

An analysis of the South African law governing minors living with their mothers in prison



M060070652

B T Ruzvidzo



orcid.org/0000-0001-7622-3102

LLB (NWU)

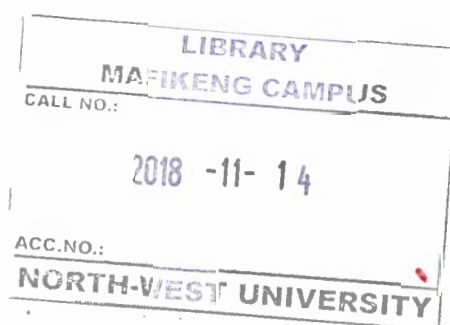


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Supervisor: Prof MLM Mbaio

Co-supervisor: Prof L Muswaka

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CANDIDATE'S DECLARATION

I, Belinda Tatenda Ruzvidzo hereby declare that this dissertation entitled "An analysis of the South African law governing minors living with their mothers in prison" hereby submitted in fulfilment of the requirements for the degree of Master of Laws (LLM) at the North-West University, has not been submitted elsewhere by me for a degree at this university and that, it is my work in design and execution and that all materials contained herein have been duly acknowledged.

Student

Belinda T Ruzvidzo

Student No

22872582

Signature

Date

DECLARATION BY SUPERVISORS

I, Professor Melvin L. M. Mbao, hereby declare that this dissertation by Mrs Belinda T Ruzvidzo for the degree of Master of Laws (LLM) entitled "An analysis of the South African law governing infants living with their mothers in prison," be accepted for examination.

Prof MLM Mbao Supervisor
June 2017

I, Professor Linda Muswaka, hereby declare that this dissertation by Mrs Belinda T Ruzvidzo for the degree of Master of Laws (LLM) entitled "An analysis of the South African law governing infants living with their mothers in prison," be accepted for examination.

Prof L Muswaka Co-Supervisor
June 2017

DEDICATION

To All the Children Living In Prisons with Their Mothers

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
ACT	Australian Capital Territory
BOP	Bureau of Prisons
CRC	Convention on the Rights of the Child
CSA	Correctional Services Act
DCS	Department of Correctional Services
MINT	Mothers and Infants Nurturing Together
NSW	New South Wales
NT	Northern Territory
PRC	Peoples' Republic of China
SACJ	South African Journal of Criminal Justice
UN	United Nations
USA	United States of America

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Graham v Bartley (1984) 57 ALR 193

Walsh v Department of Social Services [1996] 67 SASR 143

South Africa

S v Clifford 2009 JDR 0154 (SE)

S v EB 2010 (2) SACR524 (SCA)

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)

S v Makau 2006 (2) SACR 582 (SCA)

S v Thebus and Another 2002 (2) SACR 566 (SCA)

Scott-Crossley v S [2007] JOL 20717 (SCA)

Solidarity and Others v Department of Correctional Services and Others 2015 JOL 33141 (LAC)

USA

Block v Rutherford, 468 U.S 576,576-577 (1984)

Duarte v City of New York 91 A.D 3d 778 (2012)

Goebert v Lee County 510 F.3d 1312 (11th Cir. 2007)

Nelson v Correctional Medical Services 583 F.3d 522 (8th Cir. 2009)

Overton v Bazzetta, 539 U.S 126, 126-127 (2003)

Santosky v Kramer 455 U.S 745 747-748 (1982)

United States v Booker 543 U.S.220, 245 (2005)

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1948 Universal Declaration of Human Rights

Declarations

2009 Kyiv Declaration on Women's Health in Prison
Correcting Gender Inequality in Prison Health

Principles

1990 Basic Principles for the Treatment of Prisoners

Conventions

1989 Convention on the Rights of the Child

Charters

1990 African Charter on the Rights and Welfare of the Child

Rules

2010 Standard Minimum Rules for the Treatment of
Prisoners (the Nelson Mandela Rules)

2010 Rules for the Treatment of Women Prisoners and Non-
custodial Measures for Women Offenders (The
Bangkok Rules)

ABSTRACT

South is one of the countries that allow minor children to live with their mothers in correctional facilities/prisons until they are two years old. The decision to allow a minor to accompany his/her mother to prison is to allow the child to bond with the mother, and according to South African law, such decision should be taken as a measure of last resort and should be in the best interests of the child concerned. South Africa has a policy framework in place to govern minors living with their mothers in prison. However, this policy framework has shortcomings that need to be addressed in order to protect the best interests of the child living with his/her mother in prison.

It is against this backdrop that this study discusses the rights of children living in prisons with their mothers and how the living conditions in prison affect the realisation of these rights. The study also focuses on effects of maternal incarceration on children, particularly those who accompany their mothers to prison. International and Regional human rights instruments relevant to the issue of minors living in prison with their mothers are also discussed in order to find out whether South Africa as a State Party to the Convention on the Rights of the Child and The African Charter on the Rights and Welfare of the Child has incorporated these into its domestic law. Further, the study draws on comparative perspectives from other jurisdictions in order to deduce how South African policies governing minors in prison fare against other jurisdictions. The comparative study does not only analyse the policies of countries that allow minors to accompany their mothers in prison, it also discusses policies of countries that do not allow the practice.

Finally, the study offers recommendations to the South African policy makers on how to improve the current policy framework by deducing lessons from other jurisdictions in the comparative study.

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

Due to the current global economic and political environment,¹ some people tend to resort to illegal activities such as theft, fraud and drug-dealing for survival,² while others migrate illegally³ to other countries in search of greener pastures. More often than not, these activities result in the offender being incarcerated. While in the past, the prison populace has been largely male, recently, there has been a steady rise in the number of women prisoners.⁴ During the period 1995 to 2004, there was a 60.5% increase in the female prison population in South Africa.⁵ In 2009, two thousand three hundred and sixty-nine (2 369) women were incarcerated in South African prisons and one-hundred and twenty-three (123) children were in prison with their mothers.⁶

Changes in the social and economic circumstances have forced many women to take up the role of main/sole breadwinner, a role which was initially reserved for men.⁷ In the past, educated women would get proper employment, become independent and fend for their families. However, not all women are privileged enough to have a formal education. This leads to some resorting to illegal means to make a living,⁸ either because they are sole breadwinners or primary caregivers in

¹ Shah A 'Global Financial Crisis' *Global Issues* 24 March 2013 www.globalissues.org/article/768/global-financial-crisis [accessed 24 February 2016] Due to the global financial crisis, there has been a sharp rise in living costs which increases poverty levels and this in turn lead to protests and demonstrations. The financial crisis also results in job losses and salary cuts, further increasing poverty among the working class. Countries such as Zimbabwe, Libya and Ukraine among others have political crises which see many people losing their jobs with some migrating illegally to other countries. It is therefore evident that the current global financial and political crises have a negative impact on the lives of many people which may lead some to a life of crime for survival.

² Marshall C "Crime and Great Depression" *American Economic History* 2012.

³ Duvell F "Irregular migration from a global perspective" *CESifo DICE Report* 3/2011.

⁴ According to The Sentencing Project, 2010, the number of women in American prisons has increased by 64% from 1980 to 2010.

⁵ Schoeman M 'The Influence of Imprisonment on Infants and Young Children Incarcerated with their Mothers' NICRO 2009 p2.

⁶ Schoeman *ibid* p 2.

⁷ April K and Soomar Z "Female Breadwinners: Resultant Feelings of Guilt and Shame" *Effective Executive* 2013 Vol XVI No 4 32-47 p1.

⁸ Luke K "Mitigating the Ill Effects of Maternal Incarceration on Women in Prison and Their Children" *Child Welfare* 2002 Vol LXXXI #6 929-948 p930 where the author reiterates that

single-parent households.⁹ Most women are often convicted and imprisoned for crimes such as possession or selling drugs and property offences¹⁰ including vandalism, theft and trespassing which usually result in shorter prison terms.¹¹ However, serious and violent crimes such as human and drug trafficking, murder and kidnapping often result in lengthy custodial sentences which pose problems for pregnant prisoners or those with minor children. In cases of illegal immigrants, both mothers and their children may be subjected to lengthy detention while awaiting deportation to their home countries,¹² especially in circumstances where the immigrants are from very far away from the country of detention. This is because it is expensive and difficult to work out the logistics on how to deport them to their home countries. Most of these detention centres are not suitable to house minors.¹³

The imprisonment of women comes with additional problems especially where minor children are involved. Such problems include the care of the minor children during the incarceration of their mothers. In some cases, the imprisoned woman may be pregnant and may have to give birth while still serving her sentence. The question then arises as to how to deal with minor children of incarcerated women. This requires a delicate balance as there are conflicting rights at play in such situations. The conflicting rights include, amongst others, the best interests of the child principle,¹⁴ the child's right to liberty,¹⁵ the child's right to a safe environment,¹⁶ and the child's right to live with a parent.¹⁷



incarcerated women are usually poorly educated single mothers living in poverty 'struggling to be the sole financial and emotional providers for their children'.

⁹ O'Brien J (ed) *Encyclopedia of Gender and Society* Vol 2 (Los Angeles 2009) at 175.

¹⁰ Smyth J "Dual Punishment: Incarcerated Mothers and Their Children" *Columbia Social Work Review* 2012 Vol III 33-45 p35.

¹¹ Rodriguez F S, Curry T R, Lee G "Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?" 2006 *Social Science Quarterly*, Vol 87 318-339 p318.

¹² Human Rights Watch *Two Years with No Moon* 2014 describes the ordeal of an 8 year old girl and her family which included two minor sisters who were detained in a Bangkok Immigration Detention Centre.

¹³ Human Rights Watch *ibid* p1.

¹⁴ Article 3 of the United Nations Convention of the Rights of the Child General Assembly Resolution 44/25 of 1989 (hereinafter CRC) see also sec 7 of the Children's Act 38 of 2005.

¹⁵ Article 37 *ibid*.

¹⁶ Article 24 *ibid*.

¹⁷ Article 9 *ibid*.

Certain jurisdictions allow for imprisoned women to stay with their minor children in prison until the children reach a certain age¹⁸ while some make alternative arrangements¹⁹ for the care of such children until the release of the mother. In some cases, these minor children are simply left to fend for themselves.²⁰ Whether the child stays with the mother in prison or is staying outside prison, minor children are directly or indirectly affected by the mother's incarceration.

This study examines how the South African system deals with the problem of pregnant prisoners as well as those with minor children during the period of their incarceration. A comparative study between four countries, namely the United States of America (hereinafter the USA), Australia, Peoples' Republic of China and Norway was carried out. This was done in order to ascertain how these jurisdictions deal with the issue of minor children of imprisoned mothers. The justification for choosing these countries is that South Africa, Australia and the USA allow minors to stay with their mothers in prison. At the other end of the spectrum, Norway and the Peoples' Republic of China do not allow minors to stay in custody with mothers. This allowed the researcher to deduce lessons from these different jurisdictions and thus make recommendations to possibly improve South African policies and regulations governing the issue of minor children of incarcerated mothers.

The dissertation further highlights the conditions in which the minors in prison and detention centres are subjected to as well as the medical care received by pregnant prisoners. As for those minors who escape from staying in prison with their mothers, they are plagued with problems of their own such as losing contact with their caregiver and having no one to take care of them or be placed in foster homes. Since both scenarios have different repercussions, it is the aim of this study to investigate

¹⁸ Section 20 of the South African Correctional Services Act see also "Laws on Children Residing with Parents in Prison" www.loc.gov/law/help/children-residing-with-parents-in-prison/foreign.php [accessed 21 March 2015] Countries such as the USA (not all states allow children to live with their mothers in custody), Canada, UK, Botswana and South Africa among other countries allow children to reside in custody with their imprisoned mothers but the maximum age allowed to remain in such custody differs from country to country. The age ranges from birth (in cases where the child is born when the mother was already in custody) to seven years although 12 year olds have been reported to be still residing in custody.

¹⁹ "Laws on Children Residing in Prisons" *ibid* countries such as Norway and China do not allow children to live with their mothers while in custody thus alternative arrangements are made.

²⁰ Anonymous "There was no smell when we lived there!': Astonishing claim by mother of children aged 5 and 11 found living ALONE in school bus-while she and husband were in jail" MailOnline 8 March 2012 www.dailymail.co.uk/news/article-2112095/There-smell-lived-says-mother-children-aged-5-11-living-school-bus.html [accessed 21 March 2015]

what is in the best interests of the child who has a mother in prison. This ensures that the children will not end up being accidental victims of the crimes they did not commit and end up paying for the 'sins of the mother'.

The problem with imprisoning women comes when the woman is pregnant or if the imprisoned woman is a primary care-giver of a minor or a breadwinner as such imprisonment also affects the minors involved. In such cases, it is not only the prisoner's right to liberty and/or parental responsibility that are implicated but also the rights of the minor children who were in her care prior to the incarceration. Countries such as USA, South Africa and Australia provide facilities that allow imprisoned mothers to reside with their minor children in prison for a certain period.²¹ Where those facilities are not provided for, the prisoners are separated from their children and more often than not, lose parental rights in respect of their children.²² In other words, prison authorities face a problem as to whether to maintain the mother-and-child bond and let minors stay with their mothers in prison or run the risk of severing that mother-and-child relationship to give the child a 'normal' upbringing. This is so because the only guideline provided for by law²³ is the age limit until which the minor is allowed to reside in prison with its mother as well as the placement of such minor child upon reaching the age limit and everything else is left to the discretion of the correctional officials.

In most cases, minor children whose mothers are incarcerated are placed in the care of other members of the family like the grandparents, if available.²⁴ However, where this option is not readily available, the child is placed in foster care system for possible adoption.²⁵ In other cases, the children are simply left to fend for

²¹ Tabbush C and Gentile MF "Emotions behind Bars: The Regulation of Mothering in Argentine Jails" *Journal of Women in Culture and Society* 2013 Vol 39 130-149 p137 in Argentina, children may stay in prison with their mothers up to the age of 4 and then they are removed from the prison into alternative care.

²² Crary D "Prison Moms Fight Termination of Parental Rights" Los Angeles Times 12 January 2003 <http://articles.latimes.com/2003/jan/12/news/adna-prisonmom12> [accessed 20 May 2015] see also Farmer A "Mothers in Prison Losing All Parental Rights" 21 June 2002 <http://womensenews.org/story/incarceration/020621/mothers-prison-losing-all-parental-rights> [accessed 20 May 2015]

²³ S20 of the Correctional Services Act 111 of 1998 and s1 of the Correctional Services Amendment Act 25 of 2008.

²⁴ Manning R "Punishing the Innocent: Children of Incarcerated and Detained Parents" *Criminal Justice Ethics* 2011 Vol 30 267-287 p270.

²⁵ Gowland I 'Moms Behind Bars: Motherhood in Eshowe Correctional Center' (2011) *Independent Study Project (ISP) Collection Paper* 1115 1-50 p15 In the United States of America, *The Adoption and Safe Families Act of 1997* requires states to place a child who has been in foster

themselves.²⁶ Whatever option the authorities choose for the minor, there are sure to be major legal, social and economic ramifications for all parties involved especially the minor child. The child does not only suffer separation from the imprisoned parent, there are also social, economic and emotional problems which result from the imprisonment of a parent. There is a stigma that comes with having a parent in prison²⁷ which may give rise to other factors such as depression, anger, aggression, drug abuse and dropping out of school among others.²⁸

It is against this background, that the study investigates the strength and weaknesses of the South African legal and policy frameworks dealing with children living with their mothers in prison and how they can be addressed. It also seeks to determine what is in the best interests of the child in cases where the mother who is a primary care-giver to a child is imprisoned. It is hoped that this research will go a long way in ensuring that minor children whose mothers are in prison are given the best chances possible at a normal childhood. The purpose of this research is to make recommendations and offer possible solutions to the problem of children living with incarcerated mothers by highlighting the effects of the mother's imprisonment or incarceration on the child with the help of best practices in comparable jurisdictions.

1.2 Problem statement

The study is primarily concerned with the adequacy or inadequacy of the South African legal framework in dealing with pregnant inmates and minors living with their mothers in prison. The Correctional Services Act, 1998 (as amended), which is the only piece of legislation dealing with the subject of pregnant prisoners and minors living in prison with their mothers, has some short comings, as will be elucidated

care for 12 months into permanent placement. The Act also stipulates that once a child has been in foster care for 15 of the most recent 22 months, the states should seek the termination of parental rights. This Act becomes problematic particularly on mothers serving longer sentences (longer than 12 months) who run the risk of permanently losing parental rights to their children when they are imprisoned.

²⁶ Anonymous *op. cit.* note 20 above.

²⁷ Christian S "Children of Incarcerated Parents" National Conference of State Legislatures 2009 http://www.cga.ct.gov/coc/PDFs/fatherhood/NCSL_ChildrenOfIncarceratedParents_0309.pdf [accessed on 16 March 2015] see also Smyth note 5 above.

²⁸ Sanders E and Dunifon R "Children of Incarcerated Parents" <http://www.human.cornell.edu/pam/outreach/parenting/parents/upload/Children-of-Incarcerated-Parents.pdf> [accessed 19 February 2015]

herein. It fails to deal with important matters concerning the issue under discussion. Some of the issues it fails to address are as follows;

- Who decides what is in the best interests of the child and the criteria for allowing or refusing the mother and child to stay together in prison?
- Does the father of the minor have a say in deciding whether the child stays with the mother in prison?
- Who is responsible for identifying placement options?
- The minimum standards of the mother and baby units, and finally
- Identification of other options besides placement and living with the mother in prison.

All of the above ambiguities in the South African legal framework may do more harm than good to the minor children it seeks to protect. All these gaps need to be addressed in order to come up with an effective legal framework that is suitable to South African needs. This can be achieved by deducing lessons from other jurisdictions through a comparative analysis.

Although we will attempt to address all the questions raised, the main concern is to come up with alternative solutions other than placement and living in prison, options which are in the best interests of the child.

1.3 Aims and objectives of the study

1.3.1 Aims

The aim of this study is to discuss the South African legal framework dealing with children living with their incarcerated mothers and the effects of maternal incarceration on minor children. The study will further investigate how the principle of the 'best interests' of the child is applied in determining whether to allow or deny a minor the chance to live with his/her mother in prison.

1.3.2 Objectives

In line with the main aim of this study, the study's main objective is to unpack the law and related issues with a view to analyse the South African policy framework that deals with children living in prisons with their mothers. It is also important to analyse how other jurisdictions deal with the issue of minors living with their mothers in prisons in order to draw lessons which will in turn make it possible to come up with recommendations for policy reform to effectively deal with minor and children born to mothers in prisons.

1.3.3 Central Research Questions

The following inter-related questions are at the heart of this study;

- What is in the best interests of the child when the mother who is the primary care-giver and breadwinner is incarcerated?
- Who decides what is in the best interests of the child?
- Does the principle of the best interests of the child have a bearing on the sentencing of pregnant women or those with minor children?
- Which rights are affected especially in cases of children who are in custody with their mothers?
- Lastly, are there any alternatives to custodial sentences for pregnant women or women with minor children?

1.4 Rationale and justification of study

Children living in prisons with their mothers have often been called 'hidden victims of the crime',²⁹ hence the need to develop a comprehensive legal framework to regulate how these children are treated by the correctional services system. This study hopes to contribute to the limited body of legal knowledge on the problems faced by minors

²⁹ Schoeman M "Babies behind bars-hidden victims of policy and practice" *Child Abuse Research A South African Journal* 2011 Vol 12(2) 77-86 who refers to children with their mothers in prison as 'hidden victims of crime who are institutionally invisible.'

due to maternal incarceration. The study is therefore targeted at policy makers and human rights advocates to stand up for and protect children who have mothers in prisons. This study can also be beneficial to women offenders in that they get to serve their sentences while maintaining bonds with their children. It is also targeted at the judicial system to consider the best interests of the child when sentencing pregnant women or women with minor children.

1.5 Literature review

Incarcerating pregnant women or women with minor children is a common practice in many countries³⁰ worldwide. South Africa is one of the countries that has pregnant women and women with minor children in its prisons. However, there is a lack of adequate legal framework to regulate this area of the law. Section 28 of the Constitution of the Republic of South Africa, 1996³¹ may be applicable to the issue of children of imprisoned mothers as it deals with children in general but it fails to mention this group of children in particular. According to section 28(b) 'every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.' Section 28(2) further provides that in every matter concerning the child, the child's best interests are of paramount importance.

The Children's Act 38 of 2005³² ((as amended)) is entirely dedicated to children and may be applicable to the issue of children living with their mothers in prison but, like the Constitution, it does not specifically regulate the topic of minors living in prison with their mothers. Section 2(iv) of the Children's Act also provides that 'the best interests of a child are of paramount importance in every matter concerning the child.' In this regard, the Constitutional Court in *S v M*³³ noted that;

³⁰ Alejos M "Babies and Small Children Residing in Prisons" *Quaker United Nations Office* 2005 see also Mazoue N "Children Incarcerated with their Mothers: A Critique of the current Age-based Approach to the Separation of Children from their Mothers" University of KwaZulu-Natal 2012 p iv.

³¹ Hereinafter the Constitution.

³² Hereinafter the Children's Act.

³³ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

This Court, far from holding that section 28 acts as an overbearing and unrealistic trump of other rights, has declared that the best interests injunction is capable of limitation.

This means that when sentencing mothers with young children, courts should weigh and balance the child's best interests and the state's duty to punish criminal behaviour.³⁴ The view of Sachs J in *S v M* is that '...the sentencing Courts misdirected themselves by not paying sufficient attention to constitutional requirements'³⁵ when passing sentence. This highlights that courts have a role to play in protecting the rights of children when sentencing mothers of young children.

In light of the above, the court therefore came up with guidelines for sentencing mothers of minor children in cases where there is more than one appropriate sentence option.³⁶ The guidelines are as follows;

- a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- b) A probation officer's report is not needed to determine this in each case. The convicted person 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. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on children of a custodial sentence if such a sentence is being considered.
- c) If on the *Zinn*-triad approach 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.
- d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

³⁴ Cernelley M and Epstein CA "Do not visit the sins of the parents upon their children: Sentencing considerations of the primary caregiver should focus on the long term best interests of the child" *SACJ* 2012(1) 106-116 p107.

³⁵ 2008 (3) SA 22 (CC) para 48.

³⁶ *S v M* para 36.

- e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose³⁷

The Correctional Services Act 111 of 1998 ((as amended))³⁸ is the only legislation which directly addresses the issue of female prisoners with minor children. The Amended Act has reduced the number of years which a minor child can stay with her imprisoned mother from five to two years or 'until such a time that the child can be appropriately placed taking into consideration the best interests of the child.'³⁹ The Act also seems to offer the placement of the child as the only available solution in the best interests of the child. In other words, it is either that the child lives with the mother in prison or is placed in alternative or foster care.

Literature dealing with children of imprisoned women concentrates mainly on the psychological trauma⁴⁰ as well as emotional,⁴¹ social and economic implications of the mother's incarceration.⁴² Very few writers⁴³ have attempted to highlight the legal consequences⁴⁴ of maternal incarceration on minor children and those that do, fail to offer possible solutions on how to ensure that convicted women still serve their sentences without severely infringing on the rights of the child. In other words, the point of departure for this dissertation is how to strike a delicate balance between the need to punish and reform the convicted mother and the rights of the child.

³⁷ *S v M op. cit.*

³⁸ Correctional Services Amendment Act 25 of 2008.

³⁹ Sec 14 (a).

⁴⁰ Hanlon T, Carswell S and Rose M "Research on the caretaking of children of incarcerated parents: Findings and their service delivery implications" *Children and Youth Services Review* 2007 Vol 29 348-362 p350.

⁴¹ Hanlon *ibid* p 350.

⁴² Hanlon *ibid* p 350.

⁴³ Couzens M and Mazoue N 'A critical analysis of selected aspects of the South African legal framework pertaining to children living in prison with their mothers-with brief comparative comments' *Obiter* 2013 Vol 34(3) 428-455, see also Carneley and Epstein.

⁴⁴ These consequences include termination of parental rights [*Santosky v Kramer* 455 U.S 745 747-748(1982)] visitation rights of children of inmates [*Overton v Bazzetta*, 539 U.S 126, 126-127 (2003)], access to contact visits from children [*Block v Rutherford*, 468 U.S 576,576-577 (1984)] among others.

Children with incarcerated mothers are more prone to academic failure and to drop out of school.⁴⁵ These children are considered one of the most vulnerable groups in society and are at a risk of many developmental problems such as stress, attachment issues, stigma and being bullied among others.⁴⁶ The vulnerability of these children requires that they be protected by all means during their parent's incarceration whether the children are in alternative care or are living with their mothers in prison. This can be achieved through the development of a proper legal framework to regulate the subject of children living in prison with their mothers.

Couzens⁴⁷ noted the inadequacies of the South African legal framework in dealing with minors living in prison with their mothers. She highlights issues such as:

- failure to define the term 'mother' in the current framework
- failure to outline clear admission criteria
- discriminatory nature of the current framework in that it does not allow fathers who are primary caregivers to live with their children in prison.

Although Couzens makes recommendations on how the current South African policy framework may be improved, she, however, falls short of identifying alternatives to placement of the infant and children staying in prison with the incarcerated mother. In that respect, this study recommends alternatives to fill the existing *lacuna* in this field. By offering alternatives to placement and prison residency for policy reform, the resultant policies will cover all bases thereby ensuring that the best interests of the child are protected in all cases.

Vetten⁴⁸ is of the view that women in prisons are often forgotten and overlooked. This writer also reckons that Africa is still a long way in challenging the negligent

⁴⁵ Carnelley M and Epstein CA "Do not visit the sins of the parents upon their children: Sentencing considerations of the primary caregiver should focus on the long term best interests of the child" **SACJ** 2012(1).p113 discusses the effects of maternal incarceration in South Africa, see also Dallaire D, Ciccone C and Wilson L "Teachers' experiences with, and expectations of children with incarcerated mothers" **Journal of Applied Developmental Psychology** 2010 Vol 30 281-290 p281 discusses the impact of maternal incarceration in the United States of America.

⁴⁶ Dallaire D "Children with Incarcerated Mothers-Developmental outcomes, special challenges and recommendations" **Journal of Applied Developmental Psychology** 2007 Vol 28 15-24 p16.

⁴⁷ Couzens *op. cit.*

⁴⁸ Vetten L "The Imprisonment of Women in Africa" in Sarkin J (ed) *Human Rights in African Prisons* Cape Town 2008 134-154.

treatment of female prisoners as compared to other continents.⁴⁹ Vetten also acknowledges the limited availability of literature on women prisoners in Africa due to a number of reasons including the unwillingness by governments to allow outside scrutiny of their prison systems, lack of funds and resources on the part of African governments to gather and publish data on imprisonment.⁵⁰ Lack of publication opportunities is also a reason why there is limited literature on women imprisonment in Africa.⁵¹ This, in turn, results in lack of information on the subject which may be useful to law makers in the quest to develop innovative and responsive legal policies to regulate the subject of minors living with their mothers in prison.

While some women are sent to prison with their minor children, others are imprisoned while pregnant. A pregnant woman requires extra health care and a suitable diet,⁵² and since prisons were historically predominantly reserved for men,⁵³ it therefore logically follows that the prison is not suitable for pregnant women. Section 20(2) of the Correctional Services Act provides that the Department of Correctional Services (hereinafter the DCS) is responsible for food, clothing and healthcare facilities while section 8(2) states that the DCS must provide a diet that makes provision for the nutritional requirements of children and pregnant women. However, there have been reports indicating that medical and nutritional needs of pregnant prisoners have been neglected.⁵⁴ The lack of the required medical care for pregnant prisoners is not just a South African problem, the USA also encounters similar challenges.⁵⁵ Doetzer⁵⁶ discusses cases where pregnant inmates in the USA

⁴⁹ Vetten *ibid* p 34, the author reckons that this is due to the fact that Africa is diverse in culture, politics and history and also that African women are heterogeneous.

⁵⁰ Vetten *ibid* p 34.

⁵¹ Vetten *ibid* p 34.

⁵² Anonymous 'Health Care in Pregnancy' www.aboutkidshealth.ca [accessed 11 April 2016].

⁵³ Devlin M "10 Gripping Facts about Women in Prison" 2014 <http://listverse.com/2014/07/10-gripping-facts-about-women-in-prison/> [accessed 18 May 2015] the author alludes that "women's prisons are a relatively new concept and that women's prisons didn't even exist two centuries ago."

⁵⁴ Du Preez N "Imprisonment of black women with their babies and young children: A South African case study" *Child Abuse Research* 2008 Vol 9(1) 1-10 p4 where the author notes that there is a lack of prenatal and postnatal care proper nutrition, and a lack of education on childbirth and parenting. The same author also highlights that lack of health and specialized medical care was raised as a complaint during a visit to various South African prisons.

⁵⁵ Women in Prison: Health and Mental Health 2012 *Policy Brief The Gender Health & Justice Research Unit* http://www.ghjru.uct.ac.za/pdf/Policy_Brief_Health.pdf [accessed 9 June 2015] p3 where it is indicated that there is an infrequent availability of medical personnel in prisons and that where there are nurses available, they lack the proper compassion and sensitivity expected of health care workers.

⁵⁶ Doetzer G "Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth" *William & Mary Journal of Women and the Law* 2008 Vol 14(2) 363-392.

were denied medical care or had medical care delayed resulting in fatal results. The lack of medical care for pregnant inmates has sometimes resulted in litigation in USA.⁵⁷

In *Goebert v Lee County*,⁵⁸ the plaintiff informed prison officials on admission that she was pregnant and that she had a history of miscarriage. Five weeks later she began to leak amniotic fluid, and the nurse who examined her assured her that her foetus was healthy despite persistent symptoms.⁵⁹ After three requests to see a doctor, she was admitted to the hospital where the baby was declared dead due to a collapsed skull. This case serves to highlight medical issues which pregnant inmates have to deal with, which require proper legal policies and consistent implementation of such policies. In Iowa a nineteen year old inmate gave birth alone in her cell after she went into labour and banged on her cell door to alert the prison guards but the guards ignored her.⁶⁰ It should, however, be noted that there have been no reported court cases dealing with medical negligence concerning pregnant prisoners in South Africa.

Also closely related to the issue of proper medical care is the issue of perinatal shackling which is described in detail by Griggs.⁶¹ Perinatal shackling is defined as entailing the application of handcuffs, leg irons, and/or waist shackles to the incarcerated woman prior to, during and after labour and delivery.⁶² This practice is usually justified on the premise of safety for medical staff and the general public as well as to avoid flight risk,⁶³ this, despite the fact that most of these women are imprisoned for non-violent crimes, are in painful labour and that there has been no report of attempted escape.⁶⁴ This practice violates a number of human rights such

⁵⁷ Law V U.S. Prisons and Jails Are Threatening the Lives of Pregnant Women and Babies 'In These Times' available at <https://www.theguardian.com> accessed 19 September 2016

⁵⁸ *Goebert v Lee County* 510 F.3d 1312 (11th Cir. 2007).

⁵⁹ *Goebert v Lee* para 9.

⁶⁰ Griggs CL "Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners" *Journal of Gender, Social Policy & the Law* 2011 Vol 20(1)247-271.

⁶¹ Griggs *ibid* p 256.

⁶² Dignam B and Adoshi EY "Health Rights in the Balance: The Case Against Perinatal Shackling of Women Behind Bars" *Health and Human Rights* 2014 Vol 16(2).

⁶³ ACLU BRIEFING PAPER: The Shackling of Pregnant Women and Girls in U.S Prisons, Jails and Youth Detention Centers <https://www.aclu.org/aclu-briefing-paper-shackling-pregnant-women-girls-us-prisons-jails-youth-detention-centers> [accessed 26 May 2015].

⁶⁴ *Ibid*.

as the right to dignity⁶⁵ and not to be treated in an inhuman manner⁶⁶ among others. It also poses a number of medical complications such as injury and/or death of the foetus or mother or both. In the case of *Nelson v Correctional Medical Services*,⁶⁷ the plaintiff (prisoner) suffered a hip dislocation and an umbilical cord hernia directly resulting from the shackles that prevented movement of the prisoner's legs.

South Africa is not immune to the problem of perinatal shackling as there have been reported cases of women handcuffed throughout the birthing process despite being in a state hospital.⁶⁸ Section 31(1) of the Correctional Services Act makes provision for the use of mechanical restraints and the instances where such restraints may be used.⁶⁹ The instances mentioned in the Act are hardly applicable to a woman in labour, making perinatal shackling unjustifiable.

After studying the available material, we discovered that none of them offers alternative solutions to children living with their mothers in South African prisons. Currently, there seems to be two available alternatives offered by the Correctional Services Act which are: living with the mother in prison or placement. The study of other jurisdictions will deduce possible innovative solutions and recommendations that may be implemented by the South African law-makers to improve the policy framework dealing with children living with their mothers in prison.

The point of departure of this study is therefore to recommend other possible options besides incarceration and placement, options which are in the best interests of the child and do not infringe on section 9 of the Convention on the Rights of the Child (CRC).⁷⁰ This will have an impact on the existing literature. Most literature available on the subject of incarcerated mothers and their minor children is concerned with the

⁶⁵ Article 1 of the Basic Principles for the treatment of Prisoners General Assembly Resolution 45/111 of 14 December 1990 stipulates that 'all prisoners shall be treated with respect due to their inherent dignity and value as human beings.'

⁶⁶ Article 5 of the Universal Declaration of Human Rights General Assembly Resolution 217A (III) of 10 December 1948 stipulates that 'no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.'

⁶⁷ 583 F.3d 522 (8th Cir. 2009).

⁶⁸ Artz L, Hoffman-Wanderer Y and Moul K "Hard Time(s): Women's Pathway to Crime and Incarceration" **The Gender, Health & Justice Unit**, University of Cape Town 2012 p240.

⁶⁹ The section provides that mechanical restraints may be used to ensure the safety of the prisoner or any other person, to prevent damage of property, if there is reasonable suspicion that the prisoner may escape or where the court requests the use of such restrains.

⁷⁰ Adopted by General Assembly Resolution 44/25 of 20 November 1989: Sec 9 states that member states 'shall ensure that a child shall not be separated from his/her parents against their will, except...that such separation is necessary for the best interests of the child.'

prisoner,⁷¹ whereby all issues are viewed from the prisoner's point of view, ⁷² while completely ignoring the best interests of the child.

1.6 Research methodology

The study analyses the South African legal framework dealing with the issue of children living with their mothers in prison as well as pregnant prisoners. This was achieved by adopting a qualitative⁷³ approach. The research therefore is a discussion of available published sources, both primary and secondary.

Primary sources used in this study include international instruments, case law (South African case law as well as cases from other jurisdictions) and legislation. Case law was of great help in highlighting the role of the courts in protecting the rights of infants and young children of offenders during the sentencing of such offenders. Case law also ascertained if the courts have an obligation to consider the plight of young children during the sentencing of a primary care-giver.

Secondary sources such as books, journal and newspaper articles and internet sources were also used in this study. A comparative study on how different jurisdictions deal with the issue of children of incarcerated mothers was also carried out. All the sources used were duly acknowledged.

It is however important to note that the researcher was limited in the access of relevant legislation in countries such as the Peoples' Republic of China and Norway. This is due to the fact that available legislation is published in native languages of the respective countries, which is beyond the comprehension of this researcher. However, the researcher made use of published articles which discuss the aforesaid legislation.

⁷¹ Nesmith A and Ruhland E "Children of Incarcerated parents: Challenges and resiliency, in their own words" *Children and Youth Services Review* 2008 Vol 30 1119-1130.

⁷² Johnston D "Effects of Parental Incarceration" in Gabel k and Johnston D (eds) *Children of Incarcerated Parents* Lexington Books, New York 1995 where the author reiterates that most information on prisoner's children is derived from surveys of their parents and that very few studies have directly examined the children themselves.

⁷³ Wyse E.S 'What is the difference between Qualitative Research and Quantitative Research' www.snapsurveys.com [accessed 14 April 2016] Qualitative research is primarily exploratory research which provides insights into the problem and is used to gain an understanding of underlying reasons, opinions or motivations.

1.7 Scope and Limitations of the study

This study investigates the inadequacy of the South Africa legal and policy framework in dealing with minors living with their mothers in incarceration. This study is mainly concerned with children who accompany their mothers to prison and those that are born during the mother's incarceration although reference is made to other children of the female offender.

1.8 Chapter Outline

Chapter 1 This is an introductory chapter to this work and it contains the background to the study, problem statement, aims and objectives of the research, rationale and justification of the study as well as the methodology to be used.

Chapter 2 This Chapter focuses on the problems experienced by minors with incarcerated mothers from a human rights perspective. In order to understand which human (in this case children's) rights are violated in cases of maternal incarceration, the chapter will highlight the effects such incarceration has on minors. The chapter will also discuss international instruments relevant to the issue which are aimed at protecting minor children.

Chapter 3 The Chapter examines different legal systems and how these systems deal with the issue of minors whose mothers are in custody and pregnant inmates. The main focus will be on the USA, Australia, Norway and Peoples' Republic of China. However, reference to other countries will be made where necessary.

Chapter 4 This is the last and final chapter of this dissertation and is aimed at discussing the findings of the study. It also contains recommendations on how to deal with maternal incarceration in such a way that minor children do not become victims of the decisions made by others.

1.9 Ethical considerations

During this study, no interviews were carried out and the writer diligently observed all the ethical requirements. The author further guarded against plagiarism and duly acknowledge all sources used.

1.10 Summary

The thrust of this Chapter has been that the South African policy framework dealing with children of incarcerated mothers have shortfalls. It gives DCS officials too much discretion when deciding what is in the best interests of the child when the mother of such minor child is in imprisoned. This may result in the abuse of power by the officials as the legislation also fails to provide for appeal options when a mother is refused the chance to live with her minor child in prison. These disparities in the current policies necessitate the need for a comparative study to learn how other jurisdictions deal with the same issue. This will in turn result in possible solutions and recommendations to improve the current legislation. The next chapter will highlight the effect that maternal incarceration has on infants living with their mothers in prison. Further, it will discuss international human rights instruments relevant to the issue of minors living in correctional centres with their mothers.

CHAPTER TWO: THE RIGHTS OF CHILDREN INCARCERATED WITH THEIR MOTHERS IN SOUTH AFRICA

2.1 Introduction

Of the female prison populace, it is reported that 70% of all female inmates are mothers⁷⁴ and that at any given time there are between 70 and 150 babies living in correctional facilities.⁷⁵ It is however difficult to establish the accurate number of children living in correctional facilities because information available greatly varies,⁷⁶ and the same goes for the number of pregnant women in incarceration.⁷⁷ Pregnant inmates and those with babies living with them in prison have rights like any other citizen in South Africa and these rights must be protected. This chapter is focused on children of incarcerated women and how their rights are affected by their mothers' incarceration. For the purposes of this study, it is important to briefly discuss the development of the correctional system post-1994. The motivation for discussing the post-1994 era is because South Africa entered into a new constitutional dispensation in 1994 by the adoption of the Interim Constitution,⁷⁸ hence the need to examine how the correctional system fared against the constitution's scrutiny.

This chapter will therefore highlight the effects of maternal incarceration on infants in the South African context. It will further discuss international human rights instruments applicable to children living with their mothers in correctional centres. In order to understand the impact maternal incarceration has on infants, it is imperative to give an overview or background of the South African correctional system and how women fit in it.

⁷⁴ Gowland *op. cit.* note 25 p 13.

⁷⁵ "Mothers and Babies in Incarceration" 2014 ***Southern African Catholic Bishops' Conference Briefing Paper*** 352 1-4 p2 see also Women with children in correctional centres; Gauteng Department of Correctional Services Briefing 19 February 2014 available at <https://pmg.org.za/committee-meeting/16961/> [accessed on 22 November 2016] which reports that by the end of 2013, there were about eighty-seven babies in Department of Correctional Services facilities with their mothers.

⁷⁶ *Ibid.*

⁷⁷ Gerardy J 'SA's prison babies get a second chance' Mail & Guardian 12 April 2012 <http://mg.co.za/article/2012-04-12-sas-prison-babies-get-a-second-chance> [accessed on 27 June 2015]

⁷⁸ Act 200 of 1993.

2.2 Overview of the South African correctional system

The Interim Constitution entrenched fundamental human rights for every citizen including offenders.⁷⁹ These rights brought about the need for reform in the correctional system of South Africa. The Department of Correctional Services⁸⁰ had to align its legislative framework with the Constitution, in particular the Bill of Rights. The transformation included changes in the representation of DCS personnel to represent the country's demographic spread in the department,⁸¹ a phenomenon the DCS is still grappling with.⁸² The transformation also included the demilitarisation of the department, aligning the operational and organisation culture of the department with international correctional standards as well as the introduction of checks and balances to scrutinise the Department's activities⁸³ and to ensure that the DCS is accountable to Parliament.

In 1996 the Cabinet approved the National Crime Prevention Strategy (NCPS) aimed at making the criminal justice system a clear deterrent for criminals and reduce the chance for re-offending.⁸⁴ The NCPS also focused on transforming the South African prisons into rehabilitative centres that would produce skilled and reformed individuals capable of successful re-integration into society.⁸⁵ While these changes were taking place within the Department, the Constitution⁸⁶ was passed. The Constitution enshrined a Bill of Rights and it required all government departments to align their core activities with the constitutional values, which are; the supremacy of the Constitution, human dignity, achievement of equality and the advancement of human rights and freedoms.⁸⁷ Consequently, the Department passed the Correctional Services Act of 1998 which was a total departure from the 1959⁸⁸ Act. The 1959 Act

⁷⁹ Chapter 3 of the Interim Constitution of South Africa.

⁸⁰ Hereinafter the DCS.

⁸¹ Department of Correctional Services White Paper on Corrections in South Africa Draft 4 2005 p27 available at <http://www.dcs.gov.za/AboutUs/COE/Documents/WhitePaper/WHITE%2520PAPER%25208.doc> [accessed 22 November 2016]

⁸² *Solidarity and Others v Department of Correctional Services and Others* 2015 JOL 33141 (LAC).

⁸³ DCS White Paper *op. cit.*

⁸⁴ *Ibid.*

⁸⁵ DCS White Paper *ibid.*

⁸⁶ Constitution of the Republic of South Africa, 1996 hereinafter the 1996 Constitution.

⁸⁷ Sec 1 of the Constitution.

⁸⁸ Correctional Services Act 8 of 1959.

allowed an infant to stay with the mother in prison until the age of two.⁸⁹ The 1998 Act included fundamental rights for offenders, emphasised the rights of women and children and provided safeguards against the use of force and segregation of prisoners.⁹⁰ The Act also improved the community-involved release Programme as well as the disciplinary system for offenders.⁹¹ It also changed the cut-off age for children allowed to stay with their incarcerated mothers to five years.⁹²

The 1998 Act (as amended) in 2008 and the amendment brought about significant changes which portray the rehabilitative nature of the DCS. The Amendment Act changed 'prisons' into 'correctional centres',⁹³ 'prisoner' to 'inmate'⁹⁴ and 'unsentenced prisoner' to 'unsentenced offender'.⁹⁵ This Act also reverted the cut-off age for allowed infants to stay with their mothers in correctional centres back to two years.⁹⁶



2.3 Women in Correctional Centres

As at 31 March 2016, the percentage of women in South African Correctional Centres constituted 2.6% of the total prison population and the number of sentenced female inmates stood at 4193.⁹⁷ This makes women in correctional centres a minority, thereby making them somewhat invisible within the criminal justice system. It has been noted that there 'has been no systematic study of imprisonment of women in South Africa...' ⁹⁸ the minority status of women in correctional facilities coupled with the lack of information on them may lead to them being disadvantaged. For instance, most female inmates are often imprisoned in centres far from home owing to the small numbers of female correctional centres. There have been reports that 63% of women are incarcerated in prisons more than 100 kilometres away from

⁸⁹ Sec 20.

⁹⁰ DCS White Paper note 85 above p30.

⁹¹ DCS White Paper *ibid*.

⁹² Sec 20 of Correctional Services Act.

⁹³ Sec 1(e) of the Correctional Services Amendment Act 25 of 2008.

⁹⁴ Sec 1(j).

⁹⁵ Sec 1(t).

⁹⁶ Sec 14 (a) of Correctional Services Amendment Act.

⁹⁷ South Africa| World Prison Brief-International Centre for Prison Studies available at <http://www.prisonstudies.org/country/south-africa> [accessed on 6 December 2016]

⁹⁸ Artz L and Rotmann B "Taking 'A Count' of Women in Prison" *Agenda* Vol 29 2015 p3-13 p1.

their homes.⁹⁹ There are 241 correctional centres in South Africa and of these eight are exclusively for women while 91 accommodate both men and women.¹⁰⁰

The profiles of women in correctional centres differ greatly from those of their male counterparts. Most women in incarceration are between the ages of 30 to 50 as opposed to men whose majority are below 30 years.¹⁰¹ The age group of women incarcerated likely means that these women have young children. Most of these female inmates did not finish matric.¹⁰² For example, a majority of women in Haffejee's study came from a poor economic background with 45% being the sole bread-winners in their households prior to incarceration.¹⁰³ Further, most female inmates are convicted of non-violent crimes such as prostitution and drug offences.¹⁰⁴ In addition, women have peculiar health care needs as compared to their male counterparts, for example, reproductive health such as pregnancy, child birth and menstruation that require particular attention. The DCS is obliged to provide for the health care needs of all prisoners including pregnant women.¹⁰⁵ The B-Order. 1 also provides that the DCS is responsible for all the health, medical (including hospitalisation) and psychological needs of infants who are incarcerated with their mothers.¹⁰⁶ The B-Order. 1 is, however, silent on whether the DCS is responsible for the special health care needs of female inmates. In the same light, the CSA only provides that the DCS is responsible for providing a diet that meets the nutritional requirements of a pregnant woman¹⁰⁷ and fails to address the need of special health care for pregnant inmates.

⁹⁹ CSPRI Newsletter 2005 p2.

¹⁰⁰ Jules-Macquet R 'The State of South Africa Prisons' NICRO 2014 p5.

¹⁰¹ Du-Preez N "Imprisonment of black women with their babies and young children: A South African case study" *Child Abuse Research 2008 Vol 9(1)* 1-10 p3.

¹⁰² Haffejee S, Vetten L and Greyling M "Minority Report: The imprisonment of women and girls in Gauteng" *CSVR Gender Programmeme, Research Brief 4 of 2006* 1-4 p1.

¹⁰³ Haffejee *ibid*.

¹⁰⁴ Mazoue N "Children Incarcerated with their Mothers: A Critique of the current Age-based Approach to the Separation of Children from their Mothers" *University of KwaZulu-Natal* 2012

¹⁰⁵ Sec 12 (1) of the Correctional Services Act provides that the DCS must provide adequate health care services to all prisoners.

¹⁰⁶ Para 10.2.1 of the Department of Correctional Services B-Order.1: Incarceration Administration Chapter 21: Infants and Mothers (B-Order. 1). The document was obtained from a DCS official and is on file with researcher.

¹⁰⁷ Sec 134(1) (j) of the CSA.

2.4 Effects of maternal incarceration on children

Children of incarcerated women have been referred to as 'hidden victims of crime' who are 'invisible' in correctional institutions.¹⁰⁸ This 'invisibility' means that they are often ignored by the system as attention is given more to offenders and this has led to little research on the effects of incarceration on children of female inmates.¹⁰⁹ Although these children are not the ones serving a prison sentence, they feel the repercussions of their mothers' crimes. It is therefore imperative to highlight the effects of maternal incarceration on minor children of inmates.

It is common cause that maternal incarceration destabilises the family unit and this affects both children who remain on the outside or those who stay with the mother in a correctional facility. Children who live in correctional centres with their incarcerated mothers will be away from the rest of the family, for instance, they will be taken away from the father and other siblings. If a child is allowed to stay with the mother in custody, maintaining contact with the rest of the family will be difficult considering the fact that most women are imprisoned in centres far from home.¹¹⁰ This specifically applies to children who accompany their mothers to correctional centres, that is, those born outside custody, who are abruptly taken away from the family environment into a new restrictive environment with unfamiliar people.

The correctional facility environment on its own has an effect on infants who stay with their mothers during incarceration. The children of incarcerated female inmates are confined to the prison walls locked in the cells from afternoon until the next morning,¹¹¹ thereby limiting their freedom of movement and leisure. Young children like to actively explore new things and interact with adults and other children in order to develop skills¹¹² and the restrictive correctional environment does not allow the child to actively explore his/her surroundings, thereby limiting their cognitive skills development. These children also lack age appropriate contact as they spend much

¹⁰⁸ Schoeman M *op. cit.* note 29 p 77.

¹⁰⁹ Hesselink A and Dastile NP "The reality of babies and toddlers behind bars" **Acta Criminologica CRIMSA 2009 Conference Special Edition 1** 2010 65-79 p 65 notes that as of 2011 there had only been one South African study highlighting the effects of incarceration on infants and young children of female inmates.

¹¹⁰ Artz and Rotmann *op. cit.* note 88.

¹¹¹ Schoeman M *op. cit.* note 108 p 65.

¹¹² Willis M "Born to explore" available at http://www.naturalchild.org/guest/missy_willis.html [accessed on 12 December 2016]

of their time surrounded by other inmates and correctional services personnel. Hesselink also notes that these children lack exposure to male role models as they are often surrounded by females.¹¹³ This factor, coupled with lack of exposure to life outside the prison walls, may make it difficult for these children to adapt to society when they leave correctional centres.

Children who live with their mothers in correctional centres often have behavioural problems. Children learn from watching the world around them,¹¹⁴ and these children have been found to show signs of violent and age inappropriate behaviour of other inmates such as shouting and fighting.¹¹⁵ Exposure to such behaviour during a child's formative years may shape their behaviour as adults.

The rigid regime¹¹⁶ of the prison environment also has negative effects on infants staying in the correctional centres. Prison schedules are static¹¹⁷ and female inmates and their children are 'indoctrinated' to follow the same pattern every day. These children also lack exposure to many activities necessary for the development of children of their age, such as interacting with animals and nature and exposure to modern amenities and recreational facilities. This lack of exposure may give the infant a distorted perception of reality, making it difficult to adjust to life on the outside of the correctional centre upon the mother's release or placement of the child.

South African correctional centres are riddled with over-crowding.¹¹⁸ Over-crowding may be harmful to the child in that communicable diseases can easily spread where

¹¹³ Hesselink A and Dastille N "The reality of babies and toddlers behind bars" *Acta Criminologica CRIMSA 2009 Conference Special Edition* 1/2010.

¹¹⁴ Martinez E 'How Children Learn by Observing Behavior of Adults' available at http://kids.lovetoknow.com/wiki/Children_Learn_Best_by_Observing_Behavior_of_Adults [accessed 12 December 2016]

¹¹⁵ Schoeman 'Babies behind Bars' *op. cit.* note 111 above p 81, the author also reports that assault, aggressive and violent behaviour amongst female inmates is commonplace, see also South Africa: Innocents in jail 2010 available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&skip=0&query=Children+prison&coi=ZAF> [accessed 11 December 2016] where a mother reports that her son had learnt swear words from other inmates and had developed a habit of picking up cigarette butts and mimic smocking them.

¹¹⁶ Hesselink *op. cit.* note 113 above p 65.

¹¹⁷ Hesselink *Ibid.*

¹¹⁸ Hesselink *ibid* p 65 reporting that South African prisons have been 150% over populated for the past 14 years, see also Schoeman who also notes that mothers frequently have to share a communal cell with 35 other women and their children.

there people are crowded. This, together with lack of adequate health care¹¹⁹ may be fatal for the infant exposed to diseases due to overcrowding. Over-crowding may also result in scarcity of resources such as food,¹²⁰ sanitary facilities, bedding¹²¹ and free space for the proper development of infants. This is especially true for those babies who live in communal cells with other inmates. Living in communal cells with the rest of the prison populace may also pose potential safety risk to infants. Infants may face abuse and maltreatment from fellow inmates especially with the potential of sharing a cell with sex offenders and child abusers.

South Africa allows infants to stay in correctional facilities until the age of two and thereafter the mother and child will be separated with the latter being placed with relatives, in foster care or given up for adoption. The forced separation of mother and child may have negative repercussions on the child. The child with a close bond with the mother who is later separated from the mother will have undesirable emotional reaction ranging from 'sadness to anger which will in turn interfere with the development of the child.'¹²² A child forcibly separated from the mother may also have emotional attachment issues later on in life.

Children living in correctional centres with their mothers are exposed to harsh conditions that have negative effects on their physical, mental and emotional development. However, it is important to note that other children of the incarcerated inmate outside prison are also affected by maternal incarceration, hence the need to find a balance between punishing the offender and the rights of the offender's minor children. Children between the ages of two and five are still largely dependent on the mother as a primary care-giver but they do not qualify to stay with their mothers as they are above the age limit allowed to reside in prison with the mother. Carnelley¹²³ reports that children between the ages of two and six are the most impacted age group by being separated from their mothers and that they tend to have regressive behaviour. This means that these children will take longer to develop than their peers.

¹¹⁹ Sloth-Nielsen J "Children in African Prisons" **Human Rights in African Prisons** 59 available at www.hsrcpress.ac.za [accessed on 12 September 2016]

¹²⁰ Du Preez *op. cit.* note 47 above p 6 notes that all women in his study agreed that the food given to their babies was not nutritious enough.

¹²¹ Du Preez *ibid* p 7 reports that baby cribs are not available in prison.

¹²² Mazou N *op. cit.* note 94 above p 24.

¹²³ Carnelley and Epstein 'Do not visit the sins of the parents upon their children' note 45 p 113.

Older children of inmates are also negatively affected by the mother's incarceration. Most children are of school-going age and are most likely to face the stigma of having a mother in prison.¹²⁴ This may in turn affect their school work and may lead to dropping out of school. Older children of school-going age with an incarcerated mother may be left to head the household taking care of their younger siblings with no source of income which may lead to an increase in the poverty level.¹²⁵ Children of incarcerated mothers may be forced to move from place to place during the mother's incarceration due to lack of a stable alternative care.¹²⁶ Frequent moving may lead to severe trauma, abuse and neglect.¹²⁷ It has also been reported that children of female inmates may suffer from 'stress disorders, anger and aggression, low self-esteem, substance abuse and gang activities'¹²⁸ among others. Some of these effects such as gang activities and substance abuse may also result in these children arrested and subsequently incarcerated, resulting in a vicious circle of incarceration in the family.

2.5 Human rights Instruments relevant to children in incarceration with their mothers

There are a number of human rights instruments relevant to the issue of children living in prisons with their mothers. Some of the instruments such as Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are dedicated entirely to children and are relevant to children incarcerated with their mothers as they contain and protect children's rights. Other related documents such as the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)¹²⁹ and the Bangkok Rules govern the treatment of prisoners with the former dealing with prisoners in general while the latter specifically deals with the treatment of women prisoners. The instruments acknowledge that the imprisonment

¹²⁴ Dawson A *et al* "Stigma, health and incarceration: Turning the tide for the children with a parent in prison" *Journal of Child Health Care* 2013 Vol 17(1) 3-5 p3.

¹²⁵ Anon *op. cit.* note 18.

¹²⁶ Christian *op. cit.* note 27 p 3.

¹²⁷ *ibid* p 3.

¹²⁸ Carnelley and Epstein *op. cit.* note 123 p 113.

¹²⁹ Resolution adopted by the General Assembly on 17 December 2015 A/RES/70/175 revised the 1975 Resolution.

of women also impacts on children of such prisoners, thus they also make provisions for children of incarcerated women. The above international human rights instruments will be discussed below.

2.5.1 The United Nations Convention on the Rights of the Child (CRC)

The CRC was adopted by the UN General Assembly in 1989 and is the first ever legally binding international instrument dealing comprehensively with the rights of children.¹³⁰ The CRC defines a 'child' as any human being under the age of eighteen years.¹³¹ The Convention is based on the notion that children are physically and mentally immature and therefore need 'special safeguards and care.'¹³² The CRC also firmly believes that the family is a fundamental unit and the natural environment for the growth and well-being of its members, particularly children who should be protected.¹³³ Although the CRC does not make specific provisions for children incarcerated with their mothers, it requires all States Parties to take appropriate legislative, administrative and other measures to ensure the implementation of the rights entrenched in the Convention.¹³⁴

The most important provision of the CRC is Article 3 which is the 'best interests' clause. Article 3 provides that in 'all actions concerning the child, the best interests of the child should be of primary concern.' This applies to children of prisoners in that the decision to allow a child to accompany the mother to prison or to separate him or her from the mother should be in the best interests of the child. As a state party, South Africa is obliged to domesticate the provisions of the CRC into South African law.¹³⁵ In accordance with Article 2(2) of the CRC, the best interests of the child principle was entrenched in section 28(2) of the Constitution and that it should be applied in every matter concerning the child. Further, sections 7 and 9 of the

¹³⁰ Ekundayo O "Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Undermines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC" *International Journal of Humanities and Social Science* Vol 5 2015 143-158 p147.

¹³¹ Art. 1 of the CRC.

¹³² Preamble to the CRC.

¹³³ *ibid.*

¹³⁴ Art. 4 of the CRC.

¹³⁵ Art 2(2) of the CRC.

Children's Act sets the standards for the best interests of the child and emphasises the paramountcy of a child's best interests.¹³⁶ Section 9 provides that 'in all matters concerning a child, the best interests of the child is of paramount importance and must be applied.' Section 7 provides guideline when applying the best interests of the child principle.

Article 2(2) of the CRC states that all States Parties should ensure that the child is protected from 'all forms of discrimination or punishment on the basis of status, activities...of the child's parent...' This is applicable to children incarcerated with their mothers in that the incarceration of children with their mothers may be seen as punishing the child for the crimes of the mother. In this regard, South African law¹³⁷ requires that the child be protected from all forms of discrimination on any ground including the status of a family member. This means that in terms of Article 2(2) of the CRC, the incarceration of the mother should not negatively affect the child in any way and that right is protected by South African law.

Article 7 of the CRC provides that the child has '...the right to know and be cared for by his or her parent.' This Article is relevant when making the decision whether to allow the child to stay with the mother in prison or not. In addition, Article 9 of the Convention affords the child the right not to be separated from his or her parents against the child's will unless it is deemed to be in the best interests of the child. Article 9(2) further provides that pursuant to paragraph 1 of the same Article, all interested parties should be given an opportunity to participate in proceedings that affect the child. This implies that fathers and other close relatives who are part of the child's life should also be consulted in making the decision on whether or not to incarcerate a child with the mother. Article 9(3) further provides that States Parties should ensure that a child who is separated from one or both of parents should have personal relations and direct contact with both parents on a regular basis unless it is not in the best interests of the child. This means that children who are incarcerated with their mothers should maintain relations and contact with their fathers.

In this regard, section 28(1) (b) of the South African Constitution provides that a child has the right to family or parental care or appropriate alternative care when removed

¹³⁶ Act 38 of 2005.

¹³⁷ Sec 6(2) (d).of the Children's Act.

from the family environment. Section 7(1) (f) of the Children's Act (as amended) also recognises the child's need to remain in the care of his or her parents, family and extended family as well as to maintain a connection with his or her family and extended family. Further, a child must be brought up in a stable family environment and where not possible, in an environment that closely resembles the family environment.¹³⁸ This means that a child has a right to his or her parental care and this must be taken into consideration when making a decision whether to allow a child to stay with the mother in prison or not. Further, if a child is allowed to stay with the mother in prison, that child should be allowed to maintain contact with the rest of his/her family.

Article 12 of the CRC affords a child the right to be heard in matters that affect him or her provided that the child is capable of forming his or her own view and the weight given to such views is dependent on the age and maturity of the child. This provision goes hand in hand with Article 9(2) of the same Convention which requires that in all cases resulting in the separation of a child from one or both parents, all interested parties should be consulted. Since the child is affected by such separation, this clause may imply that if the child is capable of making decisions, such child should be consulted to ascertain his or her wishes on whether he/she wants to be incarcerated with the mother or not. Article 12(2) further provides that a child capable of forming his or her views should be given an opportunity to be heard in any judicial and administrative proceedings affecting the child. This may be applicable during the sentencing of primary care-givers of young children. Before sentencing, children who are capable of forming views should be given a chance to express how the absence of their primary care-giver will impact on them.

Following in the footsteps of the CRC, section 6 (5) of the Children's Act stipulates that the views of a child in matters that affect him or her must be taken into consideration with due weight given to the child's age, maturity and stage of development. Pursuant to Article 9(2) of the CRC, section 6(3) of the Children's Act provides that where it is in the best interests of the child, the child's family should be given a chance to express their views in any matter that concerns the child. The inclusion of these rights in South African law proves that South Africa has fulfilled its

¹³⁸ Sec 7(1) (f).

obligations in terms of Article 4 of the CRC which requires State Parties to undertake legislative and other measures for the implementation of the rights in the Convention.

The CRC also makes provision for the recognition of the principle that both parents have common responsibilities for the upbringing and the development of the child.¹³⁹ In other words, this means that a child has a right to be taken care of by both parents with the primary concern being the best interests of the child. This Article is relevant to children of incarcerated women, whether or not they live in prison with the mother. This simply means that children who are incarcerated with the mothers have a right to maintain a relationship and contact with the father while those who are not incarcerated with the mother have the right to maintain meaningful contact with the mother.

The right of the child to enjoy the highest attainable standard of health is entrenched in Article 24 of the CRC. With the reports of poor healthcare in prisons,¹⁴⁰ this clause is relevant to children living with their mothers in prison and States Parties should ensure that the children's right to health care is protected. The same Article also provides that States Parties should ensure appropriate pre-natal and post-natal treatment for pregnant mothers. This clause is relevant to pregnant women in prisons who should receive special care during pregnancy to ensure safe delivery of the baby thus reducing the infant mortality rate mentioned in Article 24(2) (a) of the CRC.

The right to health has been domesticated in South African law.¹⁴¹ Section 27 (1) of the Constitution affords everyone the right to access to health care while section 28(1) (c) affords children the right to basic healthcare. While the Children's Act mentions healthcare, it does not specifically afford the right to health care; it stipulates that a child has the right to information on healthcare. Further, section 20(2) of the Correctional Services Act provides that the Department of Correctional Services is responsible for the health care of children who are incarcerated with their mothers for the duration of their stay in the correctional facility.

¹³⁹ Art. 18 of the CRC.

¹⁴⁰ Sloth-Nielsen J *op. cit* note 119.

¹⁴¹ Sec 28(1) (c) of the Constitution and sec 13 of the Children's Act.

Every child has a right to a living environment conducive to the child's development as envisaged by Article 27 of the Convention. As mentioned earlier in this Chapter,¹⁴² the South African prison environment is not favourable to raising children therefore the DCS should ensure that children who are incarcerated with their mothers are housed in an environment conducive for the sound development of the child. Further, a child has a right to engage in play and recreational activities appropriate for his or her age and to participate in cultural activities.¹⁴³ In the restrictive prison environment, this clause is more relevant to children living in prisons with their mothers. States Parties that allow children to stay with their mothers during incarceration should ensure that these children should have access to age-appropriate recreational and cultural activities.

As a State Party to the CRC, South Africa has domesticated the right of the child to an environment conducive to the child's development. The Children's Act¹⁴⁴ provides that a child has a right to a stable family environment and where that is not possible the child should be in an environment that closely resemble the family environment as much as possible. Section 6(2) (e) further provides that all decisions in matters concerning the child should recognise the child's need for development and the need to engage in age appropriate play and activities.

Article 37 of the CRC is dedicated to minor children in conflict with the law. It provides that such children should not be arbitrarily deprived of their liberty and that the detention or imprisonment of such children should be a measure of last resort and should also be for the shortest time possible. Where a minor has been deprived of his or her right to liberty, he or she should be treated in a manner considerate of the special needs of a person of his or her age. More importantly, such children should be separated from the general adult prison populace. Although these provisions are meant for children who are in conflict with the law, they should be applicable to the innocent children who are in prisons with their mothers. Section 28 (1) (g) of the Constitution stipulates that children should only be detained as a measure of last resort and the detention should be only for the shortest period of

¹⁴² Schoeman M *op. cit.* note 118 p 65.

¹⁴³ Art. 31 of the CRC.

¹⁴⁴ Sec 7(1) (k).

time. Detained children should be kept away from the general prison populace¹⁴⁵ and they should be treated in a manner that takes account of the child's age.¹⁴⁶

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

The ACRWC was adopted by the Organisation of the African Unity (OAU) in 1990 to protect the rights of the African child. Before discussing the provisions of the ACRWC, it is of particular importance to note that the ACRWC was adopted as a result of the belief that Africa was under-represented during the drafting of the CRC, therefore the CRC missed out important aspects particular to the African child.¹⁴⁷ Consequently, the ACRWC was founded on the notions of the CRC with additional provisions unique to the African context such as those dealing with armed conflicts and the use of children in such conflicts, a problem prevalent in Africa. The ACRWC is therefore deemed as a supplementary instrument to the CRC¹⁴⁸ and the result is that most of the provisions in the two instruments are similar. Similar rights between the two instruments that have already been discussed under the previous topic (CRC) will only be mentioned in passing.

The Preamble to the ACRWC acknowledges that a child occupies a unique and privileged position in African society and that in order for the full development of the child, such child should grow up in a happy and loving family environment. The Charter also recognises that due to the child's needs of physical and mental development, the child requires particular care.¹⁴⁹ Article 1 of the ACRWC obliges States Parties to undertake steps to adopt legislative or other necessary measures to give effect to the provisions of the Charter. This means that domestic legislation of States Parties to the ACRWC should be consistent with provisions in the ACRWC. South Africa as a State Party to the ACRWC has incorporated some provisions of the Charter into South African law.

¹⁴⁵ Sec 28 (1) (g) (i) and sec 7(c) of the CSA.

¹⁴⁶ Sec 28 (1) (g) (ii).

¹⁴⁷ Ekundayo O *op. cit.* note 130 above p 147.

¹⁴⁸ Ekundayo *ibid.*

¹⁴⁹ Preamble to the African Charter.

Similar to the CRC, the ACRWC also recognises that in all matters concerning the child, the child's best interests should be of paramount importance.¹⁵⁰ Included in the best interests principle is the right of the child, who is capable of communicating his or her views to be heard in all judicial and administrative proceedings affecting such child.¹⁵¹ This is particularly relevant during the sentencing of the primary caregiver or when identifying alternative care for the children who cannot accompany the mother to prison.

In cognisance of the best interests of the child principle set out in Article 4 of the Charter, South Africa incorporated this principle in its domestic law. The Constitution¹⁵² recognises the best interests principle as of paramount importance and should be applied in all matters concerning the child. In addition, section 9 of the Children's Act recognises the importance of the best interests principle in all matters concerning the child. Section 7 of the aforesaid Act provides the best interests principle standard which should be considered in matters concerning the child.

The Charter also recognises the child's right to participate in recreational and cultural activities that are age-appropriate for the child.¹⁵³ Article 14 of the Charter also affords a child the right to the best attainable standard of health care and adequate nutrition. The African Charter also protects the rights of children who are deprived of their right to liberty due to detention or imprisonment.¹⁵⁴ These rights are similar to those in the CRC and are applicable to children living in prison with their mothers. To fulfil its obligation to undertake necessary legislative measures to ensure the adaptation of these rights into law in accordance with Article 1 of the Charter, South Africa has incorporated these rights into domestic law. In section 7(h) of the Children's Act, the child's right to '...emotional, social and cultural development is recognised.' The Constitution also affords everyone the right to access to healthcare including children which is in line with Article 14 of the Charter. Section 28 of the Constitution also addresses the issue of detention of minors who are in conflict with the law. Although the children who are living in prison with their mothers are not the ones in conflict with the law, they find themselves being deprived of the right to

¹⁵⁰ Art. 4 of the ACRWC.

¹⁵¹ Art. 4 *ibid*.

¹⁵² Sec 28 (2).

¹⁵³ Art. 12 of the ACRWC.

¹⁵⁴ Art. 17.

liberty and freedom of person therefore these clauses should also be applicable to them.

Article 18 of the ACRWC acknowledges the family as a natural unit and basis of society that deserves the support and protection of the State. Closely related to the right to family life is the child's right to parental care. Article 19 affords a child the right to reside with his or her parents and should not be separated from the parents against their will unless it is in the best interests of the child to do so. Further, a child who has been separated from one or both parents shall have the right to maintain meaningful and regular contact with both parents¹⁵⁵ and shall be entitled to special care and protection.¹⁵⁶ The Charter places an obligation on the parents to always ensure that the best interests of the child are of primary concern at all times.¹⁵⁷

As a State Party to the Charter, South Africa has incorporated the above provisions in its domestic law. The child has a right to be cared for by his or her parents¹⁵⁸ and to be brought up in a stable family environment and, where that is not possible, a suitable alternative environment that closely resembles the family environment should be made available.¹⁵⁹ Subsection (ii) of section 7 (1)(f)(i) of the Children's Act further provides that a child should maintain connections with his or her family and extended family, culture or tradition.

Significantly, Article 30 of the ACRWC makes provision for children of imprisoned mothers and pregnant prisoners by mandating States Parties to provide special treatment to expectant mothers and mothers of infants. However, it is important to note that the African Charter is against the incarceration of a child with its mother.¹⁶⁰ Nevertheless, it provides that non-custodial sentences should always be considered when sentencing mothers of infants and young children. The Charter also advocates for the establishment of alternative measures to imprisonment for mothers.¹⁶¹ States Parties should establish special alternative institutions for holding mothers of infants and young children¹⁶² and should ensure that the primary aim of the correctional

¹⁵⁵ Art. 19(2) of the ACRWC.

¹⁵⁶ Art. 25(1).

¹⁵⁷ Art. 20(1) (a) of the ACRWC.

¹⁵⁸ Sec 7(1) (f) (i) of the Children's Act.

¹⁵⁹ Sec 7 (1) (h) *ibid*.

¹⁶⁰ Art. 30(1) (d) of the ACRWC.

¹⁶¹ Art. 30 (1) (b).

¹⁶² Art. 30 (1) (c).



system is to reform the mother and ultimately reintegrates her into the family and society.¹⁶³

Although the Charter is against the incarceration of infants and young children with their mothers, South Africa law allows children to accompany their mothers to prison until they are two years old.¹⁶⁴ The Correctional Services Act¹⁶⁵ provides that the diet of pregnant prisoners should meet the nutritional requirements of a pregnant person and that the DCS is responsible for the basic needs of the child for such a time that the child remains at the correctional facility with the mother.¹⁶⁶ South Africa has however failed to establish alternatives to imprisonment for expectant mothers and prisoners who are mothers to infants as required by Article 30(1) (c) of the Charter.

2.5.3 The Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules)

The Standard Minimum Rules for the Treatment of Prisoners were first adopted in 1957 but were revised in 2015 and adopted as the Mandela Rules.¹⁶⁷ These Rules provide the standard for the treatment of prisoners in general and are the foundation on which the Bangkok Rules (presented below) were founded. Although the Mandela Rules are meant for the treatment of the general prison populace, there are other provisions in the Rules that may be applicable to children living with their mothers in prison.

Rule 28 of the Mandela Rules provides that women prisons should have special accommodation for pre-natal and post-natal treatment. In addition, it further provides that arrangements should be made for children to be born in a hospital outside prison and that should a child be born in prison such information should not be mentioned on the birth certificate. It is interesting to note that this provision was not

¹⁶³ Art. 30 (1) (f) ACRWC.

¹⁶⁴ Sec 20(1) of the Correctional Services Act (as amended).

¹⁶⁵ Sec 134(1) (j) *ibid*.

¹⁶⁶ Sec 20 (2) of the CSA.

¹⁶⁷ UN Nelson Mandela Rules (revised SMR) Penal Reform International available at <https://www.penalreform.org/priorities/prison-conditions/standard-minimum-rules/> [accessed on 10 December 2016]

included in the Bangkok Rules¹⁶⁸ considering that childbirth is particular to women and the Bangkok Rules are specific to the needs of women offenders and their children. In this regard, the B-Order.1 requires that arrangements should be made for children of female inmates to be born in a hospital outside the prison.¹⁶⁹ Paragraph 9.2.1 of the B-Order. 1 also specifies that the fact that the child was born in a Correctional Centre or prison should not be mentioned on the birth certificate. The South African Correctional Services Act¹⁷⁰ (as amended) also provides that the Commissioner of the DCS should ensure that, where practicable, female inmates and their children are housed in mother and child units.

The Mandela Rules provides that the decision to allow children to stay with their mothers in prison should be made considering the best interests of the child.¹⁷¹ The clause further states that women prisons should provide child specific health care services¹⁷² and that children living in prisons with their mothers should never be treated as prisoners.¹⁷³ Rule 29 (1) (a) further provides that internal and external childcare facilities staffed with qualified personnel should be made available to the children when they are not in the care their mothers. Other provisions in the Mandela Rules applicable to pregnant and nursing prisoners as well as female offenders with young children are the prohibition of the use of instruments of restraints on pregnant women¹⁷⁴ and the allocation of prisoners to prisons close to their place of rehabilitation.¹⁷⁵

South Africa has incorporated some of the provisions of the Mandela Rules into domestic law. The Constitution,¹⁷⁶ and the Children's Act,¹⁷⁷ provides that in all matters concerning the child, the best interests of the child are of paramount importance. These provisions should be applied when making the decision whether to allow the child to live in prison with the mother or not. While section 31 of the Correctional Services Act allows the use of mechanical restraints on prisoners, it

¹⁶⁸ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders General Assembly Resolution A/RES/65/229 of 2010.

¹⁶⁹ Para 10.4.2 of the B-Order. 1.

¹⁷⁰ Sec 20(3) of the Correctional Services Act.

¹⁷¹ Rule 29 (1) of the Mandela Rules.

¹⁷² Rule 29 (1) (b) *ibid.*

¹⁷³ Rule 29 (2) *ibid.*

¹⁷⁴ Rule 48 (2) of the Mandela Rules.

¹⁷⁵ Rule 59 *ibid.*

¹⁷⁶ Sec 28(2) of the Constitution.

¹⁷⁷ Sec 9 of the Children's Act.

does not mention the use of such restraints on pregnant prisoners. However, the restrictions on the use of mechanical restraints in section 31 should be applicable to female inmates, in particular, the pregnant ones.

2.5.4 Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)

The Bangkok Rules were adopted by the UN General Assembly in 2010 to address the lack of 'regulatory framework' providing for the specific needs of women offenders and prisoners.¹⁷⁸ These Rules are supplementary to the Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules) and they make regular reference to children of women offenders and prisoners. It is important however to note that the Bangkok Rules are not legally binding but make recommendations that are widely accepted as good practice for the treatment of female prisoners.

Rule 1, which is the basic rule of the Bangkok Rules, provides that in the application of non-discrimination principle, special attention should be paid to the distinctive needs of female prisoners. The Rules provides that women who are primary care-givers to young children should be given an opportunity to make arrangements for such children prior to incarceration.¹⁷⁹ This opportunity should include the possible suspension of detention to allow the mother to make such arrangements.¹⁸⁰ Taking women's responsibilities as primary care-givers into consideration, Rule 4 therefore recommends that women be allocated to prisons close to their homes or places of social rehabilitation. Further, Rule 61 gives sentencing courts the power to consider women's responsibilities as care-givers to infants as a mitigating factor during sentencing. Accordingly, the Rules recommend alternative non-custodial measures for pregnant women and women with dependent children¹⁸¹ to ensure that women offenders are not separated from their families without due consideration to their

¹⁷⁸ UN Bangkok Rules Penal Reform International available at <https://penalreform.org/priorities/women-in-the-criminal-justice-system/bangkok-rules-2/> [accessed on 10 December 2016]

¹⁷⁹ Rule 2(2) of the Bangkok Rules.

¹⁸⁰ Rule 2 *ibid*.

¹⁸¹ Rule 64 of the Bangkok Rules.

backgrounds and family ties.¹⁸² To this end, Rule 45 recommends that prison authorities should make use of options such as home leave, open houses and community-based programmes to ensure a smooth transition of a female offender from prison back to the family and society.

South Africa is a party to the Bangkok Rules, therefore its policies should be guided by the provisions of the Rules. The South African courts were guided by Rule 2(2) of the Bangkok Rules in the case of *S v EB*¹⁸³ when it postponed sentence to enable the offender to make arrangements for her minor children. In sentencing, the courts should therefore respect the precedence set by the Supreme Court in *S v EB* when sentencing primary care-givers to minor children. Pursuant to Rule 61 of the Bangkok Rules, in *S v Thebus and Another*¹⁸⁴ and *S v Makau*,¹⁸⁵ the courts considered the fact that the offenders had families and minor children to support as a mitigating circumstance which justified the imposition of a lesser sentence. Further, in *S v Clifford*,¹⁸⁶ the court amended the direct imprisonment sentence to correctional supervision because the offender was a primary care-giver to minor children. While the courts have been taking steps in the right direction in considering the best interests of children when sentencing primary care-givers, the legislature has lagged behind in incorporating the recommendations of the Bangkok Rules into law and has left it to the discretion of sentencing courts which has resulted in inconsistency. For example, in *Scott-Crossley v S*¹⁸⁷ the court failed to take into consideration the fact that the offender was a primary care-giver to minor children although this fact was brought to the attention of the court. If the fact that the appellant, who was male, was a primary care-giver was brought to the attention of the court for consideration, female offenders before the court for sentencing should be afforded the same courtesy.

Unlike the ACRWC which does not recommend that children be allowed to stay in prison with the mother,¹⁸⁸ the Bangkok Rules recommend that the decision to allow the child to stay in prison with the mother shall be based on the best interests of the

¹⁸² Rule 58 *ibid.*

¹⁸³ 2010 (2) SACR 524 (SCA).

¹⁸⁴ 2002 (2) SACR 566 (SCA).

¹⁸⁵ 2006 (2) SACR 582 (SCA).

¹⁸⁶ 2009 JDR 0154 (SE).

¹⁸⁷ [2007] JOL 20717 (SCA).

¹⁸⁸ Art. 30(1) (d) of the ACRWC.

child and that such children should never be treated as prisoners.¹⁸⁹ Children allowed to live with their mothers in prison should have an up-bringing that closely resembles that of a child outside prison.¹⁹⁰ Children in prison with their mothers should be given the opportunity to spend as much time as possible with their mothers¹⁹¹ and they should be provided with on-going health services akin to those of the community.¹⁹²

South Africa allows children to reside in prison with their mothers only if no other suitable accommodation and care is available.¹⁹³ This is a departure from the recommendations of the Bangkok Rules which stipulates that the decision to allow a minor to stay with the mother or not should be based on the best interests of the child.¹⁹⁴ The DCS also encourages female inmates to spend as much time as possible with their infants to promote bonding between mother and child¹⁹⁵ which is in line with Rule 50 of the Bangkok Rules.

Rule 52 of the Bangkok Rules makes provision for the separation of a mother and her child who has been living in prison with her. The best interests of the child should also be of primary concern when making the decision whether to separate or not and such decision should also be based on individual assessment.¹⁹⁶ The removal of a child from prison should be done with uttermost sensitivity and the children separated from their mothers should be given the opportunity to maintain contact with their mothers.¹⁹⁷ Paragraph 15.0 of the B-Order. 1 governs the placement of infants and it stipulates that the best interests of the child should be a primary consideration and that each case should be dealt with individually. Paragraph 15.11 also recommends that as far as practically possible, and if it is in the best interests of the child, the mother and child should maintain contact.

The Bangkok Rules also protect the right of pregnant and breast feeding prisoners.¹⁹⁸ This group of prisoners should be given health and dietary advice from

¹⁸⁹ Rule 49 of the Bangkok Rules.

¹⁹⁰ Rule 51 *ibid.*

¹⁹¹ Rule 50 of the Bangkok Rules.

¹⁹² Rule 51(1) *ibid.*

¹⁹³ Para 3.1 of the B-Order. 1.

¹⁹⁴ Rule 49 of the Bangkok Rules.

¹⁹⁵ Para 12.1 and 12.2 of the B-Order. 1.

¹⁹⁶ Rule 52 (1) of the Bangkok Rules.

¹⁹⁷ Rule 52 *ibid.*

¹⁹⁸ Rule 48 *ibid.*

a qualified health practitioner. Pregnant and breast feeding prisoners should be provided with an adequate diet, a healthy environment and the opportunity to exercise. In the rigid environment of prisons, Rule 42(2) provides that prison regimes should be flexible enough to allow pregnant and breast feeding women as well as those female offenders with young children to participate in prison programmes. More importantly, Rule 24 prohibits the use of instruments of restraints on pregnant women in labour, during birth or immediately after birth. Further, pregnant and nursing mothers and women with infants should not be subjected to closed confinement or disciplinary segregation.¹⁹⁹

2.6 Summary

The imprisonment of women who are primary care-givers to infants and young children is a complex issue that has ripple effects on others, particularly the children of the offenders. When a female offender who is a mother and primary care-giver to young children gets involved in the criminal justice system, questions often arise as to how to deal with the children of such an offender. In this light, the South African DCS allows female inmates to stay with their children in prison until they are two years old. Whether the children are allowed to accompany the mother to a correctional facility or to remain outside prison, the children are still affected by the incarceration of the mother.

Children who accompany their mothers to prison have an advantage of maintaining a bond with their mother but they are faced with the harsh conditions of prison life. While it is important for a child to maintain a bond with the mother during the formative years of his/her childhood for proper development, the prison environment may have adverse effect on the development of the child.²⁰⁰ On the other hand, children of a female offender who remain outside prison during the mother's incarceration also face problems of their own. Children outside prison may face neglect, poverty and stigma due to the mother's incarceration.²⁰¹ Some children may

¹⁹⁹ Rule 22 of the Bangkok Rules.

²⁰⁰ Robertson O "Children imprisoned by Circumstance" United Nations Refugees Programme 2008.

²⁰¹ Carnelley M and Epstein CA *op. cit* note 128 p 108.

develop behavioural problems such as aggressive and violent tendencies, substance abuse and dropping out of school.²⁰²

In a bid to curb the adverse effects of maternal incarceration, the UN has adopted human rights instruments that make provisions for the protection of children's rights in general, and those that make provisions for female prisoners and their children incarcerated with them. The CRC contains inherent children's rights and these rights are applicable regardless of the fact that the child is incarcerated with the mother or not. The most notable provision in the CRC that is relevant to children incarcerated with their mother is the best interests of the child principle that requires that in all matters concerning the child, the best interests of the child is of paramount importance. The ACRWC is also a regional instrument founded on the values of the CRC that contains rights of children in the African context. The ACRWC makes specific mention of children of imprisoned mothers but is against the incarceration of children with their mothers. Instead, the ACRWC advocates that female offenders who are mothers to young children should be subjected to non-custodial measures.

The Mandela Rules and the Bangkok Rules provide additional 'soft law' dealing with the rights of prisoners. While the Mandela Rules deal with rights of all prisoners in general, the Bangkok Rules contain the rights of female prisoners taking into consideration their particular needs and further proposes non-custodial sentences for female prisoners. The Mandela Rules and the Bangkok Rules are not legally binding but are considered to be the standard guidelines and good practice on the treatment of prisoners. While these Rules are specifically for the treatment of prisoners they make mention of the rights of children incarcerated with their mothers.

The rights of children living in prisons with their mothers contained in the UN instruments as well as the standards recommended for the accommodation of children living in prisons with their mothers are ideal on paper. Prison conditions and the treatment of prisoners the world over portray a different picture from the acceptable international standards and South African correctional centres are no exception. This disparity between policy and practice is an indication of poor implementation of international policies and standards at the national level. This lack of implementation of international policies at national level may be the reason why

²⁰² Dawson *et al op. cit.* note 124 p 3.

the prison environment has negative effects on the development of children who are incarcerated with their mothers.

If States Parties were to adopt the standards for female prisons housing minor children of inmates as set out in the ACRWC, the Bangkok Rules and the Mandela Rules, it could reduce the negative effects of the prison environment for the child in cases where custodial sentences are appropriate. However, it is important to note that non-custodial sentences are more ideal for female prisoners who are mothers and primary care-givers to infants and young children.

South Africa is a signatory to the CRC,²⁰³ ACRWC,²⁰⁴ the Bangkok Rules²⁰⁵ as well as the Mandela Rules²⁰⁶ and should therefore implement the rights, standards and good practice contained therein. This will ensure the protection of infants and young children who are living in South African correctional centres with their mothers. South Africa has made efforts to incorporate some provisions from international and regional instruments into domestic law. While this is commendable and a step in the right direction, a lot still needs to be done to ensure the effectiveness of human rights instruments in protecting the rights of children living with their mothers in prison.

Having looked at how South Africa fares against the provisions of international and regional human rights instruments, it is important to look at how other jurisdictions deal with infants and young children incarcerated with their mothers. To this end, a comparative analysis is essential to deduce lessons that can be learned from other jurisdictions on how to improve the South African policies and practice regarding children incarcerated with their mothers.

²⁰³ South Africa signed the CRC in 1993.

²⁰⁴ South Africa signed the ACRWC in 1997.

²⁰⁵ South Africa ratified the Bangkok Rules 2010.

²⁰⁶ South Africa ratified the Mandela Rules 2015.

3.1 Introduction

With the rise in the number of women being imprisoned the world over; there has been an exponential increase in the number of mothers and pregnant women in prison. One of the problems associated with the phenomenon is how to deal with pregnant inmates and those who are mothers and primary care-givers to minor children. Although this problem is common to many countries, different countries have different policies designed to deal with the issue. Some countries do not have any policy in place to deal with the problem despite its existence.²⁰⁷ Countries such as the United States of America and Australia allow female prisoners to stay with their minor children in prison until they reach a certain age, which differs from jurisdiction to jurisdiction. On the other hand, countries such as Norway and the Peoples' Republic of China²⁰⁸ do not allow minors to stay with their mothers in prison.

This Chapter examines policy frameworks adopted by different countries on how to deal with the health-care of female prisoners especially during pregnancy and child care. In other words, the Chapter looks at how different countries deal with the problem of pregnant prisoners and those who are primary care-givers to minor children prior to, and during, incarceration. While the study may make a comparison between different countries, specific reference will be made to the USA, Australia, Norway and PRC. USA and Australia are some of the countries which allow minors to stay with their mothers in custody.²⁰⁹ However, not all states in the USA allow

²⁰⁷ Manaleng P 'Women in prison: ignored and neglected' *IOL news* 8 March 2014 <http://www.iol.co.za/news/south-africa/women-in-prison-ignored-and-neglected-1.1658349> [accessed on 11 June 2015] where the author alludes that 'South Africa does not have a policy framework in the field of healthcare for female prisoners e.g. pregnancy, child birth and childcare.' See also Lee O 'What Happens to Babies Born in Jail' <http://www.takepart.com/article/2012/05/28/what-happens-babies-born-jail> [accessed 21 June 2015] where the author reiterates that USA does not have a national policy that dictates what should happen to children born behind bars.

²⁰⁸ Hereinafter PRC.

²⁰⁹ *Laws on Children Residing with Parents in Prison op. cit.* note 19.

female inmates to stay with their minor children in prison.²¹⁰ On the other hand, the PRC and Norway do not allow minors to stay with their mothers in prison.²¹¹

3.2 Countries that allow female prisoners to live with their minor children in prison

Although most countries²¹² allow minor children to stay in prison with their imprisoned mothers, many lack the proper policy framework to deal with children living in prisons.²¹³ This section will discuss State practice in countries that allow children to reside in prison with their mothers with specific reference to the USA and Australia. It will also investigate how these systems compare to the one existing in South African.

3.2.1 South Africa

The Constitution is the supreme law of South Africa and any law or conduct inconsistent with it is invalid.²¹⁴ While the Constitution makes provision for prisoners²¹⁵ and children,²¹⁶ it falls short of addressing the needs and rights of children living in prison with their mothers as it does not mention this class of children. The Children's Act as well as the Children's Amendment Act 41 of 2007 are the two South African pieces of legislation dedicated entirely to children. A number of provisions in the Children's Act may be applicable to the issue of minors living with their mothers in prison.²¹⁷ The Act sets out the best interests of the child standard,²¹⁸

²¹⁰ DeBoer H 'Prison Nursery Programmes in other States' <http://www.cga.ct.gov/2012/rpt/2012-R-0157.htm> [accessed 21 June 2015]

²¹¹ Laws on Children Residing in Prison note 209 above.

²¹² Alejos *op. cit.* note 30 above p14.

²¹³ Lloyd C 'When Mom's in prison, should her baby be behind bars too?' 7 February 2008 http://www.salon.com/2008/02/07/mothers_in_prison/ [accessed 21 June 2015]

²¹⁴ Sec 2 stipulates that 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

²¹⁵ Sec 35 especially ss 2(e) and (f).

²¹⁶ Sec 28 of the Constitution.

²¹⁷ Sec 6(2) All proceedings, actions or decisions in a matter concerning a child must-

paramountcy of the best interests of the child principle.²¹⁹ This can be applied when making a decision whether or not to allow a minor to accompany his/her mother to a correctional centre. Such decision should be made in the best interests of the child regardless of the mother's wish. Child participation²²⁰ is also important when deciding whether to incarcerate a child with the mother of the child. If a child is capable of formulating his/her own ideas, he or she must be allowed to state his/her wishes and such wishes should be duly considered in that particular child's best interests. Section 31²²¹ of the Children's Act is also applicable to the issue of minors residing in prisons with their mothers. It is important however, to note that although all these provisions are applicable to the issue under discussion, the Children's Act also fails to adequately deal with the problem of minors residing in prison with their mothers.

The Correctional Services Act,²²² the Department of Correctional Services B-Order.1 and the Policy Procedures on Infant and Mothers (the Policy) are the only legal instruments in South Africa which specifically deal with children of incarcerated mothers. Section 20 of the Correctional Services Act is dedicated to mothers of young children and it will be quoted below for the sake of completeness.

20(1) A female prisoner may be permitted, subject to such conditions as may be prescribed, to have her child with her until such child is five years of age.

-
- (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
 - (b) respect the child's inherent dignity;
 - (e) recognise the child's need for development and to engage in play and other recreational activities appropriate to the child's age;...

²¹⁸ Sec 7 of the Children's Act sets out the standard for the best interests principle.

²¹⁹ Sec 8 of the Children's Act is consistent with s28 (2) of the Constitution which stipulates that 'A child's best interests are of paramount importance in every matter concerning the child.'

²²⁰ Sec 10 *ibid* stipulates that every child must be given a chance to participate in matters that concern him/her and the views expressed by such child must be duly considered.

²²¹ Sec 31(1) (a) Before a person...takes any decision...involving the child, that person must give due consideration to any view and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

(b) A decision referred to in paragraph (a) is any decision-...

(iv) which is likely to significantly change, or to have adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

²²² Act 111 of 1998.

(2) The Department is responsible for food, clothing, health care and facilities for the sound development of the child for the period that such child remains in prison.

(3) Where practicable, the Commissioner must ensure that a mother and child unit is available for the accommodation of female prisoners and the children whom they may be permitted to have with them.

As mentioned earlier, Section 20 (1) was however amended by section 14(a) of the Correctional Services Amendment Act which has now reduced the minimum age of a child who may live with the mother in prison from five years to two.²²³ Section 8(2) of the same Act dealing with diet also applies to children and pregnant prisoners.²²⁴ These provisions are however inadequate to deal with the issue of minors residing in prison in that they fail to address other important issues relevant to the matter such as the standards of the mother and baby units and alternatives to incarceration for mothers with infants and young children.

Although Section 20(1) of the Correctional Services Act, (as amended), stipulates that a female prisoner may be permitted, to have her child with her until such child is two years, it is important to note that accommodation of an infant is only permitted when no other suitable accommodation and care is available at that point.²²⁵ The mother and child are housed in a mother and baby unit in the prison.²²⁶ The conditions are prescribed in B-Order. 1. In order to have a child with her in prison, the female prisoner must make an application and in cases where the prisoner is illiterate, assistance should be provided by prison officials or fellow prisoners.²²⁷ The child must be 2 years and below as per the definition of infant given in paragraph 2.1 of the B-Order. 1 as well as the Correctional Services Amendment Act.²²⁸ The Act also stipulates that an infant register must be kept at each Correctional Centre/prison where a mother and infant are detained.²²⁹ The policy is, however, silent on the issue of illegibility requirements as it does not specify the requirements that an inmate must meet before being allowed to bring her child with her to the correctional centre.

²²³ *Op. cit.* note 23.

²²⁴ 'Such diet must make provision for the nutritional requirements of children, pregnant women...'

²²⁵ Para 3.1 of the B-Order.

²²⁶ Para 3.2 of the B-order.

²²⁷ Para 9.1.1 of the B-order.

²²⁸ Para 14(a) *ibid.*

²²⁹ Para 9.1.2 *ibid.*

Where a pregnant woman is incarcerated, and there have been no problems experienced, the prisoner must be accommodated in the hospital section at night from six months onwards as a precautionary measure.²³⁰ If there are no adequate facilities at the prison, a female prisoner who is about to give birth must be moved to another prison for treatment subject to approval by the district surgeon. All necessary arrangements must be made to have all infants born in a hospital outside the prison.²³¹ When an infant is born during the mother's incarceration, the birth must be registered in terms of the Birth and Marriages Registration Act²³² and the fact that the child was born in a prison should not be recorded on the birth certificate.²³³ Mothers should be provided with sufficient rest before and after childbirth.²³⁴

As mentioned earlier, the mother and child are housed in a separate mother and baby unit inside the prison. However, there is a loophole in the B-Order. 1 where it stipulates that, 'where a correctional centre does not have a mother and child unit/single accommodation for a mother and her child...,²³⁵ mother and child may be housed in a shared communal cell.'²³⁶ This paragraph is ambiguous in that it does not specify whether the communal area will be shared with other mothers with babies or with the general prison populace since the unit is situated in the prison area. Paragraph 4.2 goes further to provide that, personnel working in the mother and child unit must ensure that the child is protected from sexual abuse and child abuse by adults and should not be exposed to general correctional centre/prison activities.' This may be difficult to achieve considering the fact that the unit is housed inside the prison complex.

Paragraph 4.3 of the B-Order. 1 makes provision for the required standards for the mother and child units.²³⁷ The Department is responsible for the provision of cots and bedding for the infant and must ensure that mother and child sleep in the same

²³⁰ Para 10.2.1 of the B-Order. 1.

²³¹ Para 10.4.2 *ibid.*

²³² Act 18 of 2010.

²³³ Para 9.2.1 of the B-Order.

²³⁴ Para 10.2.3 *ibid.*

²³⁵ Para 4.5 *ibid.*

²³⁶ Para 4.5 *ibid.*

²³⁷ The unit must comprise of a spacious cell equipped with a bed, cot and cupboards both for mother and child as well as a toilet and wash basin. An outdoor area must be available and utilised in order to expose the infants to open air, sunlight and grass. The unit must also have an indoor playing area, kitchen for the preparation of the infants' food by designated persons. The kitchen must have a fridge microwave etc. there must also be a dining room equipped with infant chairs which can accommodate the mothers and their children.

cell.²³⁸ Infant baths and hot water for the bathing of infants must also be provided for by the Department.²³⁹ The State must provide adequate clothing as prescribed for infants for such a period as the infants remain in the correctional centre,²⁴⁰ this however does not prohibit the infant from using personal clothes or blankets.²⁴¹ Section 8 also requires the Department to make age appropriate toys available to the infants.

The Department is also responsible for all the costs pertaining to medical requirements and hospitalisation of the infant for as long as the infant remains in custody with the mother.²⁴² Section 35(2) (e) of the Constitution gives every prisoner the right to 'conditions of detention that are consistent with human dignity...and medical treatment' while section 12 of the Correctional Services Act also gives prisoners the right to adequate medical care within the available resources of the Department of Correctional Services. However, available evidence suggests that this right to medical care is not being afforded to the prisoners as intended by the above provisions.²⁴³ Adequate medical care includes proper care before, during and after child birth. However, there have been reports about shackling during childbirth on a South African prisoner.²⁴⁴ This occurred despite the fact that South Africa is a party to the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders²⁴⁵. Rule 24 of the Bangkok Rules prohibits the use of instruments of restraint on women during labour, during birth and immediately after birth.

A female inmate who has an infant admitted with her to prison is still expected to participate in the daily routine of the correctional centre/prison,²⁴⁶ while still expected to be personally responsible for the care of her infant.²⁴⁷ Where the mother cannot

²³⁸ Par 5.1 of the B-Order.

²³⁹ Para 6.1 of the B-Order. 1.

²⁴⁰ Para 7.1 *ibid*.

²⁴¹ Para 7.2 *ibid*.

²⁴² Para 10.1 of the B-Order1.

²⁴³ Women in prison *op. cit.* note 48 tells the story of how prisoners do not have access to a doctor unless they are seriously ill, even when they are seriously ill, the doctor may fail to pitch up for the appointment.

²⁴⁴ Manaleng *op. cit.* note 192 former inmate reports that when she gave birth in prison, she was shackled to the bed. see also Women in prison note 55 p 3 where the researcher reported that there were two women who were handcuffed throughout the entire child birth process

²⁴⁵ Hereinafter the Bangkok Rules.

²⁴⁶ Para 4.1 of the B-Order. 1.

²⁴⁷ Para 4.2 *ibid*.



take care of the child due to day to day prison responsibilities or for any other reasons, there are 'infant-minders' to look after the infant.²⁴⁸ These 'infant-minders' are fellow prisoners who are allocated by the Case Management Committee²⁴⁹ and must meet the minimum requirements set out in paragraph 11.9 of the B-Order. 1. The B-Order. 1 is however silent on the composition of the Case Management Committee. According to paragraph 11.13 of the B-Order. 1,

'a mother may also send their child to a nearby external crèche on a daily basis according to the discretion and approval of the Head of Prison on condition that it does not involve any costs for the State.'

However, the Policy Procedures on Infants and Mothers²⁵⁰ stipulate that considerations must be made to take infants daily to an external crèche in order to expose the infant to external activities and interact with other children and the Head of Correctional Centre shall bear the costs for such expenses. There is inconsistency between the two policies which causes confusion as on which one to follow.

The B-Order. 1 as well as the Policy require that a time-limited plan be compiled for each infant on admission to the correctional centre.²⁵¹ The plan must be compiled by a Multi-disciplinary Team;²⁵² however, the composition of that team is not specified in the B-Order. 1. The Policy, on the other hand, provides that the multi-disciplinary team should be made up of officials from each of the functionaries of the six service delivery areas of the DCS.²⁵³ The plan must address the needs of the infant and should include the objectives, short term and long term goals for each infant.²⁵⁴ Section 14.4 of the B-Order. 1 states that, 'where sentence length is likely to mean that an infant will eventually be separated from his or her mother, the multi-disciplinary team must consider whether it is likely to be in the child's best interests to remain with the mother for the time being, or whether immediate separation would

²⁴⁸ Para 11.8 of the B-Order. 1.

²⁴⁹ Para 11.10 *ibid*.

²⁵⁰ The Policy was approved in the 2007/2008 Annual Report and was obtained from a DCS official. The document is on file with the researcher.

²⁵¹ Para 14.1 of the B-Order and p 8 of the Policy.

²⁵² Para 14.0 of the B-Order.

²⁵³ Para 9 of the Policy the six service areas of the DCS are as follows; security, facilities, corrections, development care and social re-integration.

²⁵⁴ The Policy para 9 and para 14 of the B-Order. 1 states that the following aspects must, *inter alia* be included in the care plan; the length of the mother's sentence owing to the fact that as an infant grows older, a correctional centre becomes increasingly undesirable, past history, and availability of a support system.

be preferable.' This means that it is possible for an infant below two years of age to be refused admission to prison with the mother simply because of the length of the mother's sentence.

Section 15 of the B-Order. 1 further provides for the placement of infants. It states that infants should be placed out as soon as possible but emphasises that each case should be treated individually with the best interests of the child as the primary consideration.²⁵⁵ The placement of infants must be arranged in consultation with the Department of Welfare and Population Development and the latter is responsible for all the placement and transportation costs of the infant.²⁵⁶ It is also imperative to note that before an infant is placed into foster care, an agreement must be made between the mother, the foster parents and other relevant role players regarding contact between the mother and the child after placement.²⁵⁷

3.3 Australia

Australia has six states and two mainland territories in the Commonwealth which apply their own legislative frameworks in relation to the correctional facilities they manage.²⁵⁸ All Australian states make provision for the accommodation of young children with their mothers in prison. However, different states have different age limits of children allowed to reside in prison with their mothers. The Australian Standard Guidelines for Corrections²⁵⁹ requires the Administering Department to develop 'well-structured policies and programmes where the interests of children are paramount' where the Department allows children and infants to reside in prison with their mothers. This section further provides guidelines on the matter of children and infants living with their mothers in prison and the guidelines are as follows:-

²⁵⁵ Para 15.1 of the B-Order.

²⁵⁶ Para 15.9 *ibid.*

²⁵⁷ Para 15.11 of the B-Order.

²⁵⁸ Laws on Children Residing with Parents in Prison The Law Library of Congress, Global Legal Research Center 2014 <http://www.law.gov> [accessed 22 August 2016] the six Australian States are Tasmania, Queensland, Victoria, New South Wales, Australian Capital Territory, Northern Territory, South Australia and Western Australia.

²⁵⁹ Para 2.58 of The Australian Standard Guidelines for Corrections, 2012 (hereinafter the Standard Guidelines).

2.59 Assessment process for determining the placement of a child in a custodial environment should include appropriate input from the relevant external agencies.

2.60 Children and infants should be allowed to reside with their primary care-givers in prison only after the Administering Department is satisfied that it is the best interests of the children to do so and there is no mechanism for the primary care-giver to complete her/his sentence in the community (for example, via home detention).

2.61 The accommodation for primary care-givers and their children should, wherever possible be domestic rather than custodial.

2.62 While prisoners are responsible for the care of their children living in prison, the Administering Department should take reasonable steps to ensure a safe environment for children.

While the Standard Guidelines are applicable to all the Australian states, it is important to look at different states individually to establish how they deal with the issue of children and infants residing in prison with their mothers.

3.3.1 Australian Capital Territory (ACT)

Prisons in the Australian Capital Territory that allow female prisoners to live with their children in custody are regulated by the Corrections Management (Women and Children Programme) Policy, 2015.²⁶⁰ This policy defines a child as 'from birth, up to and including the fourth year of life.' This means that children are allowed to stay in prison up to the age of four years. The same policy continues to define the primary carer as 'the natural mother or other female who has been the sole or main carer for the child for a substantial period immediately prior to the custody event.' The definition of primary carer given by the policy implies that any other female other than the biological mother of the child may be allowed to reside with such child in prison provided she meets the other criteria in the policy. Further, it adopts the

²⁶⁰ This policy repealed the Corrections Management (Women and Children Programme) Policy 2010 (ACT) and it is available at www.legislation.act.gov.au

definition of best interests of the child from section 349 of the Children and Young People Act 2008 and also offers guidelines on what should be taken into consideration when assessing the best interests of the child.²⁶¹

The policy requires a female detainee to apply to have their children live with them in prison. Any woman in custody who is the mother or primary carer for a child who is four years and below is eligible to apply for the Mother and Child Programme. The policy further provides the eligibility criteria for acceptance to the Mother and Child Programme.²⁶²

The Mother and Child Programme Policy specifies the people who should be involved in the assessment of applications from female inmates who want to have their children admitted to prison with them. Further, it provides that an advisory committee may 'co-opt additional expert knowledge and opinion on a needs basis'²⁶³ to help in the assessment of applications. It is also important to note that the application to the Programme may be made by the detainee before the finalisation of the matter in court but the application may not be determined before the woman commences the prison sentence.²⁶⁴ Upon approval of the application, the mother and child are placed in the women's cottage at the prison, which cottage is separate from the prison populace and comprises of 'two five bedroom units with a shared living room, dining room, kitchen, laundry and courtyard.'²⁶⁵

3.3.2 New South Wales (NSW)

The New South Wales Mothers and Children's Programme allows the child to reside in prison with his/her mother but the duration of the child's stay is determined by the

²⁶¹ Corrections Management (Women and Children Programme) Policy, 2015 at 2 the guidelines include, the physical and emotional safety of the child, maintaining a pre-existing attachment to a primary carer in the first three years of life and the effect on attachment of changing the primary care-giver, the capability of the carer and the care risks that might be present, the developmental effects on the child living in the custody environment (the age of the child and the likely length of stay are key determinates), maintaining contact between the child and the significant others and finally cultural connection and developmental issues (particularly for the Aboriginal and/or Torres Strait Islander children).

²⁶² Corrections Management *op. cit* p7.

²⁶³ Corrections Management *ibid* p 5.

²⁶⁴ Corrections Management *ibid* p 7.

²⁶⁵ Corrections Management *ibid*.

Programme the mother is in. The NSW Programme requires the female detainee to apply in order to have their child with them in prison. Of importance is that the Programme has three components: a full-time residency Programme, occasional residency Programme, and the release of the mother to serve her sentence in an approved environment away from a correctional centre.²⁶⁶ These components will be explained below.

The full time residency Programme is when a female inmate cares for a child or children full time while in custody. Children in this Programme are allowed to have weekend or overnight stays with their fathers or other relatives. However, it is of great importance to note that full time residency 'is the option of last resort' to be used when there are no satisfactory alternatives to the placement of the child or children available²⁶⁷ and should always be in the best interests of the child. The NSW Programme policy provides the minimum criteria for the acceptance in the full time residency Programme. The criteria include but not limited to, that there is a place available for the mother and child, the placement is in the best interests of the child, the child is of pre-school age and that there is no demonstrated inability on the part of the mother to provide satisfactory care for her child.²⁶⁸

Emu Plains Correctional Centre in Sydney is one of the prisons in NSW that has a mothers and babies unit. The unit is known as the Jacaranda Cottages and it permits babies and young children up to school age to stay with their mothers. While prison conditions are a far cry from those at home, there are good conditions to raise a child at Jacaranda Cottages.²⁶⁹ Each baby has a comfortable cot, stimulating toys and a pram for walks and have access to a well-kept lawn with colourful playground

²⁶⁶ Corrective Services NSW, the Mother and Children's Programme Brochure 2011 <http://www.correctiveservices.justice.nsw.gov.au/Documents/Mothers-and-Childrens-Policy-brochure-2011.pdf> [accessed 15 July 2016]

²⁶⁷ Loy M A "Study of the Mothers and Children's Programme in the NSW Department of Corrective Services" Paper Presented at the **Women in Corrections: Staff and Clients Conference convened by the Australian Institute of Criminology in conjunction with the Department for Correctional Services SA** and held in Adelaide, 31October-1 November 2000 p 3.

²⁶⁸ Loy M.A *ibid* p 3.

²⁶⁹ Weaver C 'Mum 22: I'm raising my baby in prison' Raising my baby in jail Australian Women's Weekly www.aww.com.au [accessed 22 August 2016]

equipment as well as an indoor play area.²⁷⁰ The children also have regular check-ups by qualified health workers.²⁷¹

In addition to the above criteria, female detainees must go through a security risk assessment in order to be accepted in the residency Programme at Jacaranda Cottages at Emu Plains Correctional Centre. This is to ensure the safety of the children resident at the Centre. There are three levels of risk and these are:

- Level 1 Present no risk to children and may be housed in the same cottage as a child.
- Level 2 Presents low risk to child due to violent history. May be housed in the same area as a child but not in the same house.
- Level 3 Presents a potential risk to children and may not be housed in the same area as children.²⁷²

Assessment for security risk is done by the Case Management Team with referrals to Psychologist and Drug and Alcohol Services.²⁷³ Since approval for the full time residence Programme is granted by the Commissioner on recommendation from the Mothers and Children's Committee, the NSW policy lists the members that constitute the Mothers and Children's Committee 'to ensure the best interests of the children's inmates is paramount in the Department's decision making in relation to their well-being.'²⁷⁴

The second component of the NSW Mothers and Children's Programme is the Occasional Residence Programme. This residence Programme entails the accommodation of children for certain periods such as weekends and school holidays. This Programme is also available for non-primary carers such as grandmothers or other significant and close relatives.²⁷⁵ This means that if a non-primary carer is in custody, they may apply to have a child with them in custody on

²⁷⁰ Weaver C *op. cit* note 369.

²⁷¹ *ibid.*

²⁷² Loy *op. cit* note 268 p 6.

²⁷³ Loy *ibid.*

²⁷⁴ Loy *ibid.*

²⁷⁵ Loy *ibid* p 4.

occasions such as weekends and holidays. However, the non-primary carer must acquire written consent from the primary carer of the child or children.²⁷⁶

Approved Absence is the third and final component of the NSW Mothers and Children's Programme. According to section 26(2)(i) of the Crime (*Administration of Sentences*) Act 1999, the Commissioner may issue a permit (local leave permit) allowing an inmate to be absent from the correctional centre in certain instances. One of the instances includes '...a female inmate who is the mother of a young child or young children, enabling the inmate to serve her sentence with her child or children in an appropriate environment.'

In order for an inmate to qualify for absence in terms of section 26(2) (1), she must meet the criteria set by the Department. To qualify the inmate must have been sentenced and served at least three months of the sentence, must have no further court appearances, there should be no more than twelve months to the earliest date of release, there must be suitable sponsors and an address or place of accommodation or drug rehabilitation centre and lastly, if there are drug or alcohol issues, they must have been identified and addressed.²⁷⁷

3.3.3 Northern Territory (NT)

The issue of minors residing with their mothers in NT's prisons was regulated by the Northern Territory Prisons (Correctional Services) Act 1980 which has since been repealed by the Correctional Services Act 26 of 2014. The 1980 Act provided that a 'prisoner who gives birth to a child or who has children under five years of age may apply to obtain permission to have that child or those children accommodated with her in prison.' From this, one can deduce that one prisoner may have more than one child living with her in prison at any given time. However, 2014 Act is not clear on whether the prisoner may have more than one child living with her in custody. Section 7 of the 2014 Act defines mother as the 'female parent', which means the biological mother or any other female who has parental responsibility in respect of the child. The Act in section 57 also defines a 'young child' as a child who is under

²⁷⁶ Loy *ibid* p 4.

²⁷⁷ Loy *op. cit* note 276.

the compulsory school age. The Correctional Services Act provides the minimum criteria that must be met before the Commissioner consents to have a child live with the mother in custody.²⁷⁸

In order to achieve the requirement of paragraph 2.62 of the Standard Guidelines which states that 'While prisoners are responsible for the care of their children living in prison, the Administering Department should take reasonable steps to ensure a safe environment for children,' the Department constructed a 24-bed cottage to house mothers and children at Alice Springs Correctional Centre.²⁷⁹

3.3.4 Queensland

The Corrective Services Act 2006 regulates the issue of minors residing in Queensland's prisons with their mothers. Only those children who are not eligible to start primary (i.e. elementary) school are allowed to reside full time with their mothers in a correctional facility,²⁸⁰ while those who are eligible to start school may apply only for weekend or holiday visits.²⁸¹ According to the Act, the application for the accommodation of a child at a correctional centre with the mother may be initiated by the mother or the child protection chief executive,²⁸² and if the application is successful, the mother will be responsible for the child's care and all costs associated with the care.²⁸³ The Act goes on to provide for eligibility criteria²⁸⁴ as well

²⁷⁸ Sec 57 (3) provides that the Commissioner must not consent unless the Commissioner considers that all of the following apply; (a) it is in the best interests of the child to reside at the facility with the prisoner, (b) the security and good order of the facility would not be threatened by the child residing at the facility, (c) there is suitable accommodation at the facility for the child, (d) the child is not the subject of a court order awarding custody of the child to a person other than the prisoner and (e) the child has been immunized in accordance with the recommendations of the National Immunisation Programme.

²⁷⁹ Laws on Children Residing with Parents note 211 p 10.

²⁸⁰ Sec 30 of the Corrective Services Act of 2006 (Qld).

²⁸¹ Sec 30(1) (b)(ii)(A)(B)(C).

²⁸² Sec 29(2) (a).

²⁸³ Sec 29(2) (b) and sec 4 of the Corrective Services Act (QLD) costs associated with the care of a child refers to the costs of nappies and baby goods, but does not include the cost of food and drink of the child. This means that the Department is partly responsible for the child during the stay in custody.

²⁸⁴ Sec 30(1) the criteria is that the child should not be of school going age and if the child is in school, they can only be accommodated during weekends and holidays, the child must be immunized according to the recommendations of the Department, the child is not subject to a court order requiring the child to live with someone else, the child protection chief executive has

as guidelines as to what is in the best interests of the child.²⁸⁵ The application must be assessed by a multidisciplinary panel known as the Accommodation of Children Panel²⁸⁶ and the composition of such panel²⁸⁷ is outlined in the Custodial Operations Procedure.

The Department requires a counsellor to provide support and advice to the prisoners accommodated with their children in the parenting unit.²⁸⁸ However, it should be noted that the Department provides primary healthcare to female inmates but not their children living with them in custody.²⁸⁹ It is, however, important that the Department may medically treat a child in custody in emergency situations.²⁹⁰

Queensland has an open classification facility called Helena Jones Community Correctional Centre (HJCCC). The Centre houses women who are on a release-to-work who live in the house with their children.²⁹¹ Release-to-work means that the prison may get paid employment outside the prison and commute to work every day from the prison house. They use a pass to travel to work and their daily routines imitate life outside prisons. This evidenced by the prisoner's employment for a normal wage, part of which is used to pay rent at the centre. Inmates also do their own laundry and cooking and have fewer restrictions than other inmates.²⁹² If a child

consented to the child being accommodated with the mother and the chief executive is satisfied that it is in the child's best interests.

²⁸⁵ Sec 30(2) provides that when deciding what is in the child's best interests, the chief executive may consider the following: the child's age, sex, cultural background, mental and physical health, emotional ties between the child and his or her parents, child's established routine and living pattern and finally if the child is able to express a view, consider the child's wishes.

²⁸⁶ Para 5 of the Custodial Operations Standard Operating Procedure-Management of Women and Children available at www.correctiveservices.qld.gov.au/Resources/Procedures/Offender_Management/documents/of_fprprmtarywomenchild.shtml [accessed 2 August 2016]

²⁸⁷ The Accommodation of Children Panel is determined by the General Manager of the Correctional service facility on a case by case basis and it may comprise of the general manager, deputy general manager, counsellor/case officer, correctional manager, correctional supervisor, intelligence officer, psychologist and a cultural liaison officer where relevant.

²⁸⁸ Para 8.2 of the Custodial Operations Procedures.

²⁸⁹ Custodial Operations Procedures *ibid* sec 12 however, community agencies and family nurses provide advice to mothers and monitor children's growth as well as offer immunisations while the child is in incarceration with the mother.

²⁹⁰ Para 12.2 *ibid*.

²⁹¹ Women in prison in Qld available at www.adcq.qld.gov.au/human-rights/women-in-prison-report/women-in-prison-contents/women-qld [accessed 24 August 2016]

²⁹² Women in prison *supra* note 278.

is eligible to start school during the mother's incarceration, the mother may apply to have her child with her during school holidays.²⁹³

3.3.5 South Australia

The South Australia's Department of Correctional Services allows children under the age of three years to reside with their mothers in prison.²⁹⁴

Paragraph 1.68 of the Standard Guidelines stipulate that instruments of restraint should be:

- (i) used only where the restraint of a prisoner is strictly necessary to maintain the security of the prisoner or prevent injury to any person
- (iv) removed during medical tests and procedures, provided this meets security and management requirements.

However, it has been noted there are cases where prisoners have been shackled during childbirth.²⁹⁵ In his article, Williamson reports that one Ms Fisk was shackled to a bed while she was giving birth at a Women's and Children's Hospital and both her children were allowed to stay with her until the age of six months.²⁹⁶

3.3.6 Tasmania

According to section 25 (1) of the Corrections Act 1997 (Tas), a female prisoner may seek permission for a child to live with the prisoner in prison. The application will be successful if the director is satisfied that it is in the best interests of the child to live with the parent in prison and the management and good order of the prison is not threatened by the child's presence in the prison.²⁹⁷ Further, the prisoner will be

²⁹³ Custodial Operations Standard Operating Procedure-Management of Women and Children available at www.correctiveservices.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofmpromanwomenchild.shtml [accessed 2 August 2016]

²⁹⁴ Laws on Children Residing with Parents *op. cit* note 279 p 11.

²⁹⁵ Williamson B 'Mothers should be allowed to keep babies in prison, according to former Adelaide inmate' 15 February 2016 ABC (Australian Broadcasting Corporation) www.abc.net.au [accessed on 22 August 2016]

²⁹⁶ Williamson *ibid*.

²⁹⁷ Sec 25(1)(a) and (b) of the Corrections Act 1997 (Tas).

responsible for the care and safety of their child during the stay in prison.²⁹⁸ The Act is however silent on the application procedure, any guidelines or criteria on the application process as well as the composition of the task team responsible for the assessment of the application.

3.3.7 Victoria

The Charter of Human Rights and Responsibilities Act, 2006, entitle families to be protected by society and the State of Victoria. Consequently, section 31(1) of the Corrections Act 1986 provides that a prisoner who is the 'child's parent' may request to live with the child in prison. Section 31(4) goes on to define parent as '...a person who would have day to day care and control of the child and whom the child would ordinarily be resident if the person were not in prison.' This means that the State of Victoria attempts to protect the family entity by allowing a biological mother or any other close relative included in the definition of 'parent' to stay with their minor child in prison. Further, section 43(1) of the Corrections Regulations 2009 is applicable if a 'prisoner requests that his or her child be permitted to live with them in prison under section 31 of the Act. From the definition of parent in the 1989 Act as well as the terminology used in the Corrections Regulations, one can deduce that fathers were also eligible to have children live with them in prison. However, this section was repealed in its entirety by the Corrections Act 1996 making it impossible for fathers to stay with their children in prison.

The Programme is available in two women's prisons, namely, the Dame Phyllis Frost Centre (DPFC) and the Tarrengower Prison where there are dedicated mother and child housing facilities.²⁹⁹ Mothers living with their children are housed in accommodation that meets the acceptable community standards for the safe and secure housing of children and adequately meets the nutritional, developmental and health needs of the child.³⁰⁰

²⁹⁸ Sec 25 (2).

²⁹⁹ Pregnancy and Childcare-Corrections, Prisons & Parole Victoria www.corrections.vic.gov.au [accessed 22 August 2016]

³⁰⁰ Pregnancy and Childcare *ibid*.

The eligibility criteria to allow a child to live in prison with the mother require that the prisoner must be:-

- a mother who was the primary carer of a pre-school child before entering prison, or
- a pregnant woman who is due to give birth while in prison.

In cases of pregnant prisoners, pre-natal and post-natal treatment and accommodation should be made available to female prisoners where practicable.³⁰¹

Further, arrangements are to be made for prisoners to give birth in a hospital outside the prison and if a child is born in prison, this fact should not be recorded on the birth certificate.³⁰²

3.3.8 Western Australia

The Western Australian Department of Corrective Services Policy Directive of 2007³⁰³ governs the issue of children residing in prison with their mothers. The Policy defines 'mother' as referring to a biological mother or primary carer.³⁰⁴ This means that a prisoner who is not a biological mother but was responsible for the care of the child before incarceration may have the child stay with them in prison. There are three Programmes available in West Australian prisons namely; the residential Programme, the extended day stay and overnight stay. These Programmes will be discussed below. It is important to note that these Programmes are available to both sentenced and remanded prisoners.³⁰⁵

The residential Programme entails full time residence of the child in prison with the mother. The age limit for a child to reside in prison with the mother is generally

³⁰¹ Para 2.45 of the Australian Standard Guidelines for Corrections.

³⁰² Para 2.46 of the Standard Guidelines.

³⁰³ Western Australia Department of Corrective Services, Policy Directive 10: Prisoner Mothers/primary Carers and their Children (April 2007) available at <http://www.correctiveservices.wa.gov.au/files/prisons/adult-custodial-rules/policy-directives/pd-10.pdf> [accessed 22 August 2016]

³⁰⁴ The Policy Directive p2.

³⁰⁵ Para 5.1 *ibid*.

twelve months,³⁰⁶ however, in purpose-built minimum security facilities, the age limit is four years.³⁰⁷

The extended day stay is when a child may stay in prison with the mother for a number of days at a time.³⁰⁸ It is important to note that children up to the age of twelve years may be permitted to make regular extended day stays with their carer in secure prisons or minimum security prisons.³⁰⁹

The last Programme available is the overnight stays which allow children to stay overnight at the prison facility with their mother.³¹⁰ The age limit for this Programme is six years in a secure prison while in minimum security environment children of up to twelve years of age may be permitted to stay with their primary care-giver in prison.

In order to have the child stay with her in prison, the primary carer must apply to the Superintendent.³¹¹ The Superintendent will then submit the application for consideration to the Child Care Management Committee,³¹² a Committee whose composition is detailed in section 6.3 of the Directive Policy. It is important to note that the Committee will make recommendations only. However, it is the sole responsibility of the Superintendent to make a decision whether to allow the child to stay in prison or not taking into consideration the best interests of the child.³¹³ Section 6.1 of the Policy lists cases where the Superintendent may refuse an application to have a child reside in prison with the mother and if he decides not to proceed with the application due to any reason in section 6.1, he should notify the prisoner of this and the reasons for the decision.³¹⁴

If a prisoner's application is successful, the Child Care Management Committee must come up with a Care Plan before the child enters the prison system.³¹⁵ The

³⁰⁶ Para 3.1.1 of the Policy Directive.

³⁰⁷ Western Australia Department of Corrective Services, Policy Directive 10: Prisoner Mothers/primary Carers and their Children (April 2007).

³⁰⁸ Para 3.2 *ibid.*

³⁰⁹ Para 3.2.1 of the Standard Guidelines and 3.2.2 Policy Directive 10-Prisoner Mothers/Primary Carers and their Children p4.

³¹⁰ Para 3.3 of the Policy Directive 10.

³¹¹ Para 6 of the Policy Directive 10.

³¹² Para 6 *ibid.*

³¹³ Para 6.4.1 of the Policy Directive 10.

³¹⁴ Para 6.1.2 *ibid.*

³¹⁵ Para 7.1 *ibid.*

care plans are different for the overnight stay³¹⁶ and the resident Programme.³¹⁷ The prisoner will have full responsibility of their child during their stay in prison. However the Department owes a duty of care to the child³¹⁸ and the standard of care is high.³¹⁹ Section 4.3 of the Policy goes on to provide guidelines for the upholding of high standard of care.³²⁰

While the Department owes a duty of care to the child during the child's stay in prison, the mother is responsible for preparing meals for herself and the child in their own kitchen.³²¹ Food is, however, provided for by the prison.³²² If the child has a medical emergency, the child is sent to a hospital by ambulance but the mother is responsible for the medical costs including the ambulance costs.³²³

Section 2 of the Policy outlines the required standards of the facilities for residential stays in prison. The facilities should be similar to housing in a community as far as practicable.³²⁴ Accommodation with restricted access by other prisoners should be provided for older children for overnight stays.³²⁵ The overnight facilities may also be used for the extended days stays.³²⁶

³¹⁶ Para 7.2 reiterates that a care plan for children in the overnight stay Programme should consider the following, any restrictions on contact with other prisoners, any areas within the prison where the child may not go, any special needs of the child e.g. health issues as well as frequency and duration of visits. Visits by school age children during school time will only be allowed in exceptional circumstances.

³¹⁷ Para 7.3 states that a care plan for resident children should address as a minimum the following; mothers should participate in any Programme or counselling to improve their parenting skills, any restrictions on movement of the mother within the prison, list any alternate carers (within the prison and external) and a schedule of visits to any non-custodial parent in the community amongst others.

³¹⁸ Para 4.1 of the Standard Guidelines.

³¹⁹ Para 4.2 of the Standard Guidelines *supra* note 300.

³²⁰ Some of the guidelines include; providing a contract to be signed by the mother of the child establishing the responsibilities of the mother and those of the prison, provide mothers with information on responsible and safe child rearing practices and formally implementing procedures within the prison to promote the safety and well-being of the children in prison amongst others.

³²¹ Para 19.1 of the Standard Guidelines.

³²² Para 19.2 *ibid*.

³²³ Para 17.1 and 17.2 *ibid*.

³²⁴ Para 2.1 of the Policy Directive 10.

³²⁵ Para 2.2 *ibid*.

³²⁶ Para 2.3 *ibid*.

3.4 United States of America (USA)

The United States of America is one of the countries that allow children to reside in prison with their mothers and it has two Programmes namely; prison nurseries and the community-based residential parenting Programme. While the USA has the highest prison population in the world and the number of women in prisons has skyrocketed, there are only seven states out of fifty that have prison nurseries.³²⁷ The states that have prison nurseries are: New York, Nebraska, Washington, Ohio, South Dakota, Indiana and Illinois. Seven states have community-based residential Programmes.³²⁸ These states are: Alabama, California, Connecticut, Illinois, North Carolina, Massachusetts and Vermont. The Federal Bureau of Prisons (BOP) also has a nursery Programme in its prisons called the Mother and Infant Nurturing Together (MINT).

3.4.1 Prison Nurseries

A prison nursery is a facility within a prison where a female inmate is allowed to stay and bond with her infant born during the mother's incarceration.³²⁹ Each nursery has a different cut off age limit for eligibility into the nursery Programme. The states with prison nurseries will be discussed individually below.

³²⁷ 'The Rise of Prison Nurseries' Pacific Standard <https://psmag.com/the-rise-of-prison-nurseries-4b7fcd7225e#.y146agxfz> [accessed 18 October 2016]

³²⁸ Institute on Women & Criminal Justice Mothers, Infants and Imprisonment; A National Look at Prison Nurseries and Community-Based Alternatives 2009 <http://ncfy.acf.hhs.gov/library/2009/mothers-infants-and-imprisonment-national-look-prison-nurseries-and-community-based> [accessed 11 September 2016]

³²⁹ Sterrenberg A 'Prison Nurseries' 2012 <https://www.slideshare.net> [accessed on 2 November 2016]

3.4.1.1 Washington State

Washington State is the only state that allows infants to stay with their mothers for up to three years³³⁰, and the inmate must apply and appear before the Residential Parenting Programme (RPP) Review Committee before admission to the Programme.³³¹ In order to qualify for the residential Programme, the woman must have given birth during incarceration.³³² Further, the woman must have been convicted of low-level non-violent offences and must pose less risk to the public.³³³ The female inmates must also be facing relatively short sentences; that is, they must have three years or less left of their sentence at the time of giving birth and must continue as the child's primary caregiver upon release.³³⁴ However, there are circumstances which will prohibit participation from the Programme regardless of the fact that the prisoner meets other eligibility criteria.³³⁵ These circumstances include a documented history of sexual offences against children and the existence of a court order prohibiting contact with minor children.³³⁶ The prison nursery Programme started in 1999 at the Washington Correctional Center for Women in Gig Harbour and it has twenty beds for mothers and their children.³³⁷



³³⁰ Melhus L "How are Pregnant Prisoners and Their Babies Treated in the American Correctional System?" An in-depth look at Prison Nurseries and Community-Based Residential Parenting Programmes, Parental Rights and Health Care **University of Oslo** 2013.

³³¹ Hanna-Truscott C Protective Custody; Within a Prison Nursery at the Washington Corrections Center for women 2010 <http://www.protectivecustody.org/stepinside/> [accessed 13 November 2016]

³³² Deck M V "Incarcerated Mothers and Their Infants-Separation or Legislation" **Boston College Law Review** Vol 29(3) 1988 689-713 p703.

³³³ Melhus note 329 at 26.

³³⁴ *Ibid* the reason for the requirement that the woman should have a shorter sentence of less than three years is that children are only allowed to stay in prison with their mothers up to three years. Based on the age limit, it does not make sense to allow the child to stay with a mother who still has a long sentence to serve, only to separate them when the child has reached the age limit as this can be traumatic for both mother and child.

³³⁵ Fearn NE and Parker K 'Washington State's Residential Parenting Programme: An Integrated Public Health, Education, and Social Service Resource for Pregnant Inmates and Prison Mothers' **California Journal of Health Promotion** 2004 Vol 2 34-48 p42.

³³⁶ *ibid* p 42.

³³⁷ *ibid*.

3.4.1.2 New York City

New York has two correction centres with the prison nursery Programme, namely the Bedford Hills Correctional Facility and the Taconic Correctional Facility. The centres were opened in 1901 and 1990 respectively.³³⁸ Bedford Hills Correctional Facility has a capacity of twenty-nine mother and infant pairs while the Taconic Facility has a capacity of fifteen mother and infant pairs.³³⁹

At the Bedford Hills Center, an infant can live with the mother for up to twelve months. An infant may also stay with the mother until he/she is eighteen months old if the mother has eighteen months or less left for her sentence or if the mother would be pardoned by the time the child is eighteen months.³⁴⁰ At the Taconic facility, the children can stay for twelve to eighteen months depending on the mother's Programme.³⁴¹

In order for a female prisoner to be eligible for the prison nursery Programme, the child must have been born during the mother's incarceration.³⁴² The nature of the crime and the length of the sentence are also determining factors for admission to the nursery Programme.³⁴³ In other words, women convicted of serious and violent crimes, child abuse related crimes or arson will not be eligible for admission to the nursery Programme. If a mother has been previously involved with the child-welfare system, she will not qualify for the Programme.³⁴⁴

3.4.1.3 South Dakota

The prison nursery Programme in South Dakota is at the Women's Prison in Pierre and the Programme started in 1998. This facility has no capacity limit and women

³³⁸ Institute on Women and Criminal Justice *op. cit* note 327 p 62.

³³⁹ *ibid.*

³⁴⁰ *Ibid* this is done to prevent the trauma of separating the mother and child when the child reaches 18 months, which is a possibility if the mother's sentence is longer than 18 months.

³⁴¹ Institute on Women.

³⁴² Melhus *op. cit* note 333 p 25.

³⁴³ Institute on Women note 341.

³⁴⁴ *ibid.*

prisoners are only allowed to stay with their children for thirty days.³⁴⁵ If the mother is not eligible for release at the lapsing of the allocated thirty days, the child will be sent to family, friends or foster care.³⁴⁶ Only women who give birth during incarceration are eligible for the nursery Programme.³⁴⁷ The mother should not be a violent offender or have child abuse related crimes.³⁴⁸

The difference between the nursery Programme in South Dakota and other nursery programmes in the USA is that the mothers have to pay for all expenses related to their child's care, including medical bills, during the Programme.³⁴⁹ In 2009, one pregnant inmate had to pay \$288(US) to have her child with them for the allocated thirty days.³⁵⁰ The mother and baby live in cells in an area away from the general prison populace.³⁵¹ Other prisoners at the facility are trained to become babysitters and a mother is therefore able to choose who they want to babysit their child.³⁵²

3.4.1.4 Nebraska

With a capacity of fifteen mother and infant pairs, the prison nursery was opened in 1994 in the Nebraska Correctional Center for Women in York. An infant can stay with the mother for eighteen months but the stay may be extended at the discretion of staff.³⁵³ In order for the mother to qualify for the nursery Programme, the child must be born in custody and the mother must have no record of violent crimes.³⁵⁴ Further, the mother must also be in good mental condition.³⁵⁵ The inmate must also have eighteen months or less left of her sentence when they apply for admission to the nursery Programme.³⁵⁶

³⁴⁵ Institute on Women.

³⁴⁶ *ibid.*

³⁴⁷ *ibid.*

³⁴⁸ Melhus *op. cit* note 342.

³⁴⁹ Institute on Women and Criminal Justice note 347.

³⁵⁰ *ibid.*

³⁵¹ Melhus *op. cit* note 342 p 26.

³⁵² *ibid.*

³⁵³ *ibid.*

³⁵⁴ *ibid* p 23.

³⁵⁵ *ibid.*

³⁵⁶ *ibid.*

3.4.1.5 Ohio

The nursery at the Ohio Reformatory for Women at Marysville is called the Achieving Baby Care Success Programme and it was started in 2001. The facility has a capacity for twenty mothers and 21 infants and infants can stay for up to eighteen months.³⁵⁷ In order to qualify for the Achieving Baby Care Success Programme, the woman must have given birth during custody and must have a sentence of eighteen months or less at the time of delivery.³⁵⁸ The woman must also not be convicted of violent crimes and must be of good physical and mental condition.³⁵⁹ Further, the women must attend family training courses and must adhere to rules.³⁶⁰

3.4.1.6 Illinois

Opened in 2007, the Decatur Correctional Center Moms and Babies Programme allows pregnant inmates to stay with their infants until they are two years old.³⁶¹ This Programme is contracted outside the Department of Corrections although some members at the facility are DOC personnel.³⁶² The facility can accommodate five mothers and their infants. In order to qualify for the Programme the woman must be within two years of release at the time of delivery and must not be a violent offender.³⁶³ The inmates are housed in single rooms they share with their infants and have access to a playroom and outside patios.³⁶⁴

³⁵⁷ Institute on Women note 348 p 27.

³⁵⁸ *ibid.* p 28.

³⁵⁹ *ibid.*

³⁶⁰ *ibid.*

³⁶¹ Melhus 'How are pregnant prisoners and their babies treated in the American correctional system' *op. cit.* note 355 p 21.

³⁶² Carlson J R "Prison Nurseries: A Pathway to Crime-Free Futures" ***Corrections Compendium 2009 34(1) Criminal Justice Periodicals*** p17-24 at 19.

³⁶³ Melhus note 360 p 21.

³⁶⁴ Melhus *ibid* p 22.

3.4.1.7 Indiana

The nursery Programme is housed at the Indiana Women's Prison in Indianapolis and it can house ten mothers and their infants as well as four nannies.³⁶⁵ An infant can stay until eighteen months of age.³⁶⁶ Eligibility criteria into the Wee Ones Nursery Programme are that the mother must not be a violent offender and must be eligible for release by the time the child turns eighteen months.³⁶⁷ A mother or nanny convicted of child abuse may not be admitted to the Programme.³⁶⁸ Further, the child must have been born in custody and must be born healthy to qualify for the programme.³⁶⁹ All the necessary requirements by the baby are provided for by the programme.³⁷⁰

3.5 Community-Based Programmes

Community-based Programmes offer pregnant women and/or mothers of infants an opportunity to serve their sentences in the community by diverting them from prison.³⁷¹ The facility settings of the community-based Programmes resemble the home setting with mother and child sharing a private bedroom.³⁷² These Programmes are designed for women with a history of substance abuse and they offer drug rehabilitation and treatment as well as parenting support.³⁷³ These Programmes may be utilised at various stages from pre-trial to the sentencing and may be used as condition of parole or as a probation requirement.³⁷⁴ Children may stay at the community centres until they are of school going age and the child's stay is usually dependant on the mother's sentence.³⁷⁵ Mothers participating in the

³⁶⁵ Institute on Women note 306 p27.

³⁶⁶ Institute on Women note 365.

³⁶⁷ *ibid.*

³⁶⁸ *ibid.*

³⁶⁹ Melhus note 363 p28.

³⁷⁰ *ibid.*

³⁷¹ Institute on Women *op. cit.* note 357 p 12.

³⁷² *ibid.*

³⁷³ *ibid.*

³⁷⁴ *ibid.*

³⁷⁵ *ibid.*

community-based Programme may seek permission to attend to doctors' or social service appointments as well as other community engagements.³⁷⁶

The purpose of the community-based programme is to promote and maintain the mother-child bond, a similar aspect of the prison nursery programmes. However, it is important to note the differences between community-based programmes and the prison nurseries. The first difference is that community-based programmes are not located in correctional services but in the community and are run by non-profit organisations in partnership with local corrections departments.³⁷⁷ While the children in prison nursery must have been born in custody,³⁷⁸ the children who participate in the community-based programme are not necessarily born during incarceration; mothers may bring their small children to the centre.³⁷⁹ The states that have the community-based programmes will be discussed below.



3.5.1 Illinois

The community-based programme in Illinois opened in 1999 and is known as the MOM's programme and is a therapeutic treatment programme available to pregnant or postpartum pre-trial inmates with substance abuse issues and mental health disorders.³⁸⁰ The facility can accommodate 24 inmates and children are allowed to stay in the facility up to pre-school age.³⁸¹ Women can participate in the programme in one of two ways; either they are sentenced to the centre by a judge or they are admitted to the programme if they meet certain criteria.³⁸² In order for an inmate to be eligible for the MOM's programme, they must not have been convicted of a violent

³⁷⁶ Institute on Women.

³⁷⁷ Institute on Women *op. cit* note 376.

³⁷⁸ Melhus *op.cit.* note 368 p 22.

³⁷⁹ *ibid.*

³⁸⁰ Melhus *op.cit* p 30 see also http://cookcountysheriff.org/womens_justice_services/wjs_momsProgramme.html [accessed 13 November 2016]

³⁸¹ *ibid.*

³⁸² Institute on Women and Criminal Justice note 377 p 31.

offense.³⁸³ They must also have no history of absconding from other programmes and lastly, they must have a bond less than \$300,000.³⁸⁴

3.5.2 Alabama

The community residence programme in Alabama is based at the Lovelady Center in Birmingham and was opened in 1997 and expanded in 2007.³⁸⁵ It is the only residential programme in Alabama where women involved with the criminal justice system are allowed to live with their children and the mothers participate in a 6-12 month programme.³⁸⁶ The facility has a capacity of 300 mothers and 100 children.³⁸⁷ There is no age restriction for the children who can live at the centre although boys over the age of fourteen are only allowed under certain circumstances.³⁸⁸ These circumstances are however, not clear and the restriction of permission for boys over the age of fourteen years may be arguably be seen as discrimination based on gender. The women at the centre are allowed to go to work and are provided with daily transport to do so.³⁸⁹

Women may be sentenced to the Lovelady Center by a judge as an alternative to incarceration or may stay there as a parole or probation condition.³⁹⁰ Some women are required to stay at the centre as a result of a parole or probation violation while others can volunteer to stay there for substance abuse treatment.³⁹¹ Women who stay at the Centre are offered parenting and job-readiness training with some being placed in stable jobs.³⁹² There are no hard and fast rules on the eligibility to the Programme with decisions being based on each woman's circumstances; however women who have custody of their children or those who wish to be reunified with their children must attend parenting classes.³⁹³

³⁸³ Institute on Women and Criminal Justice p 19.

³⁸⁴ *ibid* p 31.

³⁸⁵ Institute on Women and Criminal Justice note 384 p 30.

³⁸⁶ *ibid* p30.

³⁸⁷ *ibid* p 30.

³⁸⁸ Melhus *op. cit.* p 30.

³⁸⁹ Institute on Women *op. cit* note 387 p 30.

³⁹⁰ *ibid* p13.

³⁹¹ *ibid* p 30.

³⁹² *ibid.*

³⁹³ *ibid.*

3.5.3 Connecticut

Opened in 1988, the NEON Women's and Children's Halfway House has a capacity of nineteen mothers and twelve children.³⁹⁴ Children are allowed to stay at the house until the age of ten.³⁹⁵ Pregnant prisoners who meet the admission requirements are transferred to the house from the York Correctional Institution.³⁹⁶ Women who have served part of their sentence and are interested in reuniting with their children are transferred to the house to spend time with their children.³⁹⁷ The programme also makes provision for inmates who have served their sentences but are not yet ready to re-enter the community.³⁹⁸ Women are allowed to leave the centre to go for parenting classes or to go to work.³⁹⁹

3.5.4 California

California has three community-based programmes and they all opened in 1980. Children are allowed to stay at the centres until they are six years old and an inmate is allowed to have up to two children living with them at the centre.⁴⁰⁰ Women must apply to the programme from a state prison.⁴⁰¹ In order for the applicant to qualify for the programme at any of the three community-based programmes, she must be pregnant or parenting a child under the age of six.⁴⁰² The woman must also have been the primary caregiver to the child or children at the time of incarceration and must not have been deemed an unfit parent.⁴⁰³ Further, the woman must be convicted of a non-violent drug crime and must be sentenced to a maximum of six years.⁴⁰⁴

³⁹⁴ Melhus note 387 p 31.

³⁹⁵ Melhus note 394.

³⁹⁶ Institute on Women note 393 p35.

³⁹⁷ *ibid.*

³⁹⁸ *ibid.*

³⁹⁹ *ibid.*

⁴⁰⁰ Institute on Women *op. cit* p30.

⁴⁰¹ *ibid.*

⁴⁰² *ibid.*

⁴⁰³ Shain K, Strickman C, Rederford R 'California's Mother-Infant Prison Programmes: An Investigation' **Legal Services for Prisoners with Children** 2010 p4.

⁴⁰⁴ Institute on Women *op.cit.* note 384 p30.

However, it should be noted that although women must have been convicted of non-violent crimes, women convicted of a serious manslaughter charges may be considered for the programme if the crime was committed in response to a physically abusive male partner.⁴⁰⁵ The fact that the crime must have been committed specifically in response to an abusive male partner may arguably be deemed discriminatory to those in same sex marriages. This regulation seems to imply that a female prisoner convicted of a manslaughter charge committed in response to an abusive same sex partner may not be afforded the same opportunity to participate in the programme as their counterparts in heterosexual marriages or partnerships.

It is also important to note that there are certain crimes that automatically exclude women from participating in the programme. Women should not have been convicted of any of the serious crimes mentioned in section 1174.4(a) (2) of the California Penal Code,⁴⁰⁶ for example murder and robbery. A woman, who poses a potential risk of absconding, poses unnecessary risk to the public or acts in any way that negatively affects other participants may be excluded from the programme.⁴⁰⁷ Women who are otherwise ineligible for the programme may be considered if there are any mitigating factors.⁴⁰⁸ The fact that the Department of Correctional Services considers mitigating factors in otherwise ineligible prisoners is an indication that each case is considered on merit and is treated differently.

California has another programme known as the Family Foundations Programme at three centres which have capacity to house thirty-five women and forty children. Children are allowed to stay in the Family Foundation Programme until the age of six.⁴⁰⁹ This programme, unlike the community-based programme, is specifically a drug treatment Programme therefore women who are sent there must have substance abuse problems.⁴¹⁰ The Family Foundation Programme is also different from the community-based programme in that women are sent directly to the programme by a judge without going to the state prison first.⁴¹¹ Another difference

⁴⁰⁵ Shain *op. cit.* note 403 p4.

⁴⁰⁶ Other serious offences mentioned in the Penal Code of California section 1174.4(a) (2) are voluntary manslaughter, kidnapping, mayhem, arson, rape and other sexual offences.

⁴⁰⁷ Shain note 404 p6.

⁴⁰⁸ *ibid* p 6.

⁴⁰⁹ Institute on Women note 391 p30.

⁴¹⁰ Shain *op.cit.* note 406 p4.

⁴¹¹ *ibid.*

with the community-based programme is that a woman in the Family Foundation Programme does not serve her full sentence in the programme.⁴¹² Alternatively, they spent one year at the residential treatment programme and another year in aftercare/transition period in preparation for community re-entry.⁴¹³

In order for a woman to qualify for the Family Foundation Programme, she must be pregnant or have a child or children under the age of six at the time of entry to the Programme.⁴¹⁴ She must also have an established substance abuse problem and must be sentenced to thirty-six months or less.⁴¹⁵ However, it is important to note that there are certain factors that can disqualify a woman from participating in the programme. One such incidence is if the woman's child is under the jurisdiction of the juvenile dependency court.⁴¹⁶ Further, the mother must have primary custody of her child or children and must not have immigration or 'past or active felony hold.'⁴¹⁷ In addition, the applicant may not have a current conviction or past prison term for any serious offences listed in the California Penal Code.⁴¹⁸

3.5.5 North Carolina

Opened in 1987, Summit House has three facilities that can house twenty six families.⁴¹⁹ Children are allowed to stay at the house until they are seven years old.⁴²⁰ The Summit House is used as an alternative to prison for pregnant women and those with young children under the age of seven.⁴²¹ In order to qualify for the Programme, the woman must be at least seventeen years old and be pregnant or have children below the age of seven.⁴²² In addition to have children below the age of seven, the mother must have custody of the children and be the primary care-

⁴¹² Shain p 4.

⁴¹³ *ibid.*

⁴¹⁴ Shain note 410.

⁴¹⁵ *ibid.*

⁴¹⁶ *ibid* p 5.

⁴¹⁷ *ibid.*

⁴¹⁸ California Penal Code s 1174.4(a) (2).

⁴¹⁹ Institute on Women *op. cit.* note 391 p32.

⁴²⁰ *ibid.*

⁴²¹ *ibid.*

⁴²² *ibid.*

giver to the children.⁴²³ The applicants must have been convicted of non-violent crimes and are usually sentenced for twelve to twenty-four months to the Programme.⁴²⁴

3.5.6 Vermont

The Family Foundation Programme in Vermont is housed at the Lund Family Centre. The Centre was opened in the 1800s but started collaborating with the Department of Corrections in 2002 to house female prisoners with drug or mental problems.⁴²⁵ The Centre therefore provides pregnant women or those with children below five years with residential drug and mental services. The applicants must be between the ages of twelve and twenty-eight and must be pregnant or have children below five years.⁴²⁶ The children will be allowed to stay at the Centre for five years and the mother's sentence must be completed by the time the child turns five.⁴²⁷ Although the Centre is mainly concerned with women outside the criminal justice system, some women in the justice system are sentenced to the Centre as an alternative to imprisonment.⁴²⁸ The women must be convicted of non-violent offences in order to participate in the programme.⁴²⁹

3.5.7 Massachusetts

The Spectrum Women and Children's Programme was opened in 1989 and can house thirteen women and eleven or twelve children under the age of two.⁴³⁰ The residence is for women with drug abuse problems who are pregnant or have young children below two years.⁴³¹ Women who are already incarcerated or those on parole

⁴²³ Melhus 'How are pregnant prisoners and their babies treated in the American correction system' *op. cit.* note 376 p36.

⁴²⁴ Institute on Women *op. cit.* note 409 p30.

⁴²⁵ Institute on Women.

⁴²⁶ *ibid.*

⁴²⁷ Institute on Women *op.cit.*

⁴²⁸ *ibid.*

⁴²⁹ *ibid.*

⁴³⁰ *ibid* p32.

⁴³¹ *ibid.*

or probation can apply to the residence provided they meet the eligibility criteria.⁴³² The first requirement is that the woman must have a drug problem and be a mother of a minor child or be pregnant.⁴³³ In addition, the woman must not have been convicted of a violent crime and must not have any serious mental problems.⁴³⁴ The child must be below two years of age and must not necessarily have been born in custody.⁴³⁵ Women are only allowed to leave the premises upon approval of the Department of Corrections,⁴³⁶ and all trips outside the centre are supervised by personnel at all times.⁴³⁷

3.6 Federal Bureau of Prisons Residential Parenting Programme

The Bureau of Prisons (BOP) started a community residential programme called the Mothers and Infants Nurturing Together (MINT) for pregnant women at the time of incarceration.⁴³⁸ The purpose of the MINT Programme is to promote and maintain bonding between mother and child and offer parenting skills to women who wants to re-unite with their children after serving their prison sentence.⁴³⁹ The woman's referral to the centre is at the sole discretion of her unit team.⁴⁴⁰ A woman who wants to participate in the programme must make prior custodial arrangements for her child.⁴⁴¹ In other words, a woman must decide who will have custody of her child when she goes back to prison after time at the centre has lapsed. The person will also be in charge of medical and hospital costs in respect of the birth of the child.⁴⁴² The Department is only responsible for the payment of medical costs for the first

⁴³² Melhus *op. cit.* note 410 p37.

⁴³³ *ibid.*

⁴³⁴ *ibid.*

⁴³⁵ Institute on Women *op.cit.* note 431 p32.

⁴³⁶ *ibid.*

⁴³⁷ Melhus *op.cit.* note 434 p33.

⁴³⁸ Federal Bureau of Prisons 'Female Offenders' https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp [accessed 14 November 2016]

⁴³⁹ *ibid.*

⁴⁴⁰ *ibid.*

⁴⁴¹ Institute on Women note 436 p32.

⁴⁴² Melhus note 437.

three days (in case of natural delivery) or the first seven days (for caesarean birth).⁴⁴³

The applicant is transferred to the centre in the third trimester and stays there for three more months after giving birth.⁴⁴⁴ After bonding with the infant for three months the woman is sent back to the institution to serve the remainder of her sentence while the baby is sent to the custodian chosen by the mother. The time spent at the centre after birth may be extended by the Chief Executive Officer or by the Regional Director if the stay exceeds over 180 days.⁴⁴⁵ It is also important to note that if the woman is eligible for pre-release, she may remain at the centre under supervision.⁴⁴⁶ It should also be noted that the length of stay may differ from centre to centre.

In addition to making custodial arrangements for the child to qualify for the MINT Programme the woman must also be a low risk prisoner. This means that the prisoner must be convicted of non-violent offenses and must not pose a risk to the public or other inmates at the centre. The applicant must be of sound physical and mental health in order to qualify for the Programme and her behaviour in the federal institution must be good. There are disqualifiers to a woman's referral to the centre for example; a woman who plans to give the baby up for adoption may not participate in the Mint Programme.⁴⁴⁷ In addition, a woman who has more than five years of her sentence left may not participate in the Programme.⁴⁴⁸ Most importantly, women who fall pregnant during furlough are not eligible for the MINT Programme.⁴⁴⁹ The States with the MINT Programme will be discussed individually below.

3.6.1 Illinois

The Triangle Center MINT Programme was opened in the late 1990s and can house four mothers and their babies. The baby is allowed to stay at the centre for three

⁴⁴³ Melhus.

⁴⁴⁴ U.S. Department of Justice: Federal Bureau of Prisons: Community Corrections Center http://www.bop.gov/policy/progstat/7310_004.pdf [accessed 14 November 2016]

⁴⁴⁵ U.S. Department of Justice: Federal Bureau of Prisons: Community Corrections Center note 444.

⁴⁴⁶ *ibid.*

⁴⁴⁷ US Dept of Justice *op. cit* 446.

⁴⁴⁸ *ibid.*

⁴⁴⁹ *ibid.*

months and the mother is allowed to stay there three months before delivery date for prenatal care and three months after delivery for bonding with the baby and post natal care.⁴⁵⁰ The centre accommodates women from any federal institution in the country. Women are allowed to leave the centre to participate in community activities provided they have an escort.⁴⁵¹

3.6.2 Connectuit

The MINT Programme in Connectuit is centred at Hartford House. This house can accommodate five mothers and their babies. Women who participate in this Programme are transferred from the Federal Correctional Institution, Danbury.⁴⁵² The centre will not accommodate a woman from any other federal prison except the one mentioned above. Babies are allowed to stay for three months after which the mother will be returned to the federal institution to serve the remainder of her sentence and the child is out into custody arranged by the mother. Women who participate in this Programme usually have less than two years of their sentence left.⁴⁵³

3.6.3 Florida

Opened in 1998, the Tallahassee MINT Programme can accommodate ten mother and infant pairs.⁴⁵⁴ A child is allowed to stay at the centre for one year.⁴⁵⁵ Women from any federal institution are accepted into the Programme. The length of the mother's sentence does not seem to have a bearing on the mother's eligibility to participate in the Programme.

⁴⁵⁰ Institute on Women *op. cit.* note 428 p32.

⁴⁵¹ *ibid.*

⁴⁵² Institute on Women.

⁴⁵³ Institute on Women *op. cit.* note 439.

⁴⁵⁴ Melhus *op. cit.* note 430.

⁴⁵⁵ *ibid.*

3.6.4 West Virginia

The MINT Programme was opened in 1994 at the Greenbrier Birthing Center.⁴⁵⁶ The Centre can house twenty mother and baby pairs making it the biggest MINT centre in USA. Babies are allowed to stay at the centre for eighteen months.⁴⁵⁷ Of all the centres in the MINT Programme, this centre allows babies to stay the longest. Women can be transferred from any federal institution and the mother's sentence must not be more than fifteen years.⁴⁵⁸

3.6.5 Texas

The Volunteers of America is the original MINT Programme location and it opened in the early 1980s. The facility can house twenty mothers and their babies and the infants can stay for three months.⁴⁵⁹ Women can be transferred from any federal institution and the duration of the mother's sentence has no bearing on her eligibility to participate in the Programme.⁴⁶⁰

3.7 Countries that do not allow children to reside in prisons with their mothers

Norway and the Peoples' Republic of China are among the countries that do not allow infants to reside with their mothers in prison. These countries are discussed in detail below;

3.7.1 Norway

⁴⁵⁶ Institute on Women note 453 p32.

⁴⁵⁷ *ibid.*

⁴⁵⁸ Institute on Women p32.

⁴⁵⁹ *ibid.*

⁴⁶⁰ *ibid.*

Norway does not allow children to stay with their mothers in prison.⁴⁶¹ Sentence may be postponed in cases where the convicted person is pregnant and expects to give birth before the expected release date or has a child below the age of nine months.⁴⁶² However it should be noted that a pregnant woman may still be jailed especially where the pregnancy is still in its early stages.⁴⁶³ It is imperative to note that in cases of pregnant prisoners, they are given a break in their prison sentence (*soningsavbrudd*) in order to give birth and care for the child outside prison until it becomes justifiable to separate mother and child.⁴⁶⁴ This break is applicable from approximately six months into the pregnancy.⁴⁶⁵

If a sentence cannot be postponed, the convicted mother is instead accommodated in a home for mothers (*mødrehjem*) outside the penitentiary.⁴⁶⁶ Mothers with young children and short sentences may serve their sentence in a home for mothers.⁴⁶⁷ If however the sentence is longer, mother and child will be separated with the child being placed in foster care⁴⁶⁸ while the mother goes to prison to finish the remainder of her sentence. It is essential to note that in Norway, imprisonment is reserved for very serious crimes.⁴⁶⁹ Therefore since most women are convicted of less serious crimes, the courts have often commuted their sentences to community service especially where the prisoner is pregnant.⁴⁷⁰

⁴⁶¹ Laws on children residing with Parents in prison *op. cit* note 293 p46 see also Var 7 uker på vei da hun ble arrestert-frifunnet etter 11 måneder, NRK 2013 <http://www.nrk.no/ostfold/blaankt-frifunnet-etter-11-måneder-1.10866551> [accessed on 6 September 2016] (translated as was seven weeks pregnant when she was arrested, acquitted after 11 mnths)

⁴⁶² Article 6 para 3 Forskrift om innkalling og utsettelse ved fullbyrding av straff [Regulation on Notice and Postponement of Execution of Sentences] <http://lovdata.no/dokument/SF/forskrift/2010-03-19-408> [accessed 06 September 2016] hereafter Regulation on Notice and Postponement of Execution of Sentences.

⁴⁶³ Lindberg A "Pregnant Gypsy woman jailed" www.bt.no/nyheter/lokail/Gravid-sigoynerkvinn-fengslet-262598.html [accessed on 6 September 2016]

⁴⁶⁴ Laws on children residing with parents in prison note 460 p47.

⁴⁶⁵ Laws on children residing in prison *ibid*.

⁴⁶⁶ Ch.3:12 § *Straffegjennomførlingsloven* (Lov 2001-05-18 No. 21) (translated Act on Execution of Sentence) <http://lovdata.no/dokument/NL/lov/2001-055-18-21?q=STRAFFEGJENNOMF%C3%98RINGSLOVEN> [accessed on 6 September 2016]

⁴⁶⁷ Laws on children residing with parents in prison note 447 p46.

⁴⁶⁸ Ch.4-12 § *Lov om Barneverntjenester (Barnevernloven)* (translated Child Protection Act) <http://lovdata.no/dokument/NL/lov/1992-07-17-100> [accessed 6 September 2016]

⁴⁶⁹ Laws on children residing with parents in prison note 464 p 47.

⁴⁷⁰ *Gravid kvinne slipper fengsel ADRESSA* <http://www.adressa.no/nyheter/trondheim/article518193.ece?S%C3%B8k=Send+foresp%C3%B8rsele> [accessed 6 September 2016] where the court believes that a suspended seven month prison sentence is appropriate for a pregnant woman thereby sentencing her to 225 hours of community service see also *Gravid slipper fengsel* 2012 p4 www.p4.no/gravid-kvinne-slipper-fengsel

In order to qualify for accommodation at the home for mothers, a woman must not be convicted of serious violent crime against children.⁴⁷¹ The mother must also be capable of taking care of her own child.⁴⁷² Women at the home are allowed to leave the centre unsupervised, however the frequency of the trips as well as the supervision are determined by the level of security risk of the prisoner.⁴⁷³ It should also be noted that fathers may be allowed to come and join the mother and baby at the home for mothers.

3.7.2 Peoples' Republic of China

China does not allow children to live in prison with their parents.⁴⁷⁴ Article 254A of the Criminal Procedure Law of the Peoples' Republic of China (2012) stipulates that;

'A criminal sentenced to a fixed-term imprisonment or criminal detention may be permitted to temporarily serve his/her sentence outside prison under the following circumstances:

(2) Where the criminal is in pregnancy or breast-feeding period, or...'

Article 17 (2) of the Prison Law of The Peoples' Republic of China also provides that a prisoner sentenced to life imprisonment or a fixed term imprisonment may temporarily not be put in prison if she is a pregnant woman or breastfeeding her own baby. One may argue that Article 17 is discriminatory against infants who are not being breastfed because the criteria of suspending execution of sentence is not the age of the infant but rather the fact that the baby is being breastfed.

From the above legislation, it seems that the PRC does not allow pregnant women in their prisons at all because being pregnant is an automatic condition for suspension of the execution of sentence. It appears that even prisoners in their first trimester are

[fengsel/artikel/497104](#) [accessed 6 September 2016] where the court overturned a 5 month prison sentence for theft to 143 hours of community service.

⁴⁷¹ Melhus *op. cit.* note 442.

⁴⁷² Melhus *ibid* p 42.

⁴⁷³ Melhus *ibid* p 43.

⁴⁷⁴ Laws on children residing with parents in prison note 468 p 19.

not to be imprisoned. It is also not clear how long a woman is allowed to breastfeed her child before she can go to prison.

3.8 Comparative Perspectives

Having investigated how each of the chosen jurisdictions, South Africa, USA, Australia, PRC, and Norway deal with minors residing in prisons with their mothers, it is imperative to conduct a comparative analysis. This will highlight how the South African legal framework governing minors living in prisons with their mothers compare with other jurisdictions.

3.8.1 Preservation of Mother and child bond

South Africa, Australia and USA all allow infants to stay with their mothers in prison to preserve the mother and child bond during the mother's incarceration. On the other hand, the PRC and Norway do not allow infants to stay with their mothers in custody. Although PRC and Norway have a different stance from South Africa, USA and Australia, they both aim to preserve the mother and child bond. In other words, all the countries in this study are concerned with the preservation of the mother-child bond but these jurisdictions employ different ways to achieve this goal. South Africa, Australia and USA allow infants to stay in prison because it is believed that allowing the mother to stay with her child in prison will help the mother not to relapse into crime.⁴⁷⁵ Norway and PRC, on the other hand, achieve this by employing alternatives to incarceration in order to preserve the mother-child bond. It is also important to note that in some cases, Australia also makes use of alternatives to incarceration in its bid to preserve the mother-child relationship.

⁴⁷⁵ Para 3.4 of the B-Order, for Australia see also Perry *et al* "The Impact of a Correctional-based Parenting Programme in Strengthening Parenting Skills of Incarcerated Mothers" **Current Issues in Criminal Justice** 2011 Vol 22 p457-472 at 461, for USA see Shain *supra* note 416 p 19.

3.8.2 Number of children allowed to stay in prison per inmate

It seems New South Wales allows a female prisoner to have more than one child with her in prison.⁴⁷⁶ This is however different from the South African framework which is not clear on whether a prisoner is allowed to have more than one child with them in prison. In the United States, only the California community-based residential Programme specifies that a woman can have two children with her at the centre. The rest of the Programmes in the United States are silent on the issue which leaves one with the assumption that only one child is allowed in the Programmes.

3.8.3 Role of the courts

The courts play an important role in the issue of children of incarcerated mothers since they are the ones tasked with the sentencing of prisoners. One of the purposes of the comparative analysis was to establish the role played by the courts in the sentencing of women with young children and to ascertain whether they give cognisance to pregnant prisoners or to the children of female prisoners during sentencing. The South African courts were faced with such a question in the case of *M v The State (Centre for Child Law Amicus Curiae)*⁴⁷⁷ where the court was faced with the sentencing of a single mother of three convicted of fraud. The Constitutional Court suspended the four year sentence imposed by the High Court and held that it had done so in the interest of the appellant's three children as there was evidence that all of them relied on her as their primary care-giver.⁴⁷⁸ In relation to the court's decision, Mujuzi⁴⁷⁹ notes that the court must balance all interests involved during sentencing of primary care-givers especially those of children.

Australian courts have also considered the children's interests in the context of parental imprisonment in the case of *Walsh v Department of Social Security*.⁴⁸⁰ The court found that the effects of the sentence on the offender's children were relevant

⁴⁷⁶ Sec 26 (2) (1) of the Crimes (Administration of Sentences) Act of 1999.

⁴⁷⁷ 2007 (12) BCLR 1312 (CC).

⁴⁷⁸ *M v S* *ibid* para 67.

⁴⁷⁹ 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" *SACJ* 2011 (2)164-177 p172.

⁴⁸⁰ [1996] 67 SASR 143.

factors that could justify immediate conditional release. In this light, the court therefore held that the needs of minor dependent children justified the conditional release of one of the parents convicted of fraud. In *Graham v Bartley*,⁴⁸¹ the court also released a young first time offender with a baby after only serving seven days of custodial sentence. In USA, the children of convicts are essentially considered irrelevant third parties to sentencing.⁴⁸² Before 1995 judges were constrained by mandatory sentencing guidelines,⁴⁸³ however the decision in the case of *United States v Booker*,⁴⁸⁴ changed the sentencing rule. The court held that sentencing courts must consider sentencing guidelines but the guidelines are advisory and not mandatory.⁴⁸⁵ However, very few judges deviate from the guidelines to consider children when sentencing care-givers.⁴⁸⁶

3.8.4 Application process

While Australia and South Africa allow minors already born before the mother's incarceration to stay with their mothers in prison, USA prison nurseries only allow infants born during the mother's incarceration.⁴⁸⁷ The USA Community-based Residential Parenting Programmes, however, allow children born before the mother's incarceration to stay with their mothers in the programme. In all jurisdictions, it is the mother who initiates the process by application.⁴⁸⁸ In other words, the female prisoner should apply to have her child with her in prison. However, in Queensland, Australia a Child Protection Chief Executive can also initiate the process.⁴⁸⁹ In the United States, a mother can also be sentenced to the programme directly by the judge as an alternative to imprisonment. South Africa and

⁴⁸¹ (1984) 57 ALR 193.

⁴⁸² Boudin C "Children of incarcerated parents: The child's Constitutional right to the family relationship" *The Journal of Criminal Law & Criminology* 2011 Vol 101 (1) 77-118 p 93.

⁴⁸³ Federal Sentencing Act 198 (Pub. L. 100-182) see also N.Y.PENAL LAW §§70.00-70.08.

⁴⁸⁴ 543 U.S.220, 245 (2005).

⁴⁸⁵ *United States v Booker* at 250.

⁴⁸⁶ Boudin *op. cit.* note 469 p98.

⁴⁸⁷ Melhus L 'How are Pregnant Prisoners and Their Babies Treated in the American Correctional System An in-depth look at Prison Nurseries and Community-Based Residential Parenting Programmes, Parental Rights and Health Care' **University of Oslo** 2013.

⁴⁸⁸ Para 9.1.1 of the B-Order, Melhus *ibid* in Nebraska, Indiana, inmates should apply to keep their infants with them in prison see also section 31(1) of the Corrections Act 1986 (Vic) In Australia the mother also has to initiate the application process.

⁴⁸⁹ Sec 29(2)(a) of the Corrective Services Act 2006 (Qld).

Australia require that an illiterate inmate be assisted during the application process either by fellow inmates or prison officials.⁴⁹⁰ South Africa has a further requirement that if a female inmate wants her child to be placed outside prison, she must do so in writing.⁴⁹¹ The Australian and American legislation are, however, silent on whether the inmate is required to submit a written consent to have her child placed outside the correctional facility.

3.8.5 Composition of the Task team handling applications

Australian legislation⁴⁹² in all states explicitly outlines the composition of the task team that handles applications by female prisoners to have their children with them in prison. South Africa, on the other hand, requires a female inmate to apply to have her child live with her in prison but does not specify to whom the application should be directed to.⁴⁹³ Paragraph 14.0 of the B-Order. 1 mentions the 'role of the multidisciplinary team' but does not outline the composition of such a team. The Policy also provides that the 'multidisciplinary team' should be involved in addressing the needs of the child.⁴⁹⁴ It goes further to state that a team made up of 'officials from all the functionaries from the six service delivery areas of DCS...' is responsible for developing a care plan for each infant in prison.⁴⁹⁵ This is rather confusing in that it is not clear whether this 'multidisciplinary team' is responsible for evaluating applications by female prisoners to have their infants live with them in prison. US programmes also require the applications to the programmes to be screened by a committee but the composition of the committee is not specified.

The application process in the US is differs from state to state. The California Programme requires that women be told of the Programme at reception on admission to the correctional facility. A woman then fills in the application form and the Department assesses it for eligibility and, if the woman qualifies, she will be

⁴⁹⁰ Para 9.1.1 of the B-Order.

⁴⁹¹ *ibid.*

⁴⁹² Sec 6 of the Policy Directive 10 (Western Australia), see also sec 30 of the Corrective Services Act (Qld), see also Custodial Operation Standards see also sec 57 (3) of the Correctional Services Act 2014 (NT)

⁴⁹³ Para 9.1.1 of the B-Order see also para 6 of the Policy.

⁴⁹⁴ Para 8 of the Policy Directive 10.

⁴⁹⁵ *ibid.*

transported to the centre. In other states the application procedures are not clear, what is clear though is that the applications are screened by a committee for eligibility. There is no application procedure in the Federal Bureau MINT Programme because the women are sentenced to the programme directly by the judge.

3.8.6 Appeal procedures



While it is clear that a woman should apply to be admitted to a mother and child unity, there is no provision for appeal procedures in the current South African legislation. In other words, an inmate who is not satisfied with the decision of the Department in respect of her application has no recourse except to follow the normal complaints and request channels in terms of section 21 of the Correctional Services Act or to take administration action against the Department in a court of law. The inmate might require the help of the Department to institute an action in the courts, which might be difficult to get since the Department is the defendant in the case. Australia, however, has a different position. Paragraph 6.11 of the Australian Standard Guidelines provides that 'offenders should be provided with clear, accessible and fair avenues for lodging and resolving grievances...without fear of retribution.' The United States MINT Programme does not specify the appeal procedure but since women are sentenced to the programme by a judge, it follows that they can appeal the sentence through the normal judiciary process.

The other programmes in the United States require that the female prisoner apply to be admitted to the Programme and there have been reports of unjustified refusal to admit mother and child to the programmes.⁴⁹⁶ The policies for the other mother and child programmes in the US do not have a clear appeal procedure save for California.⁴⁹⁷ In the State of New York, a woman who had her application denied appealed the decision in court in the case of *Duarte v City of New York*⁴⁹⁸ and the court ruled that the woman should have been admitted to the nursery programme.

⁴⁹⁶ Zou JJ 'Access Denied: Pregnant inmates struggle to gain entry into prison nursery Programmes' the New York World 20 October 2014 available at <http://www.thenewyorkworld.com/2014/10/20/prison-nursery/> [accessed 16 November 2016]

⁴⁹⁷ Shain *op. cit* note 475 p4

⁴⁹⁸ 91 A.D 3d 778 (2012).

This case may be an indication that the inmates in the US have to rely on the courts to lodge appeals in respect of denied applications.

3.8.7 Definition of terms

The maximum age that a child allowed to stay with their mother in prison differs from state to state, or from one federal state to another in the same country. Legislation and policies in South Africa, Australia and USA define the term 'child'. In South Africa, Paragraph 2.1 of the B-Order. 1 defines an infant 'as a person from birth to two years, who is dependent on his/her mother's care, whilst the mother is in custody'. The New York Correctional Law⁴⁹⁹ defines 'infant' or 'child' as 'any person who has not attained the age of eighteen years.' The Northern Territory Correctional Services Act⁵⁰⁰ provides the definition of child as any person below the compulsory school age of six years. Western Australia⁵⁰¹ also provides the definition of the term 'mother' and both definitions are not restricted to biological mothers only but also include any other female with parental responsibility over a child. This component, that is, the definition of mother is missing from the South African legislation and policies. This failure to define the term 'mother' by the South African legislation causes uncertainty. This is so in that it does not specify whether only biological mothers are eligible to have their children with them in prison or whether adoptive mothers or any other female with parental responsibility are also eligible. All the policies in the US states which allow minors to stay with their mothers in prison also fail to define the term 'mother'.

In the same light, New South Wales law makes provision for non-primary carers to maintain a bond with their minor relatives during incarceration. Non-primary carers of minors, for example, grandmothers and aunts who are incarcerated are eligible to participate in the Occasional Residence Programme where children come for overnight or weekend stays at the correctional facility. This ensures that incarcerated relatives who are significant to a child maintain a bond with the child. New South Wales also allow children who are living with the mother to maintain relationships

⁴⁹⁹ COR Art 1§2-13.

⁵⁰⁰ 26 of 2014.

⁵⁰¹ Western Australia Department of Corrective Services, Policy Directive 10:

and bonds with relatives outside such as the father or grandparents. This is achieved by allowing children who are in full time residence to have overnight and weekend stays with their relatives on the outside. Similarly, in Norway fathers may be allowed to come and join the mother and baby at the home for mothers. However, there have been no reports of non-primary carers being allowed to participate in the programmes in USA, South Africa and in other Australian states. South Africa and USA only allows biological parents to participate in the programmes.

3.8.8 Eligibility criteria

Another hazy area in the South African legislation dealing with children living with their mothers in prison is the eligibility criteria. The South African Correctional Services Act, (as amended), only mentions the age of the child as the criterion for allowing a prisoner to have her child with her in prison. The B-Order. 1 and the Policy are silent on the admission criteria except to mention that allowing an infant to stay with the mother in prison is only permitted if no other suitable accommodation is available.⁵⁰² Australian legislation on the other hand is very clear on the requirements the female prisoner has to meet in order to have her child with her in prison.⁵⁰³ It is imperative to note that in, the full time residence of an infant is a last option to be used when no other satisfactory alternative to placement is available,⁵⁰⁴ a fact similar to the South African system. The Mother and Child Programme in the US also have clear eligibility criteria for mothers who want to participate in the programmes although states have different criteria for their programmes.

The first criterion is that the infant must have been born in State's custody⁵⁰⁵ serve for the Community-based Residential Programme which allows babies born before the mother's incarceration. In order for a prisoner to qualify for the Mother and Child Programme, she must have been convicted of non-violent crimes with no history of

⁵⁰² Para 3.1 of the B-Order.

⁵⁰³ See sec 30 (1) of Corrective Services Act (Qld), see also sec 57 (3) of the Correctional Services Act (NT), it is important to note however that the Australian states are silent on the eligibility criteria, a position similar to South Africa.

⁵⁰⁴ *Loy op. cit.* note 234 p3.

⁵⁰⁵ Elmalak S "Babies Behind Bars: An Evaluation of Prison Nurseries in American Female Prisons and Their Potential Constitutional Challenges" *Pace Law Review* Vol 35 (3) 2015 1080-1106 p 16.

child abuse.⁵⁰⁶ These two are the main criteria that are consistently applicable in all programmes and the rest of the criteria differ from state to state.⁵⁰⁷ Norway and PRC do not have eligibility criteria since they do not allow minors to live in prison with their mothers.

3.8.10 Pregnant prisoners

Prisons are often faced with the issue of pregnant prisoners and policies in South Africa, USA and Australia have some similarities in how they deal with such prisoners. According to paragraph 2.46 of the Australian Standard Guidelines 'arrangements are to be made for prisoners to give birth in a hospital outside the prison. If a child is born in prison, this fact should not be recorded on the birth certificate.' The reason for the above is to protect a child from growing up with the stigma that he was born in prison. The South African position is that 'a pregnant prisoner who is about to give birth must be removed to another prison, if adequate facilities are not available for the treatment of such prisoner.'⁵⁰⁸ Paragraph 9.2.1 of the B-Order. 1 also mentions that the fact that the infant was born in a correctional centre/prison should not be indicated on the birth certificate. The USA also requires that a pregnant prisoner be temporarily taken to hospital for the purposes of childbirth⁵⁰⁹ and also the fact that an infant was born in prison should not be mentioned on the birth certificate.⁵¹⁰

Although Norway does not allow children to stay in prison with their mothers, pregnant prisoners in early stages of pregnancy are incarcerated. Pregnant prisoners are given adequate pre-natal care they require and are allowed frequent visits to midwives outside the prison.⁵¹¹ They have ultra sound checks done at any hospital of their choice in Oslo.⁵¹² In the PRC, however, if a prisoner is found to be

⁵⁰⁶ Jbara E "The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programmes" *Indiana Law Journal* Vol 87 (4) 2012 1825-1845 p 1832.

⁵⁰⁷ Melhus *op ci* note 475 p 21-27.

⁵⁰⁸ Para 10.2.5 of the B-Order.

⁵⁰⁹ FLA STAT. ANN § 944.24 (2).

⁵¹⁰ New York Public Health Law § 4135-A (2012).

⁵¹¹ Melhus note 493 p40.

⁵¹² *ibid.*

pregnant, Article 17 (2) of the Prison Law kicks in and the execution of sentence is suspended until such a time it becomes justifiable to separate mother and child.



3.8.11 Perinatal shackling

Closely related to the issue of pregnant prisoners is the problem of perinatal shackling. Perinatal shackling is defined as entailing the application of handcuffs, leg irons, and/or waist shackles to the incarcerated woman prior to, during and after labour and delivery.⁵¹³ The use of restraints on prisoners in South Africa is regulated by section 31(1) of the Correctional Services Act (as amended). The instances where restraints may be used mentioned by the Act hardly apply to pregnant women which makes perinatal shackling unjustifiable and unlawful. Paragraph 1.68 of the Australian Standard Guidelines also mentions instances where restraints should be used.⁵¹⁴ Sub paragraph (iv) goes further to provide that restraints 'should be removed during medical tests and procedures....' The Eighth Amendment of the American Constitution stipulates that no cruel and unusual punishment should be inflicted. The case of *Nelson v. Correctional Medical Services ADC*⁵¹⁵ asserts that perinatal shackling violates the Eighth Amendment of the Constitution. After looking at the above regulations on the use of restraints, it is safe to conclude that in all the three jurisdictions, perinatal shackling is unlawful. However, there have been reported cases⁵¹⁶ of perinatal shackling in all the jurisdictions despite the practice being illegal.

⁵¹³ Dignam B and Adoshi EY "Health Rights in the Balance: The Case Against Perinatal Shackling of Women Behind Bars" *Health and Human Rights* 2014 Vol 16(2).

⁵¹⁴ Sub-para (1) stipulates that instruments of restraints should be used only where the restraint of a prisoner is strictly necessary to maintain the security of the prisoner or prevent injury to any person.

⁵¹⁵ 583 F.3d.

⁵¹⁶ Artz L, Hoffman-Wanderer Y and Moulton K *supra* note 58 reports that there have been cases of perinatal shackling in a South African state hospital see also Williamson B *supra* note 242 Ms Fisk was shackled to a bed while she was giving birth at a Women's and Children's Hospital (Australia) see also a case of perinatal shackling in USA *Nelson v Correctional Medical Services* 583 F.3d 522 (8th Cir. 2009) where the appellant alleged that she was had both her legs shackled to a bed during the final stages of labour although she was in no condition to flee.

3.8.12 Programmes available for female inmates with young children

Another notable difference between South Africa, Australia and USA is the availability of different programmes. In terms of section 26 of the Crimes (Administration of Sentences) Act, Australia has three different programmes namely, the Full time Residence, the Occasional Residence Programme and the Approved Absence. Similarly, USA also has three different programmes namely: Prison Nurseries, Community-based Residential Parenting Programme and the Federal Bureau of Prisons Residential Parenting Programme. The availability of different programmes ensures that mothers have more options to choose programmes that are more suitable to them and their child's needs. South Africa on the other hand has only one Programme which is the full residence with the mother in a correctional facility. Female inmates in South Africa who want to live with their children while serving their sentences therefore have limited choices except to have their children reside full time at the correctional centre.

3.9 Summary

The issue of minor children with incarcerated parents is a universal one but there is no 'one-size fits all' solution. Each country has policies in place to deal with the issue of pregnant prisoners or those who are mothers to minor children and these policies are unique to each country's needs. There are however some similarities as well as differences between different jurisdictions as to how they deal with minors living in prison with their mothers. One thing is certain though, whether a country allows a child to stay in prison with their mothers or not, the best interests of the child are the deciding factor. The comparative analysis in this Chapter has aided in highlighting the shortcomings of the South African legal framework in addressing the issue of infants and young children incarcerated with their mothers. Based on the above findings, it is necessary to make recommendations on how to improve the South African legal framework to address the needs of infants and young children incarcerated with their mothers. This is done in the next Chapter.

CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

4.1 Introduction

South Africa is one of the countries that allow minor children to stay with their mothers in correctional facilities until they are two years old. These children may accompany their mothers on admission or they are born during the mother's incarceration. The issue of infants and minor children residing in South African correctional centres is governed by the Correctional Services Act⁵¹⁷ (as amended) as well as the Department of Correctional Service's B-Order. 1 and the Policy on Mothers and Babies. This legislative and policy framework has its own shortcomings and is therefore inadequate in addressing the needs of infants and children living with their mothers in correctional centres. South Africa is also a party to the Convention on Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Bangkok Rules which aim at protecting the rights of children in general as well as those who are incarcerated with their mothers. The Bangkok Rules stipulate the minimum standard guidelines for the admission of infants and minor children living in prisons. However, the conditions in South Africa's female correctional centres, including but not limited to, over-crowding, poor health care, poor living conditions, inadequacy and lack of age appropriate developmental stimuli show that there is a gap between policy and reality. This factor, coupled with the weaknesses of the current legislative framework results in children suffering adverse effects of living in correctional centres. In the next section, the major findings of this study will be highlighted.

4.2 Findings

Living in correctional centres with their mothers may result in minor children developing poorly both physically and emotionally due to the restrictive prison environment. The rigidity of the prison regime as well as the children's lack of

⁵¹⁷ Act 111 of 1998.

exposure to life outside the prison and male role models may lead to difficulty in adjusting to life in society for the children. While infants and young children living in correctional centres have an advantage of bonding with their mothers, they are separated from the rest of the family namely; from the father, siblings and the extended family. Due to the fewer female correctional centres in South Africa, women are often incarcerated in centres far away from home making it difficult for the family outside prison to visit and bond with the child. The alienation of the child from the rest of the family makes re-integration into the family difficult after the mother's release. This is evidence of the need to establish community-based programmes for female offenders who are mothers to infants and young children as this will ensure that the mother will be able to maintain a bond with the child without alienating such child from the rest of the family.

The Bangkok Rules recommend that children who are incarcerated with their mothers should be kept away from the general prison populace. In South African female correctional centres without mother and child units, children often live in communal cells with other inmates and their children. This violates the child's right to privacy and may lead to behavioural problems as some children may mirror the behaviour of other inmates. It also poses a security risk to the infants who may suffer abuse at the hands of other inmates, hence the need for facilities such as halfway houses and community based programmes for mothers with young children away from general correctional facilities.

The comparative analysis in Chapter Three has highlighted the short-comings of the South African legislative and policy framework in dealing with children living in correctional facilities with their mothers. Although the Correctional Services Act stipulates that children who accompany their mothers to correctional centres should be housed in mother and child units where practicable, not all centres that accommodate infants have mother and child units, forcing the children to stay in communal cells. Correctional centres with mother and child units are often far away from the inmate's home and these units fail to meet international standards set out in the Bangkok Rules which are applied by other jurisdictions such as USA and Australia. Further, a female offender who is a mother to an infant or young child has only two options, namely; have the baby with her in a correctional centre or leave the

child with family or in foster care for possible adoption. Therefore, there is need for other alternatives to incarceration for pregnant women and mothers to infants.

4.3 Recommendations

Based on the above findings, the study has therefore come up with the following recommendations.

4.3.1 Public awareness of the rights of female prisoners on incarceration

Availability of information is vital for pregnant prisoners or those who are mothers of minor children. Female prisoners who are primary care-givers to minor children should be aware of their rights and options available to them on incarceration. Information in the form of brochures and posters should therefore be made available to the general public free of charge.

4.3.2 Provision for clear definitions

Existing and future legislation and policies dealing with minors living in prison with their mothers should have clear and unambiguous definitions. One important definition which should be included is the term 'mother'. In terms of the current legislation, it is not clear whether 'mother' means biological mothers only or any other female who has parental responsibility in respect of the child or who is a primary care-giver to a minor. Existing legislation also fails to offer guidelines on the best interests of a child who is incarcerated with the mother which should be considered when making the decision whether to incarcerate or not. This study therefore recommends that the legislature defines the term 'mother' and also submits that the definition of 'mother' should include adoptive mothers and other female primary care-givers. In addition, the legislature should provide proper guidelines as

to what can be considered to be in the 'best interests of the child' particularly those children who want to accompany their mothers to prison.

4.3.3 Task teams to handle application for admission to mother and child units

The composition of teams responsible for handling applications from mothers who want to have their children live with them in correctional facilities should be clearly outlined. The people who make up these task teams should also be qualified to make decisions concerning children. The duties and the roles of these individuals in the assessment of applications should also be clear. The requirements for the applications, for instance, documents that should accompany the application must be specified. All of this will result in consistency and uniformity in the application of the law as the applicants will know what is expected of them when they apply lest some applications may be rejected due to the failure to produce the required documentation.

4.3.4 Eligibility criteria for admission to mother and baby units

The existing framework should be reformed to include proper eligibility criteria for admission to mother and child units. This will ensure uniformity and consistency since the current framework gives DCS officials a lot of discretionary powers in terms of the criteria to admit female prisoners and their children to the mother and child units. There should at least be proper guidelines available to the DCS officials when making decisions to admit or reject applications for the mother and child units. It is also submitted that for women to be admitted to the mother and child units they must also go through rigorous security checks. Those who do not meet the security requirements should not be placed in mother and child units since they will be living with infants and may sometimes be employed as child minders in the units.

4.3.5 Appeal procedures

The B-Order. 1 and the Policy require that a female prisoner must apply in writing to have her child with her in prisons but both lack eligibility criteria guidelines. This coupled with discretionary powers the Department has, may lead to some inconsistencies in the handling of applications hence the need for appeal procedures. The current framework does not provide for appeal procedures to inmates who might want to appeal the decision of the Department concerning application for admission to the mother and baby units. This dissertation therefore recommends that legislation be amended to include procedures to appeal decisions of the Department concerning child admission applications. It is further recommended that the appeal procedure should also include the judiciary as in the case of United States of America⁵¹⁸ in order to achieve fairness since the judiciary is an independent body.

4.3.6 Mandatory standards of the mother and baby units

The legislature must stipulate mandatory minimum standards for mother and baby units and the time frames for the availability of the units in correctional centres. The B-Order. 1 has guidelines on what the mother and child units should consist of but this writer submits that is not enough. The minimum standards should be included in an Act of Parliament in order to have consistency, uniformity as well as accountability. The Correctional Services Act should make the availability of mother and baby units mandatory and give a time frame on when the correctional facilities should have these units. The weakness of the current framework becomes apparent if one looks at the fact that the first mother and baby unit was only established in 2012 at Pollsmoor Prison,⁵¹⁹ 14 years after the enactment of the Act. In the same year, another unit (Westville facility) was opened within the Durban Female

⁵¹⁸ *Duarte v City of New York.*

⁵¹⁹ Gerardy J 'SA's prison babies get a second chance' Mail & Guardian 12 April 2012 <http://mg.co.za/article/2012-04-12-sas-prison-babies-get-a-second-chance> [accessed on 27 June 2015]

Correctional Centre.⁵²⁰ In 2014, it was reported that of the 22 female prisons under DCS, 16 had mother and baby units.⁵²¹

In addition, not all correctional facilities have mother and child units and this may result in women with infants being forced to go to a correctional facility far away from home in order to access a mother and child unit. This in turn takes the child away from the father and or other significant relatives subsequently making it difficult for the child to be reintegrated back into the family and society. This is clearly not in the best interests of the child. To counter that, the Department must ensure that there is a mother and child unit at every correctional facility so that mothers with babies are accommodated close to home to encourage contact visits from the father or other significant relatives.

4.3.7 The role of the courts

The courts should play a more active role in protecting the best interests of the child when sentencing mothers who are primary care-givers to minor children. Courts should follow the guidelines proffered in *S v M*⁵²² in order to safeguard the right of children in section 28 (2) of the Constitution. Sentences imposed on mothers of young children should lean towards non-custodial sentences especially in cases of less serious crimes. If a custodial sentence cannot be avoided, the courts should take lessons from the US Community-based Residential Parenting Programmes where judicial officers have the authority to sentence a mother with minor children to a community centre to serve time while staying with her child or children

Consequently, there should be alternatives to incarceration for mothers of minor children who wish to re-unite with their children after prison. Most of the alternatives already exist in the Correctional Services Act⁵²³ and should be extended to pregnant prisoners and mothers with dependant minor children. These alternatives such as

⁵²⁰ "Minister lauded for securing the wellbeing of 'incarcerated' babies" <http://www.dcs.gov.za/docs/Incarcerated%20babies/Minister%20lauded%20for%20securing%20wellbeing%20of%20Incarcerated%20babies.pdf> [accessed on 27 June 2015]

⁵²¹ Ackermann M "Women in pre-trial detention in Africa; A review of the literature" **Civil Society Prison Reform Initiative** 2014 p 38.

⁵²² 2008 (3) SA 232 (CC).

⁵²³ Chapter VI of the Act deals with community corrections such as day parole (s54), house detention (s59), and community service (s60), temporary leave (s44) and parole (73).

house detention and community service will not only benefit the child of the inmate but will also reduce the burden of incarceration costs on the tax payer.⁵²⁴ Mothers with longer sentences who also wish to re-unite with their children after serving time should have programmes tailor-made for them to bond with their children. These programmes should however be in the best interests of the child.

4.3.8 Community-based Programmes

The DCS should consider establishing community-based programmes in all provinces to ensure that offenders who are mothers to infants and young children will be incarcerated close to home. More importantly, it will ensure that infants may be able to stay with their mothers past the two years required in correctional centres. The reason for allowing infants to be in correctional centres until the age of two is that after the infants turns two, the negative effects of the prison environment outweigh the need for the child to bond with the mother.⁵²⁵ However, the forced separation of mother and child when the child reaches two years may undo the benefits of allowing the child to stay with the mother. This could be circumvented by moving the mother from a correctional centre to a community-based programme or halfway house when the infant turns two to ensure continuous bonding and smooth re-integration into society for mother and child.

4.3.8.1 Day parole

Children of women with longer sentences may benefit from day parole. Parole is defined as the conditional release of an offender from the correctional centre into the society before the expiry of their prison sentence.⁵²⁶ Day parole is therefore the same as parole with the only difference being that an offender may leave the correctional centre during the day to spend time in the community and report back to

⁵²⁴ According to the NICRO report 2014 p19, in 2011 it costs R118 512, 00 to incarcerate an offender per year.

⁵²⁵ Hesselink and Dastille *op. cit.* note 97 p67.

⁵²⁶ Department of Correctional Service of South Africa Parole Brochure available at <http://www.dcs.gov.za/docs/Parole.pdf> [accessed 16 November 2016]

the centre at a certain time as agreed in the conditions of the parole. Day parole will be ideal for mothers who want to maintain contact and bond with their young dependent children because they can spend time with their children during the day while still serving their sentence without bringing the child into the correctional facility. This will also be in the best interests of the child because the child can spend time with the mother without up-rooting their lives and having to live in a correctional facility. The child will also get to maintain bonds with the rest of his or her family as well as the mother, therefore preserving the right to family life as stipulated in section 28 (1)(b) of the Constitution as well as in Article 9 of the CRC. This may also be useful for other dependent children of the inmate who do not qualify to live in prison with their mothers.

4.3.8.2 Temporary leave

Section 44 of the Correctional Services Act provides that a sentenced prisoner may be granted temporary leave from prison for different purposes.⁵²⁷ Low risk inmates with infants should be granted leave to spend time with their children at home to maintain bonding. This is especially ideal for inmates who previously had their children in mother and child units but the infants would have exceeded the age of two. The mother will therefore be able to visit the infant at home preserving the existing bond between the mother and child. This is in line with section 44(d) of the Act as it will ensure reintegration of the inmate into the community especially into the family as she would have maintained contact with her children. This should also be applicable to pregnant inmates. Pregnant inmates should be granted temporary leave to give birth at home and organise for a guardian for her child in cases where the sentence exceeds the two years the child is allowed to stay in a correctional centre. This will ensure that when the children leave the mother and baby units they will not go into the foster system where re-unification will be difficult when the mother finishes her sentence.

⁵²⁷ Section 44 provides that an inmate may be granted temporary leave for the following purposes; (a) compassionate leave, (b) treatment, development or support programmes, (c) preparation for release or (d) any other reason related to the successful reintegration of the offender into society.

4.3.8.3 House arrest

House arrest as envisaged in section 52(1)(a) of the Correctional Services Act (as amended) may also be beneficial to minor children of women in the criminal justice system. If women with young children are placed under house detention, they will be able to spend time with their children while serving their sentences. This will benefit the young children in that they are not separated from their mothers while the mother serves her sentence since she will serve the sentence at home. Further, the infant will also not be separated from the rest of the family since the mother will be home together with the other family members thus allowing the child to maintain bonds with the whole family. House detention will also benefit other children of the inmate and not only infants under the age of two if the offender who would not otherwise have qualified to accompany the mother to a correctional facility.

4.3.8.4 Community corrections

Section 52(1) (f) of the Correctional Services Act (as amended) provides that a person subjected to community corrections may 'take part in treatment, development or support programmes.' These programmes will be beneficial to children of women in the criminal justice system for crimes related to the use of drugs. This dissertation, therefore recommends that the DCS should extend the treatment and support programmes to inmates with drug problems who are mothers of young children. The inmates will serve their sentences in centres getting treatment for their drug problems while also spending time with their children in these centres. While the children will continue to bond with their mothers in the treatment centres, these programmes will be beneficial to both mother and child in the long run. This is so because the mother will get treatment for the drug problems and also bond with her child which will reduce the chances of reoffending.

4.3.8.5 Suspension of execution of sentence

The South African DCS should consider taking a leaf out of Peoples' Republic of China's book when it comes to pregnant prisoners, especially those with less serious crimes and do not pose a risk to society. If a custodial sentence cannot be avoided, the courts should consider suspending the execution of such a sentence until such a time the Department is able to provide for suitable accommodation for mother and child. Suspension of execution of sentence should also be applied to an applicant who is a mother to an infant or young child to grant her an opportunity to make care arrangements for her older children or infants if she does not wish to have the child with her in prison. The courts and the Department should however guard against women who may fall pregnant in a bid to avoid or delay a custodial sentence. In this light, it should be made clear that women who fall pregnant during trial or while awaiting sentencing will not be considered for the mother and baby programmes.



4.3.8.6 Overnight and weekend stays

This study also submits that there should be legislative reform to benefit other minor children of the inmate. A female inmate may have other children over the age of two but who still depend on her for their primary care needs. The current framework only allows children under the age of two to stay with their mothers in prison but this may arguably be seen as discrimination based on age for the other minor children of an inmate. It is in this light that this dissertation recommends that the framework be reformed to include other programmes such as overnight and weekend stays for older children to maintain contact with their incarcerated mother. Similarly, children who are living with their mothers in correctional facilities should also be allowed to have overnight and weekend stays with other relatives on the outside to maintain bonds with the rest of the family which will make it easier for the child to reintegrate into the family after the mother's sentence.

4.3.9 Legislative reform

The legislature should consider coming up with a comprehensive piece of legislation to govern children incarcerated with their mothers. The existing legal framework dealing with minors living in prison with their mothers is fragmented and is often inconsistent. The existing framework consists of the Correctional Services Act (as amended), Chapter 21 B-Order. 1, the Policy Procedures of the Infant and Mothers and other relevant laws such as the Children's Act. The accessibility of the law becomes difficult considering that the B-Order. 1 and the Policy Procedure are not available to the general public as it is meant for the DCS officials. In essence the public will therefore have to rely on the Correctional Services Act which does not say much on the issue except the maximum eligibility age of the child allowed to accompany his/her mother and that the DCS should provide mother and child units where practicable. The fragmented nature of the policies also results in inconsistencies, for example, the B-Order. 1 and the Policy have different positions on who should be responsible for costs of sending an infant to an external crèche.⁵²⁸ This would, however, be countered if there is one main policy or legislation regulating the issue. In this light, this study therefore recommends that instead of fragmented policies, the legislature should consider promulgating new legislation to regulate the issue of minor children living in prison with their mothers.

The promulgation of new legislation will ensure easy accessibility of the law and consistent implementation. The proposed legislation should clearly define the term mother and this definition should include adoptive mothers and other females who are not biological mothers but play the role of primary care-giver to infants and young children. The application process as well as the task team to handle such applications should be specified in the proposed legislation. The eligibility criteria should also be clearly outlined in order to ensure uniformity and consistency. The inmates should also be provided with appeal avenues if they want to challenge the decision of the DCS to deny the inmate to be accompanied by her infant child to prison. This will ensure that the DCS is accountable for its decisions. The proposed

⁵²⁸ Paragraph 11.13 of the B-Order. 1 stipulates that a mother may send an infant to an external crèche provided that the State does not incur any cost in the process while the Policy provides that infants may be taken to external crèche and that the costs of doing so should be carried by the HCC.

legislation should also stipulate the minimum standards of the mother and child units as well as the time frames for the provision of such units in all correctional centres housing infants.

The role played by the courts in sentencing offenders who are mothers to young children should be clearly defined. Sentencing guidelines as stated in *S v M*⁵²⁹ should be included in the proposed legislation to ensure consistency and uniformity in the application of the law. More importantly, the proposed new legislation should provide alternatives to prison residency or the placement of the child. Alternatives to imprisonment available in the Correctional Services Act such as house arrest,⁵³⁰ community corrections⁵³¹ and temporary leave⁵³² amongst others, should be incorporated into the proposed legislation to ensure that offenders are still punished for their crimes and still maintain contact with their children without incarcerating the children. This will be desirable, considering the words of Sachs J when he said;

'...The unusually comprehensive and emancipatory character of s28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.'⁵³³

4.4 Summary

Section 20 of the Correctional Services Act of 1959 allowed women to stay with their children in prison until the age of two years, a position which changed with the coming into effect of the Correctional Services Act of 1998.⁵³⁴ When the CSA was amended) in 2005, the 1959 position was readopted and children were allowed to stay with their mothers until they are two years old. Besides the number of years a child is allowed to stay with the mother in prison nothing has changed as far as the CSA is concerned in dealing with female inmates with infants. Meanwhile, South Africa became a party to the CRC, ACRWC, Mandela Rules and Bangkok Rules and

⁵²⁹ *S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC).*

⁵³⁰ Sec 52 (1)(a) of the CSA.

⁵³¹ Sec 52(1)(f) of the CSA.

⁵³² Sec 44 of the CSA.

⁵³³ *S v M* para 18.

⁵³⁴ The CSA of 1998 allowed women to stay with their children until the age of five.

as a State party it is bound by the provisions of such instruments. South Africa has incorporated some provisions of the CRC⁵³⁵ and the ACRWC⁵³⁶ into its domestic law. Despite the incorporation of the CRC and ACRWC's provisions into South African domestic law, the law governing minors living in prison with their mothers still falls short in addressing the needs of these children. This disparity necessitated the need for a comparative analysis of the situation in South Africa and other jurisdictions to find out how such jurisdictions deal with minors living with their mothers in prison.

The comparative analysis highlighted the shortcomings of the South African legal framework in dealing with children living with their mothers in prisons. One main weakness of the current legislation is lack of alternatives to the placement of infants or to the prison residency. Other jurisdictions such as the USA and Australia have alternatives such as, but not limited to, halfway houses, community-based programmes and occasional residence programmes. Based on these weaknesses in the current legal framework, this study therefore recommends that the legislature reforms the current framework to include alternatives to incarceration and placement of infant children of female offenders.

⁵³⁵ Some adopted provisions include but not limited to, the best interests principle, right to family life and parental care, right to health and the child's right to be heard in matters concerning him.

⁵³⁶ Best interests principle and right to family life among other provisions.

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by Belinda Ruzvidzo

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