.¹⁴⁸

4.2.1 *S v Howells*

Mrs S, a divorced mother of three minors, had been convicted of fraud and sentenced to four years imprisonment by the regional court.¹⁴⁹ She later appealed against her sentence on the grounds that she had assisted her employer in the investigation following the discovery of her fraud and had pleaded guilty to her offence.¹⁵⁰ In addition, the best interests of her children had not been considered when she was sentenced to imprisonment as there

146 *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC). The presidential decision of president Mandela to release the mothers of children under the age of 7 was considered by the Constitutional Court. The Court upheld by a majority of the Court as being in accordance with the provisions of the interim Constitution (Constitution of the Republic of South Africa 200 of 1993 .)

147 1999 1 SA 675 (C)(hereafter *S v Howells*).

148 2011 7 BCLR 740 (CC)(hereafter *S v S*).

149 *S v Howells* para 675F.

150 *S v Howells* para 680E.

was no one who could look after her children because the ex-husband was an alcoholic who was not a suitable person to care for the children though he had fair access to the children and paid maintenance every month.¹⁵¹ The maternal grandparents though they were willing to assist they both worked on a full time basis and the place they stayed had no English medium schools when the children's mother tongue was English.¹⁵² The imprisonment of the appellant was therefore detrimental to the interests of the three minor children.

The magistrate in the trial court had considered that, because of the nature and magnitude of the appellant's offence, that the interests of society outweighed the interests of the appellant and her children.¹⁵³ The appeal court ruled that the magistrate did not misdirect herself in serving the interests of the society especially considering that the white collar crimes are on the rise hence the need to deter the appellant and others from committing a similar offence.¹⁵⁴ Nevertheless the appeal court was keenly aware of the need to protect the interests of the minor children and gave an order that would protect the interests of the children. The judge ordered the Department of Welfare and Population Development to investigate the circumstances of the children and ensure that the children are properly taken care of and that they remained in contact with their mother during her imprisonment.

Before concurring with the magistrates' decision that the interests of the appellant and her children outweighed the interests of society, the judge gave a plethora of cases considering the interests of children when sentencing a primary caregiver as well as an articulation of the best interests of the child as provided for by the Constitution, international law and scholarly views.¹⁵⁵ Furthermore the judge submitted that from the facts submitted before the court there was real risk that, should the appellant be imprisoned, the

151 *S v Howells* para 680G.

152 *S v Howells* para 680G.

153 *S v Howells* para 682F.

154 *S v Howells* para 682H.

155 *S v Howells* para 682F-J. *S v Kika* 1998 2 SA 428; *President of the Republic of South Africa and Another v Hugo*.

Department of Welfare and Population Development would have to ensure that the children are taken care of.¹⁵⁶ Faced with the evidence of the children's rights at stake, the judge was reluctant to sentence the appellant to imprisonment but confirmed the magistrate's sentence and reduced the suspended sentence from two years to one year.¹⁵⁷ The state still had the responsibility in terms of section 28(1)(b) to ensure that the children would be cared for during the time that the primary caregiver was incarcerated.¹⁵⁸

In *S v Howells* the judge limited the rights of children in terms of section 36(1) by the other factors considered by the court, the interests of society and the need to deter the offender and others from committing the same offence.¹⁵⁹ The judge was acutely mindful of the fact that the interests of the minor children had to be protected but sentenced the offender to imprisonment and gave an order that the children be taken care of.¹⁶⁰ This is one of the examples where the courts had to limit the rights of children to serve other interests. The dictum implies that where the caregiver is sentenced to imprisonment and children above the age of two years are involved, the court and all other authorities responsible for children should recognise the need urgency of protecting the rights of children. Van Heerden J, only ordered the Department of Welfare and Population Development to "investigate the circumstances of appellant's three minor children without delay".¹⁶¹ The critical question arising from this is whether there was need for the Department to do an investigation on the circumstances of the children when evidence had been laid before the court that the children's interests were at stake. The failure by the court to make an order as to the alternative care of children while the mum is in prison is indicative of inadequate legal and policy arrangements. When a mother who is the sole caretaker and provider of children is criminally charge or sentenced there should be mechanisms in

156 *S v Howells* para F-G; Coetzee "Can the application of the human rights of the child in a criminal case result in a therapeutic outcome?" 2010 PER/PELJ 139.

157 *S v Howells* para 682F, 683C.

158 Coetzee 2010 PER/PELJ 147.

159 *S v Howells* para 681G.

160 *S v Howells* para 682I; 2010 PER/PELJ 139.

161 *S v Howells* para 683C.

place to ensure that a proper investigation into the best interest of the children precedes the criminal trial. In my opinion, the evidence given before the court was enough to make any competent court to give an order as to where the children would be staying and under whose care without putting the children at risk with the delays of further investigations to be done.

Developing a child centred approach does not imply that when offenders are sentenced, the child's interests should outweigh all the aggravating circumstances in a case. Neither does the child centred approach require the courts to look at the offender through the eyes of their children. It is submitted that a child-centred approach requires that sentencing of a primary caregiver punish the offender while at the same time protecting the rights of the offender's children, as they are innocent through a balancing of competing interests.

4.1.2 *S v M*

Prior to the constitutional injunction that the best interests of children are of paramount consideration in every matter concerning the child, criminal law was primarily concerned with the prevention of crime and punishment of offenders rather than the interests of children of the accused.¹⁶² The profound aspect of this judgement lies in the manner in which it has developed child law and the aspect that section 28 of the Constitution is a statement of realisable and enforceable rights which was an addition to the court's pronouncement of the section.¹⁶³ The judgment in *S v M* has aided in developing a child centred approach in relation to the sentencing of primary caregivers because children's rights are being considered as a separate issue in the sentencing of primary caregivers and not only as a mitigating factor.¹⁶⁴ In addition the judge has given clarity as to the rights of children provided for in terms of section 28 of the Constitution particularly the right to family or parental care as well as the paramountcy of the best interest principle and the implications of the provisions.

162 Abramowicz S "A family law perspective to incarceration" 2012 Family Court Review 229.

163 Skelton 2008 (1) CCR 351.

164 Coetzee 2010 PER/PELJ 143.

In *S v M*, Sachs J sets out the guidelines to assist courts to decide on sentence in such a way that the interests of the children of offenders are protected when their caregiver is to be sentenced.¹⁶⁵ The court before sentencing the offender has to firstly determine whether the convicted person is a primary care giver whenever there are indications that this might be so. The convicted can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact and the court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered. When the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated. If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

S v M dealt with the role of a sentencing court where the person to be sentenced is the primary caregiver of minor children, keeping in mind the constitutional protection of the best interests of the child.¹⁶⁶ In this case, the appellant was a 35 year old single mother of three minor children who had been convicted of 38 counts of fraud and four counts of theft and who had previous convictions for fraud. She had been sentenced to four years imprisonment but the Constitutional Court set aside this sentence and replaced it with a sentence of suspended imprisonment on condition that the offender paid back the money, does not commit a similar offence and correctional supervision in terms of section 276(1)(h) of the *Criminal Procedure Act* 51 of 1977.¹⁶⁷

The best interests of the children born and living in a correctional facility with their mothers are included in the phrase “every matter concerning a child”.

165 *S v M* para 36.

166 *S v M* para 9; Skelton A “The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments” 2009 AHRJ 490.

167 *S v M* para 77.

These children's rights are not absolute but they are mutually related and interrelated and interdependent and form a single constitutional value system.¹⁶⁸ Furthermore, the judge argues that the word "paramountcy" coupled with the phrase "every matter concerning the child" would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. The court then goes a step further to clarify that the paramountcy principle does not oust or override all the other considerations. It is a principle capable of being limited and concludes that the best interests of the child are not absolute.

The question that arises then is how the best interests of children born or living with their parents in correctional facilities be limited? In as much as it cannot be interpreted to mean that the direct or indirect impact of measure or action on children must in all cases overthrow other considerations children living in correctional facilities should have their needs and rights treated as a priority because correctional facilities are never designed for the upbringing of children.¹⁶⁹ The limitation of these children's rights should be applied in a manner that acknowledges that these children are in the circumstances due to their parent's crimes. In my opinion, the limitation of the rights of children born or living in a correctional facility with their mother should be as little as possible when putting into consideration the vulnerability of these children due to their age and the fact that they are staying in a correctional facility not by choice. The developmental needs of the children born or living in correctional facilities with their mothers should be brought into consideration where a decision shaping the life of these children has to be made by any administrative authority. The judgment concludes that sentencing officers should pay appropriate attention to the children of a primary caregiver and take reasonable steps to minimise damage.¹⁷⁰ Thus even when children are born or live in a correctional facility, steps to minimise the effects of prison on

168 *De Reuck* 2004 SA 406 CC para 56.

169 Skelton Constitutional Protection of Children 283; S v M para 26.

170 Skelton Constitutional Protection of Children's Rights 284.

their lives should be taken and this includes providing them with an environment that children who are not staying in prison are receiving.

4.1.3 *S v S*

Mrs S had been sentenced by the regional court to a custodial sentence and she appealed to the High Court against the sentence. In her application for leave to appeal to the Constitutional Court the appellant argued that the correct sentencing approach of a primary care giver set out in *S v M* was not applied when she was sentenced and the interests of her minor children had not been considered.¹⁷¹ Mrs S, a married woman with two minor children, whilst employed at a firm of insurance brokers, had falsified a valuation certificate in respect of a wristwatch and a ring by altering it to a certificate in respect of a ring only.¹⁷² She pleaded guilty to the offence and on sentence the probation officer produced a report that concluded that, should custodial sentence be imposed on the offender there would be an adequate family support system for the children as Mrs S's mother-in-law was willing to assist Mr S to care for the children.¹⁷³ It was submitted that the offender would have had a suspended sentence if she would compensate the complainant, however she defaulted payments.¹⁷⁴

In delivering judgment, Judge Khampepe argued that sentencing courts must perform their function in matters concerning children in a manner which shows respect for children's rights brings a focused and informed attention to the needs of children at appropriate moments in the sentencing process.¹⁷⁵ Furthermore, the judge argued that it was true the children's interests will be adversely affected by the incarceration of their mother but this does not impose an obligation on the sentencing courts to protect at all costs, the children from inevitable consequences of losing their primary care giver if she

171 *S v S* para 2.

172 *S v S* para 3.

173 *S v S* para 6.

174 *S v S* para 7.

175 *S v S* para 21; *S v M* para 17.

is incarcerated.¹⁷⁶ The court concluded by stating that all the court can do is minimise damage when weighing the competing needs of children and the need to punish the offender and ordered the Department of Correctional Services to ensure the social worker visits the children regularly.¹⁷⁷

In addition to the above, the state contended that the best interests of the minor children had been taken into account during the sentencing of the offender and differentiated the facts of the present case to those in *S v M*. It was the court's view that in *S v M* the appellant was a single parent, and was almost exclusively burdened with the care of her children and no one could step in to assist with care of the children while Mr S and his mother were willing to look after the children while the offender was in prison.¹⁷⁸ In addition all the reports compiled by the social workers and the curator suggested that the fundamental needs or the basic interests of the children would be neglected if the mother was incarcerated.¹⁷⁹ The court dismissed the appeal and ordered the Department of Correctional Services visits the children at least once a month during the appellant's incarceration.¹⁸⁰

In this case as mentioned above, the court found that the applicant's situation was marked differently from the mother in *S v M* and applying *S v M* to the facts that lay beyond its ambit was wrong.¹⁸¹ In my opinion the majority judgment erred in its submission and arguments. In as much as Mrs S was not a single parent as the mother in *S v M*, the main focus was the care of the children while the mother was in prison not merely the existence of a co-resident parent. The reports that the court based the decision on did not suggest that the fundamental needs or the basic needs of the children would be neglected if their mother was incarcerated.¹⁸² Failure of the report to disclose the basic interests of the child, in my opinion, should have been a

176 *S v S* para 45.

177 *S v S* para 45 and 66.

178 *S v S* para 62.

179 *S v S* para 64 and 65.

180 *S v S* para 68.

181 *S v S* para 62.

182 *S v S* para 64 and 65.

major concern of the court as this was the main thrust of the appeal. Therefore it is submitted that it was the duty of the court to investigate if the co-resident parent would be in a position to care for the children while Mrs S was incarcerated. However the judge argued that the court must pay proper attention to these issues and take measures to minimise damage when weighing up the competing needs of the children with the need to punish the offender.¹⁸³ The judge ordered a social worker in the employ of the Department for Correctional Services to visit children of the appellant while she was incarcerated.¹⁸⁴

On the contrary, Justice Khampepe in the minority judgment submitted that it would not be in the best interests of the child to have Mr S care for the children due to his frequent visits to his paramour and his tight work schedule such that he has limited time to care for the children.¹⁸⁵ In addition to the above, Mr S's mother who had earlier on accepted to help Mr S and used to take care of the children periodically, has indicated her inability to do so because she now suffers from osteo-arthritis and back pain.¹⁸⁶ From the evidence placed before the court, Mrs S was the only person who could adequately look after the needs of the children and it was not in the children's best interests, taking account of their ages and health requirements, to sever their links with her by imposing a custodial sentence.¹⁸⁷

4.1.4 Application of the S v M approach in S v S

Justice Khampepe makes reference to the court's argument that considering the interests of children when sentencing a primary caregiver is not to permit errant parents to avoid appropriate punishment. Rather, it is to protect innocent children as is reasonably possible in the circumstances from avoidable harm.¹⁸⁸ The manner in which Khampepe J, applied the submission

183 S v S para 45.

184 S v S para 68.

185 S v S para 44.

186 S v S para 43.

187 S v S para 50.

188 S v S para 45; S v M para 35.

is certainly not in the context that Sachs could have intended it to imply as the consideration of children's rights in sentencing is not to allow primary caregivers to avoid punishment. It is argued that the court, as the upper guardian of all constitutionally enshrined rights of children, is entitled to protect children when a parent is sentenced. In my opinion, the court may also give other options of sentences that are possible and available in the circumstances that do not disrupt parental care at the same time serving the interests of justice. The *S v M* judgment explains quite clearly that the choice of the sentencing option least damaging to the interests of the children is made 'within the legitimate range of choices in the circumstances available to the court'.¹⁸⁹ The question that arises therefore is, how then can the courts consider the option that is least damaging from the wide range of choices available before the court while Khampepe J, argues that the court has no obligation to protect children from the inevitable consequences of losing a primary caregiver.¹⁹⁰

4.2 Analysis of the judgments and scholarly comments on the court's approach to the sentencing of primary caregivers

Several scholars have commented on the consideration of children's rights when a primary caregiver is sentenced resulting in a therapeutic outcome that brings in a new twist to criminal law especially the sentencing of primary caregivers in the form of transformative constitutionalism. Mujuzi¹⁹¹ submits that the court's argument in *S v M* is a clear departure from the traditional ways that philosophers and even the court itself, had previously looked at punishment and its role in society with regard to the offender and not from children's rights perspective. Coetzee¹⁹² argues that considering section 28(1)(b) and 28(2) as part of a sentencing process makes way for the possibility of a therapeutic outcome where a judge considers the interests of people as opposed to being case-oriented. She further submits that therapeutic jurisprudence may still

189 *S v M* para 33. Skelton 2009 AHRJ 491.

190 *S v S* para 45.

191 Mujuzi, JD "Punishment in the eyes of the Constitutional Court of South Africa: "The relationship between punishment and the rights of an offender in the sentencing of primary caregivers of children" 2011 SACJ 172.

192 Coetzee 2010 PELJ 147.

offer suggestions for carrying out the decision more therapeutically; even leading to a change of a custodial sentence to a non-custodial sentence. She also contends that after due consideration of section 28(1)(b), the court can come to a decision without paying any attention to the human, emotional and psychological side of the legal process.¹⁹³

In response to the two scholarly submissions above, I agree with Mujuzi that punishment should not only focus on the on the interests of the offender but the interests of dependants and children of the offender as well. However, considering children's rights does not imply that the courts should lean on the judgment that is least restrictive on the interests of children at the expense of Constitutional justice as it would result in grave injustice that the drafters of section 28 of the never anticipated or intended.

The application of section 28(1)(b) and section 28(2) to the sentencing of a primary caregiver does not imply that the offender is certain to get a non-custodial sentence. Even where there is evidence before the court to the effect that the interests of children are at stake, a primary caregiver can be imprisoned in the interests of justice. It is in these circumstances that primary caregivers end up being joined in correctional facilities by their babies or having to give birth in the correctional facility. When an offender takes his or her child to prison it therefore becomes the duty of the Department of Correctional Services as an administrative authority to ensure that there is no infringement upon the rights of the child and that the child does not overstay but is quickly placed into alternative care as prisons were never designed for children to be raised in them.

4.3 The relevance of the court's child-centred approach for children born or living in a correctional facility with a parent

Magistrates and judges are aware of the conditions in the prisons through the annual reports by the judicial inspectorate for the Correctional Services. With

¹⁹³ Coetzee 2010 PELJ 151.

the knowledge the courts have about the conditions of prison facilities, the judges can give offenders sentences that protect the children's interests and minimise the chances of a child being born or having to live in a correctional facility while serving the interests of justice as well. The sentencing court should consider the unborn or young child's interest when placing the parent in a specific facility/prison. This can be done by choosing a sentence that is least damaging to the interests of the children, serving the interests of society as well as administering justice. The DCS and the DSD on the other hand, should make sure the rights of the child are protected in relation to the regulations for the child's care and placement into alternative care.

4.4 Conclusion

In all these cases discussed above the court's approach has been to consider the impact of imprisonment on the children's rights to care and considering the range of legitimate choices in the circumstances impose punishment that is least damaging to the interests of the children.¹⁹⁴ Developing a child-centred approach to the rights of a primary caregiver or a pregnant mother, in my opinion, means giving importance to the idea that children need to be cared for and protected from the harsh conditions of life in ways possible though it is not having children's rights being treated as absolute. It is not trite law that if an offender is a primary caregiver he or she should be sentenced to a non-custodial term because the children have a right to parental care and it is in the best interests of the child. No constitutional injunction can in itself isolate or protect children from the shocks and harsh perils of life.¹⁹⁵ The fact that children will be adversely affected by the incarceration of a primary caregiver does not impose an obligation on sentencing courts from protecting children from the inevitable consequences of losing a primary caregiver.¹⁹⁶ When the court is aware that the interests of the children of the offender will be affected, the court has to make an order to protect the children.¹⁹⁷ In cases

194 *S v M* para 33; *S v S* para 46.

195 *S v M* para 20.

196 *S v S* para 45.

197 *S v S* para 45.

where it would result with the child having to be born or live with the parent in a correctional facility, the Department and officials will have to ensure the child is provided with the socio-economic needs required and an environment consistent with human rights standards of children.

5 Conclusion

The consideration of children's interests when sentencing a primary caregiver is a watershed moment in the history of sentencing law.¹⁹⁸ Prior to this emerging era the best interests of the child were mainly considered in family law disputes such as maintenance claims and custody. In the South African jurisprudence, the inclusion of section 28(1)(b) and section 28(2) in the Constitution has brought about a change in the sentencing process. The constitutional injunction that the best interests of the child are paramount in every matter concerning a child places an obligation on any decision making authority to consider the effects of the decision on a child, sentencing of primary caregivers included. This change in the judicial mind-set is only achievable by proper regard for constitutional requirements and this emerging trend will certainly curtail the right to parental care and ensure that family disruptions are minimised as possible.

The DCS and the DSD should apply the same principles applied by the courts when determining the best interests of the child in placing the child in alternative care or making any decision on children living or born in correctional facilities. Best interests of the child should be the central consideration at all stages of the process relating to the incarceration of a parent. Funds in the DCS have been channelled a lot to the rehabilitation of child offenders and programmes have been designed to help these children without much being said about children born or living in correctional facilities with their parents. Children of incarcerated parents have the same rights as other children and that these children should not be treated as if they are in conflict with the law as a result of the actions of their parent(s). Although there is always a challenge and failure on the part of the DCS to provide for

198 Abramowicz "A family law perspective to incarceration" 229.

prisoners with the defence of budgetary constraints and lack of professionals in the Department, children in prison should as much as possible be provided with their basic needs especially in the correctional facility. More funds should be allocated for children living with parents in correctional facilities.

The rights of children born or living with a parent in a correctional facility are provided in international law, regional treaties and national legislation as well as policies of the DCS. The CRC contains rights that protect children living with a parent in a correctional facility, the best interests of the child, the right to parental care, the right to alternative care when removed from family environment or where parental care is lacking, to mention but a few. All these rights are also provided for in the ACRWC though the Charter has addressed the rights of pregnant prisoners and children living in correctional facilities with their mothers in article 30 in specifics than what the CRC has done.¹⁹⁹

National legislation and the policies applied by the DSD and DCS should be a mirror image of the international law so as to aid in implementation of these human rights on the ground. Unless the policies and practices take into account the needs of children, the courts and the DSD will be guilty of sentencing children to a lifetime of trauma. Certain legislative provisions like section 20(3) which seek to provide a limitation to the socio-economic rights of children living with a parent in correctional facility are certainly a drawback to the development of a child centred approach. There should be a highest level of commitment in the policies to ensure children of offenders in correctional facilities are taken care of. Policies and regulations should provide for the periodic reports about the state in prisons to include the situation of children living with parents in prison rather than focus on child offenders only. These period reports also helps incite some form of accountability and builds public trust in the DCS.

The best interests of the child should be taken into account when deciding whether to remove children born in prison and children living in prison with a parent. In as much as the removal of such children should be treated in the

199 Chirwa D 2002 *IJCR* 157.

same way as other instances where separation is considered, a sense of urgency has to be applied to the cases of children in correctional facilities. Hence the need for the DCS and the DSD to work on the child's placement plan into alternative care the moment the primary caregiver arrested rather than await the sentencing when the prisoner and the child are in the hands of the Correctional Services. Even if there is uncertainty as to the outcome of the sentence, custodial or non-custodial, a contingency plan to cater for the child interest is certainly the best way to develop a child centred approach. The separation plans should allow cooperation in order to allow acceptance between parents, relatives and NGOs well in advance before the time comes. There is also need for the establishment of a transitional facilities and programmes that allow parents and children to be prepared for the separation as abrupt separation can have adverse effects on both the mother and the child.

The environmental limitations associated with a prison curbs a child's social development because the child has no exposure with the outside world, and has limited exposure to everyday activities and attachment with family and other members of society hence the need to move children to alternative care at an early age. Be that as it may, the rights of the children in correctional facility need to be protected due to their vulnerability.²⁰⁰ Cooperation of the DCS, the DSD, NGOs and the primary caregivers' relatives and family is also crucial in the removal of the child from the correctional facility to ensure the child's interests are protected from all angles. Children in Correctional facilities with parents should also be allowed to attend external crèches where facilities are conducive to sound, physical, social and mental care and development.²⁰¹ This does not only develop the child's interaction with the outside world but also helps acts as an option when the state does not have the adequate resources to provide children with crèche facilities in every correctional centre. Policies should also allow the relatives and the other

200 Sloth-Neilson Children in African Prisons in Sarkin J *Human Rights in African Prisons* (HRSC Cape Town 2008) 130.

201 *UN General Assembly UN Guidelines on the Alternative Care of Children* para 48: Best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community.

parent have time to visit the child and interact with the child such that the moment the removal occurs the child has a proper and efficient support system.

These children need protection from abuse by other inmates, prison officials and unscrupulous social workers who might benefit from placing the child in a care of a certain foster parent or home. The provisions in the *Correctional Services Act* and the policies should incorporate the protection of children of offenders who live with them in correctional facilities from abuse by prison officials and provide stiff penalties for any infringement of the rights of these children. The prison officials and the social workers should go training on developing a child centred approach to the implementation of the policies and legislations. In addition, children in correctional facilities should also be visited by social workers who are not within the prison system so as to allow external evaluation and proper checks and balances on the mother-child-unit facilities.

The *Correctional Services Act* has been amended several times to provide for the rights of children born or living in correctional centres with their children.²⁰² In addition to the Acts the policies of the DCS have also addressed the concerns of children living in correctional centres with their parents. The legislature has indeed provided a framework for the protection of children in the correctional facility through the incorporation of most human rights in the legislation and policies. Legislative provisions alone are not adequate, implementation of the provisions is crucial for the development of a child centred approach. Currently the situation on the ground is a contrast to the mirror image of the rights provided in the legislations as the DCS is faced with challenges of overcrowding, budgetary constraints and lack of trained personnel to deal with these children once they are placed in correctional facilities.²⁰³ If the conditions of children born or living in a correctional facility have to changed, budget has to be engendered to meet the developmental needs of female offenders and the mothers with infants in prison as well.

202 S 20 of the *Correctional Services Act*.

203 Annual Report of the Judicial Inspectorate for Correctional Services 2011/2012.

Jurisprudence has been developed by the Constitutional Court that recognises the state's obligation to progressively provide material assistance to families living in poverty and that recognises children as vulnerable group in need of protection. Children living in a correctional facility are vulnerable in all respects thus placing obligation on the state to protect them. During the time these children are in the correctional facilities they have a right to their socio-economic rights. The state has an obligation to cater for the needs of these children as their parents are unable to provide for them and all persons in correctional facilities are the responsibility of the state.²⁰⁴ The rights of prisoners are not limited and so should the rights of the children living with their parents in correctional facilities thus imposing an obligation for the state to provide children with the adequate accommodation, food and health needs.²⁰⁵

204 S 35(2) of the Constitution.

205 *B and Others v Minister of Correctional Services and Others para 49.*

BIBLIOGRAPHY

Literature

Abramowicz 2012 FCR

Abramowicz S "A family law perspective to incarceration" 2012 Family Court Review 228-240

Alejos M Babies and small children residing in prisons (Quaker, United Nations Office, 2005)

Alston and Tobin *Laying the Foundations for Children's Rights* 2005

Alston P and Tobin J *Laying the Foundations for Children's Rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (UNICEF Florence, Italy 2005)

Brand "Introduction"

Brand D "Introduction" in Brand D and Heyns C *Socio-economic rights in South Africa* (PULP Pretoria 2005)

Bilchitz 2003 SAJHR

Bilchitz D "Towards a reasonable Approach to the Minimum Core: Laying the Foundation for the future Socio-Economic Rights Jurisprudence" 2003 SAJHR

Boezaart *Child law in South Africa*

Boezaart T (ed) *Child law in South Africa* (Juta Cape Town 2009)

Bosman-Sadie and Corrie *Practical Approach to the new Children's Act*

Bosman-Sadie H and Corrie L *Practical Approach to the new Children's Act* (LexisNexis Durban 2010)

Coetzee 2010 PER/PELJ

Coetzee E "Can the application of the human rights of the child in a criminal case result in a therapeutic outcome?" 2010 PER/PELJ 126-154

Chirwa D 2002 IJCR

Chirwa D “The merits and demerits of the African Charter on the Rights and Welfare of the Child” 2002 IJCR 157-170

Erasmus 2010 SAPL

Erasmus D “There is something you are missing; what about the children? ‘Separating the rights of children from those of their caregivers” 2010 SAPL 124 – 136

Friedman, Pantazis, Skelton “Children’s Rights” 47-8

Friedman A, Pantazis A, Skelton A “Children’s Rights” in Woolman S , Roux T, Bishop M *Constitutional Law of South Africa* 2nd ed (Juta Cape Town 2009) 47-1 – 47-47

Mason-White H and Kearney HF Children of (Alleged) Offenders: Revised Draft Framework for Decision Making (Quaker United Nations Office March 2012)

Mujuzi, 2011 SACJ

Mujuzi, JD “Punishment in the eyes of the Constitutional Court of South Africa: “The relationship between punishment and the rights of an offender in the sentencing of primary caregivers of children” 2011 SACJ 164

Robertson Collateral Convicts: *Children of incarcerated parents:*

Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011 (Quaker, UN office, Geneva Switzerland 2012)

Stewart 2008 SAJHR

Stewart L “Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic of others” 2008 SAJHR 472-494

Stewart 2010 PSIL

Stewart “Adjudicating Socio-economic Rights under a Transformative Constitution” 2010 Penn State International Law Review 487-512

Stewart 2010 IJCR

Stewart L “Resource constraints and a child’s rights to legal representation in civil matters at state expense in South Africa” 2010 IJCR 1-26

Skelton 2009 AHRJ

Skelton A “The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments” 2009 AHRJ 482-500

Skelton 2008 CCR

Skelton “Severing the umbilical cord: a subtle jurisprudential shift regarding children and their primary caregivers” 2008 CCR 351-370

Skelton and Courtenay 2012 SAJCJ

Skelton A and Courtenay M “The impact of children's rights on criminal justice: recent cases” 2012 South African Journal of Criminal Justice 180-193

Sloth-Neilson “Children in African Prisons”

Sloth-Neilson Children in African Prisons in Sarkin J *Human Rights in African Prisons* (HRSC Cape Town 2008)

Van Bueren *The International Law on the Rights and Welfare of the Child*

Van Bueren G *The International Law on the Rights and Welfare of the Child* (Kluwer Law the Hague 1998)

Case law

AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 3 SA 183 (CC)

De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2004 1 SA 406 (CC)

EN and Others v The Government of RSA and Others 2007 1 BCLR 84 D

Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC)

Jooste v Botha 2000 2 SA 199 (T) 210C-D/E

Minister of Health v Treatment Action Campaign 2002 5 SA 703 (CC)

President of the Republic of South Africa and Another v Hugo 1997 4 SA 1 (CC)

S v Howells 1999 1 SA 675 (C)

S v M 2008 3 SA (CC)

S v S 2011 7 BCLR 740 (CC)

Legislation and government publications

Children's Act 38 of 2005

Correctional Services Act 111 of 1998

Criminal Procedure Act 51 of 1997

The Constitution of the Republic of South Africa 1996

International instruments

African Charter on the Rights and the Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1990)

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990)

Standard Minimum Rules for the Treatment of Prisoners (adopted 31 July 1975)

UN General Assembly UN Guidelines on the Alternative Care of Children 2009 (adopted 24 February 2010)

Internet sources

Annual Report of the Judicial Inspectorate for Correctional Services (2011/2012) <http://judicialinsp.pwv.gov.za> [date accessed on 03 November 2012]

Curnow R "Babies behind bars" 5/5/2011 Wits Justice Project (CNN) <http://www.journalism.co.za/babies-behind-bars-doing-time-with-mom-cnn.html> [date of use 2 April 2012]

Dissel A “Correctional Services Act: a survey of the latest amendments” August 2008 *CSPRI Newsletter* <http://www.csvr.org.za/docs/cspri27.pdf> [date of use 2 April 2012]

Ford, Allison. “Bonding Behind Bars: Do Prison Nurseries Help or Hinder Parenting?” 2010 14 <http://www.divinecaroline.com/22354/100800-bonding-bars-doprison-nurseries> [date of use 25/07/12]

Makhaye “Liberating babies from jail” 25/4/2010 *City Press* <http://www.citypress.co.za/SouthAfrica/Features/Liberating-babies-from-jail-20100424> [date of use 19 April 2012]

Mapisa-Nqakula “Address by the Minister of Correctional Services at the DSD conference on early childhood development” East London 28/03/2012 <http://www.polity.org.za/article/sa-mapisa-nqakula-address-by-the-minister-of-correctional-services-at-the-dsd-conference-on-early-childhood-development-east-london-28032012-2012-03-28> [date of use 3 April 2012].

White Paper on Correctional Facilities in South Africa www.info.gov.za/view/DownloadFileAction?id=68870 [date accessed 11/11/12]