UNIVERSITY OF KWAZULU-NATAL

CHILDREN INCARCERATED WITH THEIR MOTHERS: A CRITIQUE OF THE CURRENT AGE-BASED APPROACH TO THE SEPARATION OF CHILDREN FROM THEIR MOTHERS

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CHILDREN INCARCERATED WITH THEIR MOTHERS: A CRITIQUE OF THE CURRENT AGE-BASED APPROACH TO THE SEPARATION OF CHILDREN FROM THEIR MOTHERS

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DECLARATION

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ABSTRACT

It is a worldwide phenomenon that, when mothers are imprisoned, their young children are allowed to accompany them. However, practices between different countries, and even within different prisons, vary greatly and there are arguments both for and against the incarceration of children with their mothers. Some argue that, without better alternative care options, these children benefit from the strong emotional attachment that develops because they spend so much time with their mothers. Others contend that prisons are not suitable environments for children to live and grow in. It is generally agreed that allowing young children to accompany their mothers in prison and separating them from their mothers, are both problematic.

Most countries that allow young children to be incarcerated with their mothers set an upper age limit, after which time the child is removed. This reflects an assumption that from a certain age the adverse effects of a prison environment on the young child and its development outweigh the benefits of being with the mother. There is no empirical evidence on the optimum age of separation and it varies between countries.

In South Africa, Section 20(1) of the Correctional Services Act 111 of 1998 (as amended by the Correctional Services Amendment Act 25 of 2008) determines that children may accompany their mothers in prison up until the age of two years, after which time they must be removed from the prison environment.

For those children incarcerated with their mothers, this compulsory separation could constitute a violation of their right to family life. For these children there may come a stage when the issue of separation has to be dealt with, but it is at such times when a flexible approach to the age of separation is suggested. A flexible approach would require an individualised analysis of the child's best interests. It is suggested that the potential for flexibility does exist in Section 20 of the Act. However, it is also submitted that since it is merely potential and not policy, prison authorities might have too much discretion in interpreting this section. This might result in a lack of uniform practices and some children might therefore be disadvantaged.

The overall aim of this study is to critically examine the abovementioned piece of legislation in order to assess whether this approach is compatible with children's rights and is in their best interests.

LIST OF SELECTED ACRONYMS AND ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CA	Children's Act
CSAA	Correctional Services Amendment Act 25 of 2008
CC	Constitutional Court
CRC	United Nations Convention on the Rights of the Child
DGD	Day of General Discussion
DCS	Department of Correctional Services
DSD	Department of Social Development
EPR	European Prison Rules
QUNO	Quaker United Nations Office
Para.	Paragraph
SAHRC	South African Human Rights Commission
UN	United Nations
UNODC	United Nations Office on Drugs and Crime

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CHAPTER 1: INTRODUCTION

1.1 *Introduction*

The imprisonment of mothers has an enormous impact upon their children. When mothers are imprisoned, their infants and/or young children may go into prison with them, or they may be left on the 'outside.' Neither of these options is fully desirable. As the Special Rapporteur on Prisons and Conditions of Detention in Africa stated: 'Prisons are not a safe place for pregnant women, babies and young children and it is not advisable to separate babies and young children from their mothers.' (Chirwa, 2001: 36). Most countries do allow children, in limited and varying circumstances, to be incarcerated with their mothers (Robertson, 2008: v). Alejos (2005: 9) states that while this is an accepted practice, opinion varies about whether it is in the best interests of the child. Countries have undertaken different approaches and applied varied policies to this issue.

During its 2004 Discussion Day on Early Childhood Development, the Committee on the Rights of the Child identified 'children living with their mothers in prison' as being amongst the 'most vulnerable children.' They have been described as 'hidden victims', as 'their reality and circumstances related to incarceration are seldom recognised' (Schoeman and Basson, 2006: 5). This view is based on the fact that when the time arrives for these young children to leave prison without their mothers, they are sometimes sent to shelters or to relatives who live far away from the prison. Contact with their mothers is then severely hampered. However, given the right resources as well as conditions which are conducive to early childhood development, the potential exists for the children's stay in dedicated mother-and-baby prison units with their mothers to be beneficial, both to the children and their mothers.[1] The ideal situation for children is that the mother-child relationship is not broken and that babies are not deprived of their mother's affection. Allowing infants and young children to accompany their mothers in prison allows for the development and maintenance of such relationships.

This study uses the definition of the child as stated in the 1989 United Nations Convention on the Rights of the Child, as well as in the Children's Act 38 of 2005. Article 1 of the CRC

[1] Such conditions are discussed in parts 2.2.2 and 2.3 of this study.

declares that: '...a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.' Likewise, Chapter 1 of the Children's Act defines a child as '... a person under the age of 18 years.' The term infants is used in the Correctional Services B-Order 1 policy to define a 'person from birth to 2 years, who is dependent on his/her mother's care, whilst the mother is in custody' (para. 2.0).

This research stemmed from an awareness of the impact on a child of a rule determining the age that a child who is incarcerated with his or her mother must be separated from her. In South Africa Section 20(1) of the Correctional Services Act 111 of 1998 (as amended by the Correctional Services Amendment Act 25 of 2008) determines that children may accompany their mothers in prison up until the age of two years, after which they must be removed from the prison environment.[2]

1.2 *Problem Statement and Research Questions*

In South African prisons the treatment of female prisoners and their children who are incarcerated with them is currently governed by the Correctional Services Act 111 of 1998 (hereafter, called the Act), as amended by the Correctional Services Amendment Act 25 of 2008 (hereafter, called the CSAA). Prior to this amendment, Section 20 of the Act allowed children to remain with their mothers up until they were five years of age. Section 20 of the Act now allows a mother to have her child with her only until the child is two years of age or 'until such time that the child can be appropriately placed taking into consideration the best interest of the child'. Once the child has reached the age of two years the Department of Correctional Services in conjunction with the Department of Social Development must secure the proper placement of such child [Section 20(1A)]. The rationale behind this amendment was that in terms of bonding between mother and child, the first two years of life are critical, but that after that period, allowing a young child to remain in prison can do more harm to the child's development than good (Schoeman and Basson, 2006: 1-27). Separating a child from his or her mother is always a traumatic experience (*Ibid.* p 19), and the potential trauma

[2] For comparative purposes Appendix 2 is a table listing the policies of States around the world with regard the age of release of children who are incarcerated with their mothers. Officially, the upper age limit is seven years in Brazil.

caused by separation raises questions about whether or not it is indeed in the best interest of an infant or young child to be incarcerated with his or her mother (Hesselink and Dastile, 2009: 77). Others feel that in the absence of better alternative care options, infants and young children may benefit by accompanying their mothers in prison (Taylor, 2004: III).

The overall aim of this study is to critically examine the current South African legislation which governs the removal of children from their incarcerated mothers in order to assess whether this approach is compatible with children's rights and their best interests. Section 20 of the Act is the main provision regulating the treatment of female prisoners and their children who are incarcerated with them[3].

Considering the provisions of Section 20 of the Act the following research questions are posed:

- How is a child's development affected by being imprisoned with his or her mother?
- What is the impact of compulsory separation from their mothers on children aged two?
- Is the imposition of a rigid, age-based rule for the removal of children from their mothers in the best interests of all children?
- Can South Africa learn from other countries in terms of the treatment of children incarcerated with their mothers?

1.3 *Aims of the Research*

The aims of this study are to:

- explore and analyse the views of both national and international scholars;
- identify local and international policy and trends regarding children who are incarcerated with their mothers, as well as their subsequent separation;
- draw conclusions and make recommendations.

[3] Section 20 of the Act is given in full in part 4.2.2 of this study.

1.4 *Principal Theories Upon Which the Study will be Based*

This research will be underpinned by 'the best interest of the child principle'. This is one of the principles of the 1989 United Nations Convention on the Rights of the Child (hereafter, the CRC) and the South African Children's Act (Act 38 of 2005). It is a guiding principle in the 1990 African Charter on the Rights and Welfare of the Child (hereafter, the ACRWC) and in those provisions of the Constitution of the Republic of South Africa, 1996 (hereafter, the Constitution) which pertain specifically to children (Section 28). Section 28(2) of the Constitution determines that 'a child's best interests are of paramount importance in every matter concerning the child'. The wording in the Constitution is more emphatic than that contained in the CRC and according to Skelton (2009: 280), it is clear that Section 28(2) 'intends to expand the meaning and application of best interests to all aspects of the law that affect children'.

Bonthuys (2005: 3) asserts that in South Africa, applications of the best interests of the child principle 'stress the fact that the best interests of a particular child would depend on the surrounding circumstances and that each case should be decided on its own merits'. Skelton (2009: 283) states that:

> a truly child-centred approach requires an in-depth consideration of the needs and rights of the particular child in the 'precise real-life situation' he or she is in. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child.

It is submitted that in order for Section 20 of the Act to be reflective of the 'best interest of the child principle' a more flexible and individualised approach would be needed to the separation of children who are incarcerated with their mothers.

1.5 *Research Methodology*

This study is based on a literature review. For contextual details, information was gathered from international and national sources. Primary sources such as international conventions, international and national legislation, policy documents, reports and concluding observations

from relevant international committees and bodies were studied, as well as international and national cases. Secondary sources such as international and local journal articles, newspaper articles and NGO publications were also used.

1.6 *Limitations*

The study is limited by the fact that no field visits were carried out to assess the implementation of the Act as amended by CSAA.

1.7 *Research Outline*

This paper is organised as follows:

In Chapter 2 a general overview of the situation of infants and young children who are incarcerated with their mothers is given. This chapter includes an examination of the effects that growing up in a prison environment may have on child development. The mother-child bond and how this affects child development is discussed, as well as the impact on children aged two of forced separation from their mothers.

Chapter 3 contains an examination of international as well as some regional human rights protection frameworks which are applicable to these children.

In Chapter 4 South African legislation and policies as well as the institutional approach to children accompanying their mothers in South African prisons are reviewed.

Chapter 5 contains selected comparative aspects from around the world in terms of the treatment of children incarcerated with their mothers.

In Chapter 6 concluding comments are given regarding the application of relevant international human rights instruments in the context of infants and young children who are incarcerated with their mothers. Recommendations for South Africa are made in terms of the drafting of policy and legislation for the advancement and protection of the human rights of

infants and young children who are incarcerated with their mothers and who subsequently need to be separated from their mothers and the prison environment.

CHAPTER 2: HOW BABIES AND YOUNG CHILDREN ARE AFFECTED BY ACCOMPANYING THEIR MOTHERS IN PRISON

2.1 *Introduction*

The focus in this study is on the relationship between the children who are incarcerated with their mothers, and their mothers. The reason for the focus on the relationship between the child and his or her mother is because it is most often the mother they are incarcerated with. Only very occasionally are they incarcerated with the father (Robertson, 2008: 18). In a *Submission to the United Nations Study on Violence against Children* it was postulated that the reason that it is most often mothers that children accompany in prison is:

> that most frequently it is women who assume the role as primary care-giver for children, that the deprivation of liberty of men and women may affect their children differently, that the prison environment may not be a positive environment for children and that, in general, not many male prisons have special arrangements for fathers to keep their children with them (Quaker United Nations Office, 2005: 12).

In South Africa some children can live in prisons with their mothers, but such provisions have not been extended to fathers. This reality is given recognition in Section 20(1) of the Correctional Services Act (Act 111 of 1998; the Act), as amended by the Correctional Services Amendment Act 25 of 2008 (the CSAA), which refers to children accompanying their mothers into prison and makes no reference to children accompanying their fathers. This could be deemed discriminatory given that according to the Children's Act 38 of 2005 (the Children's Act) parental responsibilities and rights are shared, and they continue to be shared whether the parents are married or divorced, or even if they were never married, as long as the unmarried father has acquired parental responsibilities and rights (Section 20-21 of the Children's Act). Likewise, in Article 18 of the 1989 Convention on the Rights of the Child (the CRC) the parental responsibilities of both parents are recognised. Tomkin (2009: 36) states that any policy which fails to recognise the role of the father in his child's development generates

> a potential violation of not only equality and anti-discrimination measures, but specifically in this instance, Article 18 of the CRC which provides that the development of the child is the responsibility of both parents, and Article 9, which provides that the child has the right not to be separated from her or his parents.

In 1997 the Constitutional Court (hereafter, the CC) of South Africa decided a case involving sexual discrimination against men. The case, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), involved a father who challenged a presidential pardon issued by then President Mandela. In 1994 President Mandela issued a pardon for certain groups of prisoners who had committed crimes which were considered not serious. One group was mothers with minor children under the age of 12. *Hugo*, an imprisoned father with a child under the age of 12, challenged the pardon on the grounds that it was unconstitutional and that it 'unfairly discriminated against him on the ground of sex or gender and indirectly against his son in terms of section 8(2) because his incarcerated parent was not a female' (para. 3).

The court did not disagree that the Presidential pardon was discriminatory, in fact it admitted that it discriminated on 'a combined basis, sex coupled with parenthood of children below the age of 12' (*Ibid.*, para. 33). Although it was acknowledged as a discriminatory decision it was one which 'did not restrict or limit their rights or obligations as fathers in any permanent manner' (*Ibid.*, para. 47). Ultimately the CC decided that the pardon given to imprisoned mothers with children under the age of 12 years was not unfair.

In light of this judgement Hubbard (1997: 1) makes the statement that 'discrimination is not always unfair'. Allowing children to be incarcerated with their mothers and not their fathers should be interpreted in a similar way as the Presidential pardon given to imprisoned mothers with children under the age of 12 years. Section 20(1) of the Act which allows mothers, and not fathers, to take their children into prison with them recognises the 'social significance of the maternal role of the mother in the family and in the upbringing of children' [Department of Correctional Services (the DCS), Infants and Mothers Policy, no date: 2). Given the recognition of the role of fathers in the Children's Act (Section 20-21) as well as in Article 18 of the CRC, new developments are likely and it is possible that in the future both the law and

the courts would be more sensitive to the need of children to be placed with their incarcerated fathers.

This chapter examines how babies and young children are affected by being incarcerated with their mothers. The research and arguments presented in this chapter will inform the analysis conducted in the subsequent chapters, which reflects upon the relationship between the best interests of the child and the decision to separate a young child from his or her incarcerated mother. Two of the research questions identified in the first chapter are dealt with here, namely

- How is a child's development affected by being imprisoned with his or her mother?
- What is the impact of compulsory separation from their mothers on children aged two?

This chapter is structured as detailed below.

Part 2.2 contains an overview of the situation of mothers and their children in prison. In Part 2.3 the bond between the imprisoned mother and her child is discussed. The impact that accompanying a mother in prison has on the social relationships of infants and young children is considered in Part 2.4. Practical issues which accompany the removal of a child from prison are reviewed in Part 2.5.

2.2 *Mothers and Their Children in Prison: an Overview*

2.2.1 *General Overview of Mothers in Prison*

Worldwide women constitute a minority group within the prison community (Du Preez, 2006: 26). Fair (2009: 3) states that there are similarities in the types of women imprisoned in each country and suggests that they are generally a 'very disadvantaged group even amongst the most disadvantaged in the country and many come from backgrounds of abuse and violence'. Most women prisoners are convicted and incarcerated for non-violent crimes, such as 'prostitution, fraud or drug offenses' (Villanueva, 2009). It has been reported that in many countries, of the women who are detained and imprisoned, the vast majority are mothers

(Alejos, 2005: 4). Furthermore, these mothers are often the main carers of their children (*Ibid.).* However generally, female prisoners are perceived as being 'incapable of being "good mothers"' (Schoeman, 2011: 78). These mothers often experience difficulty in finding alternative carers for their children (Schoeman, 2011: 84). They may turn to relatives to assist but according to Schoeman (*Ibid*) such agreements can be 'problematic ... especially in the scenarios where the imprisoned women were the primary and/or sole breadwinner of the extended family'. Sometimes, taking her baby or young child into prison with her seems to be the best choice out of several bad options that a mother has. Luyt (2008: 321) stated that those mothers who were either the sole or the primary caregiver for their child/ren, found separation from their children to be 'extremely destructive'.

2.2.2 *Conditions of Detention and their Impact on the Children who are Incarcerated with their Mothers*

Allowing babies and young children to be incarcerated with their mothers is a procedure that occurs in most countries around the world. However according to Robertson (2008: v) it is one in which there is 'no acknowledged best practice'. He cites the diverse conditions in which children live in prison, the opportunities they have for development and the varying degrees of contact that children have with the outside world. Very often the reality is that some of the children who are imprisoned with their mothers become the 'hidden victims' referred to in Part 1.1 (Schoeman and Basson, 2006: 5). Young children share the same conditions as their mothers and therefore suffer the often deficient and overcrowded prison systems.

Poso, Enroos and Vierula (2010: 518) state that studies examining the impact of children living in prison with their mothers lie at the 'margins of research interest', and that 'existing studies tend to be small in scope and incidental'. Within South Africa there has been minimal investigation into the impact that imprisonment has on the young children who are incarcerated with their mothers, likewise on the effect of forced separation between these mothers and their young children (Schoeman, 2006: 3). In spite of the lack of in-depth research into the topic, Robertson (2008: 1) states that 'there seems to be broad consensus that sometimes the least bad option is for the child to live in prison with a mother'. The

potentially positive effects of allowing a child to be incarcerated with its mother will be discussed later in this chapter.

In 1992 the UK Home Office commissioned a study to evaluate the development of infants and young children who are incarcerated with their mothers (Catan, 1992). It was found that poor unit design, staffing and protocols within the prisons were to blame for developmental delays in the infants and young children who were assessed. The study recommended that mothers should be given the option to take their children into prison with them but that more attention needed to be given to creating environments that were child-friendly (*Ibid.)*. Tomkin (2009: 37) states that when adequate facilities are provided for children who are incarcerated with their mothers 'the advantages of maintaining contact between the mother and child become more significant'. This contact is beneficial not only to the child in aiding development, but also to the mother by 'contributing to the rehabilitation of the prisoner through securing family links, rather than aggravating and intensifying feelings of loss and failure associated with the imprisonment of a parent.' (*Ibid.*)

Since the children referred to in this study are infants and young children not of formal school-going age, the need for formal education will not be discussed. However, learning begins at birth (Consultative Group on Early Childhood Care and Development, 1996: 3), and a lack of educational stimulus (as may be found in prison environments) in the early years 'may negatively impact upon the child's early educational development' (Tomkin, 2009: 40). In terms of informal 'nursery schools' the example of prisons in Karnataka state in India is noteworthy. Prison services have set up crèches and nursery schools which are 'attended by children imprisoned with their parents, children of prison officials and children living close to the prison' (Atabay, 2008: 70). The UNODC states that the 'scheme helps to mitigate the problem of children living in prison becoming socially isolated by allowing them to mix with children from the surrounding area.' (*Ibid.*)

With regards to cognitive stimulation, Tomkin (2009: 40) points also to the importance of the quality and skills of the prison staff who care for the children. She states that more 'needs to be done to systematise at regional and international levels the resources and standards of care available to babies and small children living in prisons.'

2.2.3 *Decision-making: Who Decides if a Child Should be Incarcerated with its Mother?*

The question of who decides whether a child can be incarcerated with his or her mother is important. The children concerned are most often too young to make and communicate decisions about whether they want to live in prison, so decisions are made by others. Whoever makes the decisions must take heed of the requirement under international law to take the best interests of the child into account in all actions concerning the child [CRC, Article 3(1)]. In South Africa, based on Section 20 of the Act, it would seem that the decision rests primarily with the mother. Section 20(1) states that a female prisoner may be allowed to care for her infant who accompanies her in prison or who is born in prison. Section 9.1.1 of the DCS B-Order 1 policy stipulates that a female prisoner must apply in writing to keep her infant with her (B-Order 1, Chapter 21: Infants and Mothers, no date). However, according to the same document it would appear that the policy ideal is that mothers do not take children with them into prison, unless there is an inadequate support system outside the prison. It is written that the 'admission of an infant with a mother is only permitted when no other suitable accommodation and care is available at that point' (*Ibid.*, Section 3.0). Furthermore, Section 3.3 states that the 'needs of the infants should be regarded as first priority'. A more in depth analysis of the relevant legal provisions in South Africa is provided in Part 4.2.

Other countries take different approaches. Robertson (2008: 7-8) listed some of the different decision makers in this area:

> Within England and Wales the prison governor decides whether a baby should be allowed to live in prison, based on the recommendation of an admissions board. In France it is the children's custodians who make the decision; ... Similarly, in Nigeria a child's parents will make the decision over whether the child will enter prison, a decision with which the authorities must comply (providing the child is below the upper age limit of 18 months) ... In Chile, the mother requests that her child be allowed to join her, with a Family Court judge making the decision;... in Venezuela the director and social worker at the penal institution make the final decision after the mother makes her request...In Australia, the designated Superintendent makes a decision based upon 'the recommendation of a "Paediatric Committee" consisting of prison management staff, uniformed staff, a nurse or a medical

> practitioner and the Assistant Superintendent Prisoner Management'; prisoners allowed to bring their children into prison must sign a contract acknowledging the conditions, accepting full responsibility for the care of the children and acknowledging having been informed about restrictions that may apply.

The diversity in terms of decision-makers and the policies which are adopted in different states reinforces the statement made by Robertson (2008: v) that the act of allowing babies and young children to accompany their mothers in prison is one in which there is 'no acknowledged best practice'. It is noteworthy that in many of the countries listed above the decision is taken by a variety of stakeholders on a case-by-case basis.

Bastick and Townhead (2008: 54) suggest that when it comes to deciding whether or not a child should be allowed to be incarcerated with its mother, it should be 'child welfare, rather than prison authorities' who should have the primary responsibility for making this decision. Child welfare authorities should indeed have some role in making the decision to allow a child to join his or her mother in prison. Child protection professionals might have a better understanding of what is best for the child than the members of the judiciary or the prison authorities.

In South Africa, although it appears in the Act that the decision to take her child into prison with her rests with the mother, this decision is 'subject to such regulations as may be prescribed by regulation' [Section 20(1)]. Neither the Act nor related policy documents (such as the DCS Chapter 21: Infants and Mothers of the B-Order 1 policy document) are clear on who is involved in the decision-making process, or on the extent of involvement of parties other than the mother. Section 3.0 of the B-Order 1 document states that the 'admission of an infant with a mother is only permitted when no other suitable accommodation and care is available'. Section 3.0 also stipulates that social workers must be informed of the admission of a mother with an infant. However in a written reply to a question asked by the Independent Democrats, the Minister of Social Development stated that the Department of Social Development becomes involved in the process only when the infants are going to be 'introduced into society before they turn two years old' [(Independent Democrats) Sarah Paulse: DSD Q &A; 22 August 2011]. It is thus unclear within the South African context who

is involved in making the decision of whether a child can accompany its mother in prison, and at what stage other parties become involved.

2.2.4 *Why Would Mothers Want their Infants to Accompany them in Prison?*

There are various reasons why mothers would decide to keep their children in prison with them, the most obvious being that most mothers would not choose to be parted from their children. But other factors contribute to the decision to keep a child in prison. According to Luyt and du Preez, (2010: 107) the main reason that mothers choose to have their children live in prison with them is because there is a lack of adequate supervision for them in free society. Particularly in the case of impoverished women, it may simply be that when they were convicted and sent to jail, there was no one willing or able to assume responsibility for the child. In a personal interview conducted with a Child Welfare Society member in 2006, Schoeman and Basson (2006: 11) found that the majority of cases where South African children of incarcerated mothers were placed in foster care, the placement took place within a child's extended family. Schoeman added that when 'placement within their extended family is not a viable option the possibilities of foster care placement are less frequent' (*Ibid.*).

State or institutional care is also an option but according to Townhead (2006: 8), some women experience that 'temporary imprisonment (even for a short period of time) may lead to permanent separation of families'. Townhead states that a mother whose children have been placed in state care 'usually cannot reclaim custody of her children unless she has accommodation' (*Ibid.*) but it is often difficult for a mother to secure accommodation on release (*Ibid.).* Faced with the risk of permanent separation through institutional state care for the children, some mothers may feel that they do not have a choice but to take their children with them into prison. Luyt (2008: 316) states that some mothers, when faced with the perceived risk of being permanently separated from their children, 'may decide to neglect their families for a period' and to leave them unattended.

The potentially negative effects of institutional care have also been well documented. Richter (2004: 39) states that 'long-term studies into adulthood, for example by Rutter and Quinton (1984), show that institutionalization in the first five years of life jeopardizes adult emotional and social adjustment'. In 1977 a World Health Organization expert committee made the

following conclusion, 'continuity of relationships to parental figures is especially important in the first few years of life … children most at risk are those who experience multiple changes of parent figures or who are reared in institutions with many attendants who have no special responsibility for individual children' (WHO, 1977: 22). Before deciding to send a child to institutional care it would therefore need to be established which of the two options, institutional care, or parental care within the confines of a correctional facility, would serve the child best.

There are other reasons why women would decide to take their children into prison with them. Women, who are alleged to have killed their husbands, may also not have the option of leaving their child outside at the mercy of relatives. An interesting point here, and one that is inconsistent with international research, comes from a 2008 South African study conducted by Du Preez (2008: 8), in which she examined the imprisonment of black women with their babies and young children. It was stated that the 'number of mothers with accompanying children in prison in South Africa is low because most imprisoned mothers would rather have their children taken care of by someone outside the prison'. Contrary to this statement, international studies have pointed to the fact that mothers sentenced to custody very often prefer and choose to keep their babies and small children with them while in prison (Alejos, 2005: 9).

Some women prisoners and even prison staff, expressed the opinion that prison may be a better environment than living on the streets or in residential care and that prison 'provided the children with shelter, food and protection' (Robertson, 2008: 13). Schoeman and Basson (2006: 3) state that imprisoned women receive more privileges if their children remain with them and this may be a motivating factor to keeping their children with them. It has even been alleged that some impoverished women, upon finding out that they are pregnant, will commit petty crimes prior to the birth of their babies because by doing this, the mother 'knows that she will receive a lighter sentence, and she knows that she will receive adequate to good medical care and regular access to such medical services during the birth of her baby' [interview with Mr Lila, Corrections Coordinator of the Pretoria female correctional centre (2009) in Hesselink and Dastile, 2009: 66].

Allowing a child to be incarcerated with its mother because the child will be better provided for than in 'free society' or because the mother will receive a lighter sentence and free medical care will raise opposition to allowing the children to accompany their mothers because there are obvious cost implications to accommodating the children of incarcerated mothers in prison. It is expensive to create and run special mother and baby units (Schoeman, 2011: 78). Furthermore, in situations where 'correctional centers are financially overburdened and overpopulated, expensive facilities to take care of the needs of a small number of mothers and their children becomes a luxury that correctional authorities in many countries cannot afford' (*Ibid.*).

However, in terms of financial costs it has been stated that allowing mothers to take their children into prison with them can reduce later recidivism on the mothers' part (Byrne in Conova, 2006:2). The reduction in recidivism could defray prison's costs of accommodating the babies and children of incarcerated mothers on repeated occasions. Consideration should also be given to the research that was conducted in America which found that the imprisonment of mothers is associated with a child's increased time in child welfare custody and the subsequent decreased likelihood of reunification. This then results in increasing cost to already over burdened state child welfare systems (Ehrensaft *et al.*, 2003: 1-2). Perhaps it should also be borne in mind that every system is open to abuse. While acknowledging the potential for abuse, is that enough of a reason to deny the children of incarcerated mothers [children who have been labelled amongst the most 'vulnerable children' (Committee on the Rights of the Child; 2004 Discussion Day on Early Childhood Development)], the opportunity to be cared for and to be raised by their mothers? Situations where the mothers abuse the good intentions of Section 20(1) of the Act, which permits mothers to take their babies and young children into prison with them, are perhaps reflective of greater issues in society than of individual cases of system abuse.

2.2.5 *Leaving Prison*

Most prison systems that allow babies and young children to be incarcerated with their mothers in prison set a limit, which is either age or developmentally based, after which the child has to leave the prison environment. Bastick and Townhead (2008:50) assert that the

practice of removing children at a certain stage reflects fundamental beliefs that prison environments have adverse effects on a child's development and that from a certain age these 'outweigh the benefits of the child being with its mother.' There is little consensus on the appropriate age or developmental level of the child for the separation of child and mother and it varies from birth (ie the child is not permitted to stay in prison and is removed at birth) to 7 years of age in some Brazilian states [Quaker United Nations Office; 2011 (a)]. In South Africa the Act (as amended by the CSAA) states that a child that accompanies his or her mother in prison is allowed to stay until it is two years of age. Under the original Act a child was allowed to remain with his or her mother in prison until it was five years of age.

2.3 *The Bond between the Imprisoned Mother and her Child*

In order to determine whether or not it is in a child's best interests to accompany his or her mother into prison, and if so until what age, a basic knowledge of how child development is affected by the bond between mother and child is required. It has been stated that the purpose of allowing a child to be incarcerated with his or her mother should be to 'strengthen the emotional attachment between the mother and child, which is a vital factor in child development' (Action for Children and Youth Aotearoa, written submission, p 4, in Robertson 2012: 24). According to Azar (2009: 1) early mother-child bonding results in positive future outcomes for both mother and child. She found that babies who bond securely with their mothers develop into more self-reliant toddlers with a higher self-esteem than those toddlers who are deprived of that bonding experience. This initial bonding aids in developing successful peer relationships and a better ability to cope with challenges and stress.

Azar's findings are supported by Goshin and Byrne (2009: 6), who conducted research on how living in prison affects a child's development. The research followed '100 continuously enrolled mother-baby' pairs throughout their stay in New York nursery prisons and then retained and studied 76 of the mother-baby pairs throughout their first year of re-entry into 'free' society. While some opponents to allowing a child to be incarcerated with his or her mother warn that the child might be harmed through living in prison, Goshin and Byrne (2009: 7) asserted that the children benefit from the contact with their mothers. They state that:

> Children raised in a prison nursery program exhibit measurable rates of secure attachment consistent with or exceeding population norms. This is in stark contrast to children raised in the community during maternal incarceration (Poehlman, 2005b). Secure attachment to a primary caregiver in infancy is hypothesized by child developmentalists to be the mysterious mediator known as resilience ... Improving rates of secure attachment in infants with incarcerated mothers has the great potential to promote healthy development in the child's life and prevent the negative sequelae linked to maternal incarceration thereby decreasing the systemic burden of providing services to this population (*Ibid*.).

Richter supports the theory that the potential of a negative environment to shape the development trajectory of a young child is not as powerful as the potential of a strong caring relationship to positively influence the child and his or her development:

> a strong caring relationship can protect a young child from the effects of deprivation and disadvantage. The caring relationship is the strongest explanation for why some children who grow up under wretched conditions nonetheless grow well, are healthy, are able to be productive in school and work, and have good relationships with other people (Richter, 2004: 3).

Irwin, Siddiqi and Hertzman (2010: 6) assert that in child development, not only are relationships key, they are the 'principal driving force'. They explain that 'strong nurturant relationships are better predictors of health and ECD (early childhood development) than the socioeconomic conditions in which children live and learn' (*Ibid.)*. What is important is that when children live under disadvantaged circumstances (such as would be found in a prison environment) they need 'as much help as they can get from caregivers' in order to reach their development potential (Richter, 2004: 4).

If babies are not cared for by their mothers sometimes the alternative is more detrimental to the child. Children whose mothers are incarcerated are often passed around and the children are not given the opportunity to develop a strong attachment to anyone. This is problematic because a child's social development is 'dependant on a secure attachment with his caregiver' (Schoeman, 2006: 18). Social anthropologist Sheila Kitzinger made the following statement with regards the 'potentially traumatic effect on a child of a break in attachment to his/her primary carer':

> Children who have been with their mothers in prison have benefited from strong emotional attachments that have flourished because they have spent so much time together. On the other hand, when children do not have a continuing relationship with other individuals in the nuclear and extended family, they are especially vulnerable to separation from their mothers. When prisoners' babies are cared for outside prison 50% are shifted between four and five different homes before their first birthday' (*P and Ors v Secretary for Home Department and Anor* [2001] EWCA Civ 1151: para. 53).

Bhana and Hochfeld (2001: 18) explain that new caregivers are often 'thrust into the role by default, when they least expect it, and when they have few resources to cope with the task'. In agreement with Kitzinger above, Hendriks, Black and Kaplan (1993: 100), state that children have on average four or five different carers before their mother is released. When children are moved from home to home the new caregivers may not understand the emotional and social problems that the children have because of the separation from their mother. This places the children in an even more disadvantaged position. Sometimes when placement within their extended family is not an option, children are placed in foster care. According to Byrne, children who are separated from their incarcerated mothers run higher risks of developing learning difficulties and becoming 'cold and aggressive adults who, in turn, make poor parents' (Byrne in Conova, 2006: 2). Keeping convicted mothers and their children together has the potential therefore to prevent future emotional and psychosocial problems for such children.

Similar to the results cited by Goshin and Byrne above, Catan (see Part 2.2.2 above) found that children living in mother-baby units in prison did not display any severe developmental impairments (Catan in Tomkin, 2009: 37). Although the 'locomotive and cognitive development of the babies who spent over four months in the mother-baby units slowed down', on release they quickly caught up with the children who had not been in prison (*Ibid.*). Furthermore, Catan's (*Ibid*. p: 38) research revealed that those babies and young children who accompanied their mothers in prison experienced greater stability than those in foster or state care [4].

[4] Neither Catan nor Tomkin define the term 'stability' but in Richter's review of caregiver-child interactions in which she also refers to stable relationships it can be deduced that 'stability' in this context alludes to warm, intimate and continuous relationships (Richter, 2004).

In child-friendly environments, keeping convicted mothers and their children together has potential advantages not only to the children, but also to their mothers. Mothers can be motivated to better themselves, both in prison and in their lives beyond prison (Stern, 2004: 9). This has a cyclical effect and is of benefit to the children of such mothers because, as Byrne points out, 'recidivism is obviously an important factor in the child's well-being because if the mother returns to prison, her baby is separated from her again' (Byrne in Conova, 2006:2).

A further benefit which can arise from a child accompanying his or her mother in prison involves breastfeeding. In interviews conducted with prison staff in the UK, Robertson (2007: 32) discovered that 'the breast-feeding rate is much higher than in the local population because there aren't any men to not support it'. The period between pregnancy and a child's second birthday is critical in a child's development, and breastfeeding is a key element in shaping the health and wellbeing of children (Walker, 2011 : 1327). Scientific studies have shown that 'exclusive breastfeeding for 6 months followed by appropriate complementary feeding practices, with continued breastfeeding for up to 2 years and beyond, provides the key building block for child survival, growth and healthy development' (International Baby Food Action Network [IBFAN] 2011: 2). Research has also proved that breastfeeding has emotional and psychological benefits to breastfeeding for both mother and child (*Ibid.).*

Deck (1998: 693) states that normal child development 'may require the establishment through continuity of care by one adult caretaker, of an attachment bond which the infant maintains through childhood'. To separate a child at age two from his or her mother [as required by Section 20(1) of the Act], who up to that stage would have been the child's only caretaker, without consideration of the best interests of the individual child could impede the child's development. The World Health Organisation (2002: 3) has defined the mother-child relationship as 'an inseparable biological and social unit.' It has been stated that separation of mother and child 'severely compromises the capacity for normal maternal-child behaviours. The simple acts of breastfeeding, eye-to-eye contact, physical closeness, emotional bonding, are all considered essential for optimal child development' (IBFAN : 5).

The disruption of 'attachment bonds seems to be particularly dangerous between the ages of 6 months and 4 years' (Black, 1992: 969)[5]. Bowlby's Attachment Theory (which is based on the supposition that the mother-child bond is the primary force in child development (Bretherton, 1992), maintains that 'contrary to popular cultural beliefs, close attachment to the mother remains crucially important to children through the toddler and early childhood years' (Porter, 2003: 3). Porter (*Ibid.*) further states that 'multiple studies have found that two-year-olds maintain as much, if not more, closeness to their mothers as their one-year-old counterparts'. According to attachment theory once an attachment between parent and child has formed, separation from the parent can result in adverse emotional reactions from 'sadness to anger, which, in turn, will interfere with the optimal development of the child' (Parke and Clarke-Stewart, 2001: 7). Mcleod (2007) states that the critical period for attachment is between birth and two years of age. He explains that if the attachment figure is 'broken or disrupted during the critical two year period, the child will suffer irreversible long term consequences of this maternal deprivation'. According to Mcleod, this risk continues until the age of five.

In light of the evidence above it can be said that while prisons and correctional facilities may not be considered the ideal environment for a child to live and grow in, being deprived of a mother's nurturing and care may constitute a greater deprivation with longer lasting consequences. Research shows that a stable and caring relationship between parent and child can protect 'a young child from the effects of deprivation and disadvantage' (Richter, 2004: 3). Not only can the possible negative effects of the prison environment be mitigated by such a relationship but it can establish a positive development trajectory for the child. The separation of mother and child can be damaging to the child, particularly during critical periods of a child's development. Such effects can be exacerbated if alternative care options lack the emotional and physical support the child needs. It is in light of these statements that it is suggested that Section 20(1) of the Act, which states that a child is allowed to stay with its mother only until it is two years of age, should be re-assessed with a view to incorporating a more flexible and individualised approach to the separation of mother and child.

[5] Dr Dora Black is a consultant child and adolescent psychiatrist who was a member of an expert working group, appointed in 1998 by the Director-General of the Prison Service. It was their task was to examine existing British Prison Service policy in relation to mothers and babies in prison.

2.4 *Accompanying Mothers in Prison: Children and their Social Relationships*

Children who are incarcerated with their mothers may have greater contact with their imprisoned mother than they might otherwise have had, but their contact with the rest of their family and the outside community is curtailed. Article 30 of the CRC stipulates that children have a right to engage and interact with people in their community of origin and to participate in cultural activities. It is perhaps in relation to Article 30 that the rights of children who are incarcerated with their mothers are most affected: '[i]n general, the restrictive policies and environmental limitations associated with a prison environment curbs these children's contact with the outside world' (Schoeman, 2011: 84).

Some states make special arrangements to fulfil the rights of children who are incarcerated with their mothers to have contact with the rest of their family. In Egypt, for example, provision is made for children under twelve years of age, who live in state care, to visit their imprisoned mothers twice a month. These visits are in addition to the mother's normal visiting schedule (Robertson, 2008: 26).

Children who accompany their mothers in prison are also deprived of exposure to male figures, including a father figure (Schoeman, 2011: 84). Robertson cited the example of a two and a half year old child who 'was (initially) afraid of men because he lived with women all the time ... He was crying at the sight of trees and grass.' (Robertson, 2007: 32). Some prisons, for example Polsmoor prison, attempt to create a normalising environment for the children by giving them the 'opportunity to attend a formal crèche outside the prison walls' (Schoeman and Basson, 2006: 23). Through such opportunities they are exposed not only to the crèche environment but to other experiences that children who grow up in 'free' society normally have. In other studies on South African prisons it was found, however, that the children had 'limited exposure to the outside world and exposure to everyday activities' (Schoeman, 2011: 84). Such impacts, as well as the conditions and facilities that are available, need to be considered when determining whether or not it is in a child's best interest to be incarcerated with his or her mother. It is suggested that such decisions need to be made on a case by case basis, taking into account the specific circumstances of the

particular child and his or her mother and also the available resources and facilities in which the child will be accommodated and cared for.

Bastick and Townhead (2008: 55) state that children must be given regular opportunities to leave the prison in order to experience and participate in ordinary life outside. Such experiences will be beneficial not only when the children leave the prison permanently, but also in terms of realising their right to be exposed to cultural practices and to form an attachment with their community of origin.

This paper argues for a flexible approach to the separation of children who accompany their mothers in prison, and it does not necessarily oppose the separation of all children at age two from their imprisoned mothers. It is suggested that in each case the individual circumstances of the particular child need to be considered and a decision should be made that serves the best interests of that particular child. Such an approach would be consistent with the 'best interests of the child' principle as found in the CRC, the Constitution and the Children's Act. If the child in question has been allowed to establish 'quality' relationships with extended family (through visits) during its stay with its mother in prison it is possible that the two year old child will adjust to the separation from his or her mother.

Parke and Clarke-Stewart (2001: 3) state that one of the predictors of how well the child adjusts to separation is 'likely to be the quality of relationships with extended family and non-family informal social networks'. They further assert that 'to the extent that the child has already established close emotional relationships with extended family' the trauma of transition to this alternate care will be lessened (*Ibid.*). However, according to Murray (2005: 451) the reality is 'that many children will face a decrease in stable, quality parenting following their parent's imprisonment'. If that is indeed the reality that many children will face, a rigid rule stating that all children who accompany their mothers in prison need to be separated from their mothers at age two, may not serve their best interests. A more flexible policy is suggested in which the circumstances and future care arrangements of each child are examined before the child reaches the age of two, and a decision taken in light of how the interests of the child would best be served.

2.5 *Removing the Child from Prison: Practical Issues*

As has been stated earlier in this chapter, there is little consensus on the right age or developmental level at which to separate a child from his or her mother, and states vary in their policy. What is common to most states is that some form of cut-off age is applied, after which the child has to be removed from his or her mother and from the prison environment. It is submitted that the imposition of a rigid cut-off age (as is the case in South Africa under Section 20(1) of the Act) does not necessarily accommodate the best interests of the individual child. It is the tenet of this paper that a more flexible approach is taken, whereby a determination is made on a case by case basis.

When young children who have been living in prison leave, they may leave either with the mother or before her. When the child and mother leave together it is most common that the mother will continue to care for the child (Robertson, 2008: 19). If the child has reached the age or developmental stage after which he or she is no longer permitted to stay in prison those states that have some flexibility in their policy may consider allowing the child to continue staying with his or her mother if her sentence is almost completed. If the regulations do not allow such flexibility, or if the mother still has a lengthy portion of her sentence to serve, the child will need to be separated from the mother and alternative care arrangements will need to be secured. At whatever stage the child leaves, there are various practical issues that will affect the child. This section briefly examines some of these issues.

Robertson (2008: 19) found that authorities will often make use of the 'built-in flexibility' in regulations to enable children to leave prison with their mothers. Prison staff in the only women's prison in Krygyzstan said that it was easier for the children if they left with their mothers and because of this 'two thirds of children who have left Krygyzstan's only women's prison during the tenure of the current governor have done so with their mothers' (*Ibid.*). Robertson established that in Nigeria, the eighteen-month limit 'is often flexible at times up to reasonable infancy'. He also found that '[b]oth Chile and Venezezuela allow the maximum age to be exceeded by up to six months in exceptional circumstances' when the director of the prison, with the 'national children's authority and in some cases the Family Court' will review the child's case and make a final decision (*Ibid.*, p: 20).

In the United Kingdom certain judicial decisions have informed the issue of separating a child from his or her imprisoned mother. In one case a mother appealed to allow her child to continue staying with her in prison even though the child had reached the 18 month cut-off. The appeal was based on her child displaying separation anxiety. Judicial review held that 'the Prison Service had the right to determine when a child should leave a prison MBU (mother and baby unit), but should exercise flexibility about the upper age limit rather than operating a strict policy of separating the child from the mother at 18 months of age' (*P and Ors v Secretary of State for Home Department and Anor* [2001] EWCA Civ 1151)[6]. The above examples show that those states applying flexibility in terms of separation, promote a case-by-case analysis and decisions are made which consider children's best interests.

Factors to consider in determining whether the child should be allowed to stay in prison past the cut-off age would include how much longer the mother is likely to be in prison (Robertson, 2008: 20) and what alternative care options are available for the child (Black *et al*., 2004: 897). Robertson (2008: 20) states that the 'discretion to extend a child's time in prison tends to be exercised only when the mother is nearing the end of her sentence and removing the children (*sic*.) would cause the trauma and disjunction of separation followed by reunification shortly afterwards'. If the mother still has a lengthy sentence to serve consideration should also be given as to how far away from the prison the child will be placed. Robertson (2008: 26) states that the greatest challenges children faced in visiting their mothers in prison were 'difficulties in reaching the prison, particularly if children live far away and/or costs of reaching prison were high'.

Section 20(1A) of the Act states the following: '(1A) Upon admission of such a female inmate the Department must immediately, in conjunction with the Department of Social Development, take the necessary steps to facilitate the process for the proper placement of such a child'. Therefore in South Africa in the event that the child will not be placed with relatives, the DCS and DSD must take responsibility for ensuring that appropriate alternative arrangements for the care of the child are made. Ideally such decisions should take into account the input of the various stakeholders – the mother, other family members and child welfare specialists.

[6] This case will be discussed in greater detail in Chapter 5.

In terms of policy the DSD refers to a multi-disciplinary team which is tasked with compiling a 'time-limited plan' for each infant admitted into prison(s 14.1 DSD, B-Order 1: Chapter 21). Such a plan must involve consultation with the 'mother and, where applicable, with external relatives/important role-players (s 14.2; *Ibid.*). However, despite the importance of such decisions it has been found that

> too often prison authorities do not consider what will happen to a child after s/he leaves prison and do not liaise effectively with other agencies working in this area. Such failures can lead to children living in unstable or inappropriate situations, parents being unable to reunite successfully with their children once they come out of jail or even children staying in prison long after they should have left (Robertson, 2008: 23).

When decisions are taken, counselling and practical support should be provided to the child, the mother and other family members. The reality is that post-release support is 'often minimal and short term or entirely lacking' (Robertson; 2008: 19).

Other practical issues that deserve attention at the time of separating a child from his or her mother would include making transitional arrangements, such as overnight or weekend visits at the child's new place of care. Generally such arrangements would include the child only but sometimes, such as in Krygyzstan, a mother may be given temporary leave with her child to help settle her child into a new life (Robertson, 2008: 23). It must be borne in mind that for most young children who accompany their mothers in prison, the prison environment might be the only one that the child knows, and he/she may also not have had exposure to many other people in the 'outside' world. Such transitional arrangements might also ease the difficulty of separation for the mother. Arrangements should also be made for continued visits and continued contact with the mother. Ideally, after the child's separation and release, the child's progress should be followed by the relevant authorities. Chile has a 'six month monitoring programme' in which officials visit the child's new home, make telephone calls and visit the child's pre-school (if this is applicable). The purpose of the programme is to ensure that the child has continued contact with the imprisoned mother and to establish that the child is being well looked after (*Ibid.*)

However well it is managed, the separation of mother and child will inevitably be traumatic for both mother and child. It is unknown what long-term effects this separation has on the child as there is a dearth of research covering post-prison care-giving for children. Statistics on how many mothers and children are not able to reunite following the mothers release are also not available. Prior to separating children and their mothers it would be ideal if provision were made for an individual assessment of the circumstances and needs of each child. Such a provision would require flexibility in the relevant policy. During the assessment the interests of the child would need to be evaluated in order to determine whether they would best be served by allowing the child to remain with the mother or by arranging appropriate alternate care. When the child is going to be separated from his or her mother both the mother and child should be prepared for this change and plans for post-release support should be established.

2.6 *Conclusion*

According to the research reviewed in this chapter the situation of babies and young children accompanying their mothers in prison raises complicated issues. In South Africa Section 20(1) of the Act (as amended by the CSAA of 2008) permits mothers to take their babies and young children into prison with them. There are various reasons why mothers would choose to take their children into prison with them, but most often it seems to be the best choice out of all available bad options. Part of the aim of this chapter was to provide answers to the two research questions listed in Part 2.1. What is clear from the discussion in this chapter is that every aspect of a child's life, from his/her emotional and physical development to all of his/her relationships, is affected by his/her mother's imprisonment and by the child accompanying his/her mother in prison. The research reviewed has shown that the benefits of maintaining contact between mother and child (through allowing the child to be incarcerated with its mother) can outweigh the potentially negative effects of living in a prison environment. Furthermore, when adequate facilities are provided for these children the benefits become more significant.

From the review conducted in this chapter there appears to be a lack of empirical evidence on the optimum age of separation of a child from his or her mother. Popular attachment theory

states that the critical bonding period in a child's life is between the ages of nought and two years. In theory therefore, separating a child from its mother at age two should be satisfactory but the child's adjustment and subsequent development would depend on the quality of the attachment that the child establishes with the new caregiver as well as the quality of care he or she receives. Given the trauma of separation from his or her mother and the readjustment to a new environment and new culture, such a child would require special attention and care. However, as was stated in Part 2.5 post-release support is often minimal and sometimes it is entirely lacking. In cases where stability and care will not be provided for the child it is submitted that consideration should be given to allowing the child to continue residing with its mother in prison. Such a flexible solution may be in the child's best interests.

As has been stated in this chapter, this paper argues for a flexible approach to the separation of children who accompany their mothers in prison, it does not oppose the separation of all children at age two from their imprisoned mothers. It is suggested that in each case the individual circumstances of the particular child need to be considered and a decision should be made that serves the best interests of that particular child. Such an approach would be consistent with the best interests of the child principle as found in the CRC, the Constitution and the Children's Act.

In the next chapter various international and regional instruments that are relevant to the rights of children who accompany their mothers in prison, and to the forced separation of such children, will be examined.

CHAPTER 3: THE INTERNATIONAL NORMATIVE FRAMEWORKS RELEVANT FOR THE PROTECTION OF INFANTS AND YOUNG CHILDREN INCARCERATED WITH THEIR MOTHERS

3.1 *Introduction*

Zermatten (2005: 5) states that there are few other situations where so many human rights are violated as during imprisonment. And when children are involved the situation becomes even more complicated. Infants and young children accompanying their mothers in prison are amongst a large group of children for whom the realisation of their basic rights needs special attention, particularly from policymakers and practitioners around the world. There have been many positive developments in this field, with both regional and global treaties safeguarding the interests of children. Perhaps the most significant of these is the almost universally ratified Convention on the Rights of the Child (the CRC)[7], adopted by the UN General Assembly in 1989. One of the aims of this study is to analyse local and international policy and trends in relation to infants and young children who are incarcerated with their mothers, as well as to the subsequent separation of these children from their mothers. In light of this aim it is necessary to examine various international and regional instruments pertaining to the rights of children which have relevance for the situation of this category of children.

The international documents that will be examined are the 1948 Universal Declaration of Human Rights, the 1989 CRC; the 1957 United Nations Standard Minimum Rules for the Treatment of Prisoners; and the 2010 United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules). The relevant regional human rights instruments which will be discussed are the 1990 African Charter on the Rights and Welfare of the Child and the European Prison Rules. Human rights instruments do not specifically address the needs of children who are incarcerated with their mothers, therefore it is necessary to interpret how general provisions would protect such infants and young children. Where there are provisions that can be related to the separation of

[7] As of 2009, the only two states that had yet to ratify the Convention on the Rights of the Child were the United States of America and Somalia (Mahery, 2009: 309).

these children from their incarcerated mothers, the link will be made. While not all the instruments discussed below are legally binding, those that are not (for example the Bangkok Rules) provide useful guidelines for the developers of State legislation, policy and practise.

Chapter 3 is structured as follows: Part 3.2 examines various international instruments which set protective frameworks and which are relevant to persons deprived of their liberty. As the CRC is the primary source for children's rights in international human rights law a large part of this chapter will be focussed on examining its provisions. Part 3.3 briefly considers relevant regional human rights instruments and systems which pertain to children who are incarcerated with their mothers. Part 3.4 contains concluding comments.

3.2 *International Instruments*

3.2.1 *Universal Declaration of Human Rights (1948)*

The Universal Declaration of Human Rights (hereafter, the Declaration) was adopted by the United Nations in 1948 in an attempt to give substance to 'human rights and fundamental freedoms' (Mubangizi, 2004: 13). Although this document is in the form of a declaration rather than a convention and 'therefore lacks formal binding force' , it has been 'widely recognised as binding due to the obligations contained in the Charter of the UN and because parts of the Declaration have become part of customary international law' (*Ibid.*).

The Declaration underlines the need for the special care and protection of both children and mothers, and states that 'all children ... shall enjoy the same social protection [Article 25(2)]. Article 1 proclaims the right of everyone to a standard of living adequate for their health and well-being. Article 16(3) refers to the protection that the family unit is entitled to by society and the State. In the context of this study both Article 16(3) and art 25(2) could be applied to protecting the mother-child relationship in cases of maternal imprisonment.

3.2.2 *United Nations Convention on the Rights of the Child (1989)*

The CRC provides particular provisions to ensure the protection of children and the realisation of their rights. South Africa ratified the CRC in 1995[8] so all South African laws and administrative policies should conform to the norms and standards of this Convention (United Nations Committee on the Rights of the Child, General Comment No. 5 (2003): para. 1). Like the Universal Declaration of Human Rights, the CRC reaffirms that children need special care and it emphasises the family's role in caring for them (Preamble to the CRC). The CRC contains regulations for those children who are imprisoned because they are in conflict with the law, but not for the young children who are incarcerated with their mothers. The only explicit mention that is made of the children of incarcerated parents is found in Article 9(4), which stipulates that when a parent is imprisoned, state parties are obliged, upon request, to provide the child, or where appropriate another family member, with essential information concerning the whereabouts of the parent unless the provision of that information would be detrimental to the child. However, the CRC contains other provisions that can be applied to protect such children.

The United Nations Committee on the Rights of the Child (hereafter, the Committee) identified Articles 2, 3, 6 and 12 of the CRC as general principles (General Comment No.5 (2003): para. 12). Article 2 ensures rights to every child, without discrimination of any kind. Article 3(1) establishes the principle that the best interests of the child are a primary consideration in all actions concerning children. Article 6 relates to the child's inherent right to life and the obligations that State parties have to ensure, to the maximum extent possible, the survival and development of the child. Article 12 refers to the assurance that states parties need to give to children, who are capable of forming their views, the right to freely express those views in all matters concerning the child. Because of the age of the children who are the focus of this study (young children of age two years and younger) the principle of respecting the views and feelings of the young child (as contained in Article 12) will not be considered.

[8] The relationship between international human rights standards and the South African legal system will be more fully examined in chapter 4. Suffice to say that international law, such as the CRC, plays an important role in the protection of human rights in South Africa.

The principles of non-discrimination, the best interests of the child and the right to life, survival and development will be referred to.

3.2.2.1 *The Non-discrimination Principle*

Article 2(1) of the CRC requires that: 'States parties shall respect and ensure the rights set forth in the present Convention to each child within their *jurisdiction* without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race ... or other status'. According to this article states which are party to the CRC have assumed obligations under international law to ensure the realisation of all the rights set forth in the Convention for every children in their jurisdiction, irrespective of the child's or his or her parents' status. Children of imprisoned mothers should therefore not be discriminated against as a result of the incarceration of their mother. In fact, Article 2(2) adds particular protection to the children of imprisoned parents. Article 2(2) requires that states parties 'take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.' Justice Sachs made the statement that a child 'cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them ... the sins and traumas of fathers and mothers should not be visited on their children' [*S v M* (Centre for Child Law as Amicus Curiae) [2008] (3) SA 232 (CC) 261, at para. 18].

The non-discrimination principle was interpreted by the Committee to mean that states are required to 'actively identify individual children and groups of children the recognition and realization of whose rights may demand special measures' [General Comment No. 5 (2003): para. 12]. Alejos (2005: 16) asserts that far from being reduced, the role of states towards children who are incarcerated with their mothers becomes 'in fact more relevant, as these children are more vulnerable and in need of special protection and assistance'.

The Committee stated that Article 2 means 'that particular groups of young children must not be discriminated against' (CRC General Comment No. 7 (2005): para. 11(b). Children whose parents have been convicted of a crime and those infants and young children who are

incarcerated with their mothers have been identified as particularly vulnerable groups of children (see Part 1.1, *supra*). The Committee explained that discrimination may take 'the form of reduced levels of nutrition; inadequate care and attention; restricted opportunities for play, learning and education ... Discrimination may also be expressed through harsh treatment ...' [CRC General Comment No. 7 (2005): para. 11(b)]. States parties are therefore obliged to enact special measures to ensure that the infants and young children who are incarcerated with their mothers are protected from any form of discrimination as described by the Committee.

Article 20 of the CRC adds support to Article 2(1). Article 20 refers to state's obligation to ensure continuity of care, and provide special protection and assistance when the child is temporarily or permanently deprived of his/her family environment. The Committee explained that when children are faced with long-term disruptions to relationships through, for example, parental imprisonment, their 'rights to development are at serious risk' (General Comment No. 7; 2005: 16). According to the Committee '[r]esearch suggests that low-quality institutional care is unlikely to promote healthy physical and psychological development and can have serious negative consequences for long-term social adjustment, especially for children under 3 but also for children under 5 years old' (*Ibid.*). It is in light of such a comment that the suggestion is made for a flexible approach to the separation of the children who accompany their mothers in South African prisons and who have reached the two year old limit.

Where the decision to separate the child has already been made, the Committee encourages states 'to invest in and support forms of alternative care that can ensure security, continuity of care and affection, and the opportunity for young children to form long-term attachments based on mutual trust and respect...' (*Ibid.* p 17). Such an approach to the alternative placement and care of the child would involve planning prior to the separation of child and mother, as well as on-going post-separation monitoring and support for the child, the mother and the child's new carers.

3.2.2.2 *The Best Interests Principle*

Article 3(1) of the CRC is the key provision based on the principle of the best interests of the child. It stipulates that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Thus, according to Article 3(1), every decision which affects a child needs to have been made with due consideration of the effects of that decision on the child's rights and interests. Although the best interests principle is a feature of other international and regional instruments[9], it is in the CRC where 'the principle is both a right in itself and one through which the other rights are viewed and interpreted' (Tomkin, 2009: 19).

The best interests principle is, however, difficult to both interpret and apply. Making a determination on what is in the child's best interests is about predicting results and consequences that are difficult to estimate (Archard and Skivenes, 2009: 8). Freeman (2007: 27) states that the concept is 'indeterminate' and that there 'are different conceptions of what is in a child's best interests'. Skivenes (2010: 339) asserts that in 'its current state, this principle offers little guidance to decision-makers who have to make decisions impacting on the lives of children and adults'. Furthermore, by referring to '*all actions*' this provision implies a positive act by the State. However, the phrase '*all actions*' is so broad that it is rendered problematic. The comments of Justice Sachs in the South African Constitutional Court reveal the challenge of interpreting the best interests principle [as found in Section 28 (2) of the Constitution]: '[O]nce more one notes that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while delivering little in particular' (*S v M* (Centre for Child Law as Amicus Curiae) [2008] (3) SA 232 (CC) 261, at para. 23).

According to Tomkin (2009: 24), in the absence of a clear definition of the best interests principle, 'judges rely on limited principles that have been established through case law and any guidelines that exist in national instruments'. The result is that decision-makers may feel

[9] For example, art. 4(1) of the African Charter on the Rights and Welfare of the Child, and Article 5(b) of the Convention on the Elimination of All Forms of Discrimination Against Women.

that they have little direction and great latitude and responsibility when making decisions on the best interests of the child. These difficulties are further exacerbated by the fact that the moral, psychological and legal notions of what is in the best interests of the child can conflict with one another.

Freeman (2007: 45) remarks that the use of the indefinite article '*a*', in the phrase '*a primary consideration*', as opposed to the definite article 'the', recognises that 'competing interests *inter alia* of justice and of society at large, should be of at least equal if not greater importance than the interests of the child'. In examining the drafting history of Article 3(1) Alston (1994: 13) contends that the final form chosen 'would seem to impose a burden of proof ... to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist'. Tomkin (2009: 21) defines the phrase '*primary consideration*' as denoting that the best interests of the child 'would be the first consideration among others', and that like all human rights they 'remain subject to the rights, interests and duties of others'. Tomkin therefore submits that 'when a parent is imprisoned, the interests of justice, and of society at large to hold offenders to account, cannot be necessarily overridden by the rights of the child to *inter alia* the care and company of his or her parents' (*Ibid.*).

While acknowledging the inherent difficulties in its interpretation and application Tomkin (2009: 19) states that 'the application of the principle internationally is indicative of its wide acceptance'. According to Freeman (2007: 40) there are a number of reasons why children's best interests are a primary consideration and the most common justification is that '[c]hildren are more vulnerable. In a world run by adults, there would otherwise be a danger that children's interests would be completely ignored'.

In the context of this study the best interests of the child should be taken into account when deciding whether it is in the best interests of the child to both be incarcerated with its mother, and to subsequently separate the child from its mother when the child has reached the upper age limit. While the CRC does not attempt to provide an authoritative statement of 'how an individual child's interests would best be served in a given situation', it does 'provide a number of signposts capable of guiding those seeking to identify what is in the best interests of the child and excludes from the equation, by implication, various other elements' (Alston, 1994: 19).

Article 3(2) of the CRC places an obligation on states to

> ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 3(2) provides a measure of guidance on the meaning and scope of the best interests of the child as contained in Article 3(1). States have an obligation to provide protection and care for children, while at the same time respecting the rights and duties of those legally responsible for the child. Freeman (2007: 66) calls Article 3(2) a 'backstop provision' and explains that there are categories of children who are neglected by the CRC. Since infants and young children who are incarcerated with their mothers are not mentioned in the CRC, this group of children could constitute one such category. According to Freeman if there are gaps or omissions in the provisions of the CRC, Article 3(2) is meant to fill those gaps. He states that 'if a particular form of protection or care is being denied as a result of an act or omission not specifically proscribed in UNCRC provisions, the state party remains under an obligation to take 'appropriate legislative and administrative measures' (*Ibid*).

As a group of children who have been identified as 'particularly vulnerable' (see Part 1.1) it may be that infants and young children who are incarcerated with their mothers need special protection and care which goes beyond the protection and care offered to all children in the CRC. Special care and protection could refer to the care and protection that would be required for children who live in prison to achieve the fulfilment of their basic rights. It can also be suggested that an example of the special care and protection that the children referred to in this study require would be a measure of flexibility in the age of separation from their mothers. Such a provision would also give recognition to the right of the mother to bring up her child (as provided for in Section 19 of the Children's Act).

The CRC is clear that it is usually in the best interests of the children to be raised by their parents. Article 9 requires that 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'. Under normal circumstances therefore, it would constitute a violation of the children's rights to separate them from their mothers (Schoeman, 2011: 81). Bastick and Townhead (2008: 54) state that an 'infant child may only be separated from its parents when determined by competent authorities that such separation is necessary for the best interests of the child'. However, in a commentary to Article 9 Doek (2006: 23) refers to the inherent dilemma that imprisonment poses to the rights of the child, the choice being to separate the child from the parent or to have the child live in the prison 'knowing that a prison does not provide an appropriate environment for babies and young children'. Adding to this dilemma is the fact that while it is rarely in the child's best interests to be separated from his or her parents, the interest of the child will not necessarily always trump those of society. At times this will mean that convicted parents will be incarcerated despite this not being in the child's best interests.

Regarding the sentencing of primary carers and the best interests principle, some clarity is given in the UN General Assembly Resolution 63/241 (2008), paragraph 47(a) which provides that States

> should give priority consideration to non-custodial measures when sentencing or deciding on pre-trial measures for a child's sole or primary carer, subject to the need to protect the public and the child and bearing in mind the gravity of the offence [UN General Assembly, Resolution: Rights of the Child, (2008): para. 47(a)]

This resolution attempts to balance the interests of the child and the advantage of non-custodial sentences for the child's sole or primary carer, with the interests and sometimes competing rights of all those affected. The reality is that when a mother is imprisoned she is more often than not, the child's sole carer (Tomkin, 2009: 27) and the effects of her imprisonment will often have devastating effects on her child. This is aggravated by the fact that worldwide there are fewer women's prisons because there are statistically fewer women prisoners (United Nations Office on Drugs and Crime, 2008: 15). There is therefore a higher risk that the mother will be imprisoned further away from the child [Briefing on the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), 2011: 2]. The CRC does not give guidelines about when it would be in the child's best interests to be separated from his/her incarcerated mother.

3.2.2.3 *Other Relevant CRC Provisions*

Moving away from the 'best interests' principle, Article 6(2) of the CRC refers to states' obligation to ensure to the 'maximum extent possible the survival and development of the child.' States therefore need to ensure that children have adequate resources both to survive, and to develop. The Committee on the Rights of the Child declared that states parties are 'urged to take all possible measures to ... create conditions that promote the well-being of all young children during this critical phase of their lives' (Committee on the Rights of the Child, General Comment No. 7, 2005: para. 10).

When, and if the decision is taken to remove a child who accompanied his or her mother from the prison environment, the state's responsibility does not end with the placement of the child with family members or in state care. Article 9(3) declares that the responsibility of the state extends to enabling the child, who is separated from one or both parents, to have regular contact with both parents, except if it is contrary to the child's best interests. Possible practical measures to enable regular contact between mother and child can be described as the 'provision of financial assistance to cover the cost of travel to the prison, as well as the minimization of bureaucratic procedures which may hinder such contact' (Atabay, 2008: 71).

Article 20(1) of the CRC refers to 'a child who is temporarily or permanently deprived of his or her family environment...'. In the context of this study the young children who are separated from their mothers at two years of age would be separated from not only their mothers, but also their family environment if not placed within a family. According to the Committee, '[c]hildren's rights to development are at serious risk when ... they suffer long-term disruptions to relationships or separations (e.g. due to ... parental imprisonment ...)' [Committee on the Rights of the Child, General Comment No.7, 2005: 36(b)].

The Committee further explained that the adversities would impact on children differently depending on, amongst other factors, the availability of wider sources of support and alternative care (*Ibid.*). Research suggests that 'low-quality institutional care is unlikely to promote healthy physical and psychological development and can have serious negative consequences for long-term social adjustment, especially for children under 3 but also for children under 5 years old' (*Ibid.*). Article 20(1) and 20(2) place obligations on states parties

in such circumstances to ensure special protection and assistance to such children, as well as to ensure alternative care for such a child'. The Committee encouraged states parties to support alternative forms of care that 'can ensure security, continuity of care and affection ...' (*Ibid.*).

3.2.2.4 *Recommendations of the Committee on The Rights of The Child*

During its 2004 Discussion Day on Early Childhood Development, the Committee identified 'children living with mothers in prisons' as being among the most vulnerable children (UN Committee on the Rights of the Child, 2004: para. 3). In a number of its Concluding Observations the Committee has addressed the plight of these children. In these Concluding Observations recommendations concerning amongst other matters, sentencing of the primary carer, guidelines on the placement of children with their parents in prison, living conditions in the prison and alternative care options for the children of convicted mothers are made. The Committee consistently upholds the principle of the best interests of the child in its observations and recommendations. What follows in this section is a brief presentation of the position of the Committee.

The Committee examined the report of Thailand and made the following recommendation in relation to children incarcerated with their mothers: "the Committee recommends that the principle of the best interests of the child (Article 3) is carefully and independently considered by competent professionals and taken into account in all decisions related to detention, including pre-trial detention and sentencing, and decisions concerning the placement of the child.' (Concluding Observations: Thailand, 2006: para. 48). The Committee also encouraged the state party to 'ensure that living conditions in prisons are adequate for the child's early development' (*Ibid.*).

With reference to the Philippines, Bolivia, Mexico and the Islamic Republic of Iran, the Committee expressed concern about the living conditions of children who are incarcerated with their parents, as well as the regulation of their care if they are separated from a parent (Concluding Observations: Philippines, 2005: para. 53; Bolivia, 2005: para. 39; The Islamic Republic of Iran, 2005: para. 51, Mexico, 2006: para. 39). When making recommendations to

the states of Bolivia, The Islamic Republic of Iran and Mexico, the Committee encouraged these states to

> 'develop and implement clear guidelines on the placement of children with their parent in prison, in instances where this is considered to be in the best interest of the child (e.g. the age of the children, the length of stay, contact with the outside world and movement in and outside the prison)... It further recommends that the State party develop and implement adequate alternative care for children who are removed from prison, which is regularly supervised and allows the child to maintain personal relations and direct contact with its parent remaining in prison' (Concluding Observations: Bolivia, 2005: para. 40; The Islamic Republic of Iran, 2005: para. 52; Mexico, 2006: para. 40).

Given the concern that had been expressed by the Committee over those children who accompany their parents in prison, on the 30th September 2011 the Committee on the Rights of the Child held a Day of General Discussion (DGD) on 'Children of Incarcerated Parents'. Despite the clarity and the relevance of the various CRC provisions, they are hardly applied to this vulnerable group.[10] It was the first time the issue of children with imprisoned parents had been discussed in a United Nations forum.

A consistent view expressed in the sessions was for priority to be given to the best interest of the child at all stages of the judicial system. In the session focussing on children living with or visiting a parent in prison, the need to prioritise non-custodial measures was encouraged as was the need to define who would be responsible for overseeing the babies and young children in prison. Institutionalised training for prison officials, as well as improved and deepened 'research and initiatives at the national, regional and global levels' were also identified as requiring attention. (Committee on the Rights of the Child, 2011: 5).

In concluding this brief examination of the jurisprudence of the Committee it can be said that the potential of the CRC to advance the cause of babies and young children in prison has

[10] In a submission made to the Committee prior to the DGD the Partners of Prisoners and Families Support Group (POPS) acknowledged the 'clarity of articles relating to the rights of the child around actions taken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'(UNCRC, Article 3)'. However, they stated that in their view 'there remain significant shortfalls in the implementation of policies and practices supporting the rights of children of incarcerated parents within justice systems' (POPS, 2011: 1)

been confirmed both by the concluding observations issued in the examination of state reports, as well as during the day of general discussion. As was stated in Part 3.2.1.4 above, the gap appears to be more in the effective implementation of the provisions by different States, than it does in the provisions themselves.

3.2.3 *The UN Standard Minimum Rules for the Treatment of Prisoners (1957)*

The UN Standard Minimum Rules for the Treatment of Prisoners (hereafter, 'the SMR') were adopted in 1957, but, according to a report issued by the Quaker United Nations Office (2005: 20) they still reflect 'what is generally accepted as being good principle and practice in the treatment of prisoners'. Although not legally binding these Rules are 'internationally accepted as good practice in the treatment of prisoners and the management of prisons' (Schoeman, 2011: 80). Rule 23 is the only provision containing a recommendation for children incarcerated with their mothers: '... there shall be special accommodation for all necessary pre-natal and post-natal care and treatment' and that arrangements need to be made for babies to be born in a hospital outside the prison (Rule 23). These Rules also stipulate that if a child is born in prison, this should not be recorded on their birth certificate.

It is important to note that the SMR only make mention of nursing infants and not older children. In Part 1, Article 23(2) refers to 'nursing infants [who] are allowed to remain in the institutions with their mothers ...'. Thus, nursing infants can remain with their mothers only if this is 'authorized'. According to the Quaker United Nations Office (2005: 20) it appears from the SMR that 'allowing children to stay with their mothers is an entitlement or privilege given to children and not to their mothers'.

The Quaker United Nations Office further points out that the SMR do not acknowledge the consideration of the child's 'best interests' (CRC Article 3) in determining whether a nursing infant can stay with its mother in prison, 'leaving open the possibility to "allow" children to remain with their mothers without due consideration of what is in the best interests of the child' (QUNO, 2005: 20). Such a gap could result in infants living in conditions which are not conducive to the survival and development of adults, let alone infants. The SMR also make no mention of State's responsibility to give the child special protection and provide

care and assistance as is needed for his or her well being [CRC articles 3(2); 2(1) and 20(1)]. Because the SMR has the potential to cause children to live in negative conditions, it is necessary that the SMR must be interpreted in light of the CRC.

It has been found that in some countries babies and young children live in prisons without 'their presence being registered or monitored by the State and/or without any special provision being made for them' (Bastick and Townhead, 2008: 49). Rule 7 of the SMR stipulates that in every place where persons are imprisoned, registration records are to be kept. Infants and young children who accompany their parents in prison should therefore be duly registered.

Despite the fact that they are accepted as 'good practice' in the treatment of prisoners (QUNO, 2011: 17) the SMR do not draw sufficient attention to the special needs of girls, women and young children. Rule (8) of the SMR specifies the separation of male and female prisoners. However with particular reference to children accompanying their mothers in prison, no mention is made of for example, adequate accommodation, treatment and safety, specialised medical care, preservation of family links, educational and recreational programmes, adequate facilities, and specialised attention for the enjoyment of their basic human rights and freedoms (*Ibid.* p 19). The Rules also make no mention of an upper age limit for children living in prisons.

While the SMR do not offer much protection to the infants and young children who are incarcerated with their mothers, it must be remembered that they were drafted more than 50 years ago, and more than three decades before the drafting of the CRC. When they were formulated they constituted an early recognition and acceptance at international levels that under certain conditions, infants and young children may be maintained in prison with their mothers. However, in light of current understanding of human and children's rights, the use of the SMR in isolation could be problematic. A hypothetical situation could arise whereby a state, when considering the situation of a child accompanying his or her mother in prison, argues that according to the SMR they are not obliged to apply the best interests of the child principle. In such situations, if the state has ratified the CRC, the best interests principle is cross-cutting since Article 3(1) refers to 'all actions concerning children' and enjoins both courts and administrative bodies (which would include prisons). Furthermore, Article 3(2) of

the CRC places an obligation on states parties to ensure the protection and care of children, and Article 3(3) refers to the requirement to ensure that those facilities and institutions that provide care for children conform to particular standards.

3.2.4 *The UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (2010)*

On the 21 December 2010 the UN General Assembly adopted the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures (Resolution A/RES/65/229), known as the Bangkok Rules. The Bangkok Rules complement and supplement, but do not replace the UN Standard Minimum Rules for the Treatment of Prisoners (the SMR). The newly adopted Bangkok Rules developed out of recognition of the different needs and characteristics of women in the criminal justice system. They provide comprehensive provisions concerning, amongst others, the rights of children incarcerated with their mothers. Although not binding on states, the Bangkok Rules can be useful in developing a framework that would guide states in renewing and upgrading existing laws.

While the Bangkok Rules are mainly concerned with the needs of women prisoners and their children, it is important to note that since the focus of the Bangkok Rules includes the children of imprisoned mothers, it is necessary to acknowledge the role of both parents in the child's life. Some of the provisions would therefore apply equally to male prisoners who are fathers.[11]

Like the CRC, the Bangkok Rules state that any decisions dealing with the separation of a child from its mother must be based on individual assessments and the best interests of the child (Rule 52). The Rules also stipulate that children in prison with their mothers should

[11] In the preamble to the Bangkok Rules the Economic and Social Council noted that it was

> '[*m]indful also* of its resolution 63/241 of 24 December 2008, in which it called upon all States to give attention to the impact of parental detention and imprisonment on children and, in particular, to identify and promote good practices in relation to the needs and physical, emotional, social and psychological development of babies and children affected by parental detention and imprisonment.' Furthermore, in Para. 9 of the preamble, the Economic and Social Council referred to 'pregnant woman or a child's sole or primary caretaker' when addressing sentencing or pretrial measures.

never be treated like prisoners (Rule 49). The 'Bangkok Rules' clearly state that children must be considered at all stages of a parent's contact with the criminal justice system. Furthermore, it is specified that mothers must be provided with the maximum possible opportunities to spend time with their children who are imprisoned with them (Rule 50). Rule 51.2 states that the environment provided for children in prisons 'shall be as close as possible to that of a child outside prison'[12].

Perhaps one of the more innovative provisions of the Bangkok Rules, which relate to children incarcerated with their mothers, is rule 2.2:

> Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children.

In some areas, offenders are immediately taken to prison following sentencing, without the time to make arrangements for their children's care (Robertson, 2011: 17). Rule 2.2 should apply to all those caring for children.

As the most comprehensive and specific international instrument relating to the treatment of women prisoners and their children, the Bangkok Rules constitute a positive step forward for this usually marginalised group. Up until the end of 2010, when the 'Bangkok Rules' were approved without a vote, there was a dearth of legal provisions specifically addressing the needs of children who accompany their mothers into prison. The Bangkok Rules bridge the gap to some degree in that they act as a basic international framework within which States can assess whether their prisons and correctional facilities are equipped to fulfil the rights of the infants and young children who accompany their parents in prison.

[12] For a list of all the 'Bangkok Rules' pertaining to children residing in prisons with their mothers see Appendix 1.

3.3 *Relevant regional human rights instruments and systems*

The protection offered by international human rights instruments is complemented by regional human rights instruments and norms. The main focus on this section will be on the 1999 African Charter on the Rights and Welfare of the Child as it contains the only provision which expressly protects children of imprisoned mothers. Other regional instruments remain silent on this issue. Tomkin (2009: 12) states that a result of the lack of legal provisions is that 'the courts have been required to adapt and apply legal provisions of a more general nature when examining the rights of children in any given case'. A brief examination of the European Prison Rules will also be made.

3.3.1 *The African Charter on the Rights and Welfare of the Child (1990)*

The African Charter on the Rights and Welfare of the Child (hereafter referred to as the ACRWC) reaffirms the obligations of African States in terms of international human rights norms. South Africa ratified this Charter in 2000.

Like the CRC, the ACRWC also recognises the principle of the best interests of the child, but in stronger terms. Article 4(1) provides that 'in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration'. The ACRWC states that 'the child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents'. No child shall be 'separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child' (Article 19). States parties to the ACRWC are required to assist parents and guardians and in case of need, provide material assistance and support with regard to nutrition, health, education, clothing and housing [Article 20(2)]. States parties are also required to assist parents and guardians in their child-rearing responsibilities and to ensure the development of institutions which provide care for children [Article 20(2)].

Article 30 of the ACRWC requires states parties to provide special treatment to expectant mothers and to mothers of infants and young children who have been found guilty of a crime. In providing such special treatment states are required to:

a. ensure that a non-custodial sentence will always be the first consideration when sentencing such mothers;
b. establish and promote measures alternative to institutional confinement for the treatment of such mother;
c. establish special alternative institutions for the holding of such mothers;
d. ensure that a mother shall not be imprisoned with her child;
e. ensure that a death sentence shall not be imposed on such mothers;
f. the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

The ACRWC does not state that mothers with children may never be sentenced to imprisonment, but rather that non-custodial measures should be the first consideration [Article 30(a)]. Alternatives to institutional confinement should therefore be sought before a mother is sentenced to institutional confinement. However, the ACRWC does prohibit children being imprisoned with their mothers [Article 30(d)]. Article 30(d) must be read with Article 30(a), thus mothers should not be imprisoned with their children and non-custodial sentences should be the alternative option. Whilst the aim of this specific article is the protection of those children whose mothers have been found guilty of a crime, by providing a comprehensive restriction on children residing in prison with their mothers, Article 30 may be deemed insufficiently flexible. However, in light of the conditions in most African prisons it has been stated that '[A]frican children are especially harshly affected by being imprisoned with their mothers' (Sloth-Nielsen; 2011: 3).

Sloth-Nielsen (*Ibid*.) describes African prisons as generally been in a 'terrible physical state', with a near complete lack of health care services' and a chronic shortage of food. In addition, due to the low numbers of female prisoners relative to male prisoners 'the numbers do not warrant expensive building interventions to provide a better quality of institution to cater more appropriately for infants and babies in prison with their mothers' (*Ibid.* p 3-4). It is for these reasons that the ACRWC requires that non-custodial and alternative measures be employed where children risk being imprisoned with their mothers. Furthermore, as it is the

only specific provision relating to the children of imprisoned mothers Aricle 30 should 'not only be applied by States members of the African Union but should also be looked to by other States as a series of steps to be applied in order to better protect such children' (Bastick and Townhead, 2008: 40).

The ACRWC is a good example of a regional norm, inspired by the CRC, which recognises children as rights-holders and addresses the specific situation of children of imprisoned mothers. However, despite the progressive provision in Article 30 of the ACRWC, the African Committee of Experts on the Rights and Welfare of the Child has not given a great deal of attention to the plight of children of imprisoned mothers. The only exception was found in the Committee's Recommendations and Observations to Uganda[13], in which it was stated with reference to the Ugandan report that

> The Committee observes that the Report doesn't provide information pertaining to the treatments given to incarcerated pregnant mothers and incarcerated mothers of babies and young children and recommends that this information be included in the next reports.

3.3.2 *European Prison Rules*

In 1973 the Council of Europe (hereafter, the Council) developed the Standard Minimum Rules for the Treatment of Prisoners. In 1987 these Standard Minimum Rules were reformulated and adopted as the European Prison Rules (hereafter, the EPR). The EPR established minimum standards for the treatment of prisoners and for all aspects of prison administration and material conditions of detention (Alejos; 2005: 27). These rules are not binding for member States but are evidence of an awareness of the rights of prisoners (EUROCHIPS website: European Prison Rules). In 2006 the Committee of Ministers of the Council of Europe adopted a new version of the EPR. Accordingly the 2006 EPR replace their predecessors in their entirety (*Ibid*.).

[13] In fairness, it must be noted that the African Committee of Experts on the Rights and Welfare of the Child has only recently started to analyse state reports.

Rule 36 of the European Prison Rules states the following:

> 36.1 Infants may stay in prison with a parent only when it is in the best interest of the infants concerned. They shall not be treated as prisoners.
> 36.2 Where such infants are allowed to stay in prison with a parent special provision shall be made for a nursery, staffed by qualified persons, where the infants shall be placed when the parent is involved in activities where the infant cannot be present.
> 36.3 Special accommodation shall be set aside to protect the welfare of such infants.

Unlike many of the other international instruments, Rule 36 of the European Prison Rules applies to 'parents', i.e. to mothers and fathers.[14] Rule 36 establishes a broad framework for allowing infants to stay in prison with their mothers by highlighting that the best interests of the infants should be the deciding factor. Rule 36 does not set any upper age limit for the separation of infants from their imprisoned mothers (Council of Europe, 2006: 61-62).

In 2009 the Parliamentary Assembly of the Council of Europe adopted Resolution 1663 (2009) of 28 April 2009 on Women in Prison. The main points which are relevant to this study are:

- prison regimes and facilities must be 'flexible enough to meet the requirements of pregnant women, breast-feeding mothers and prisoners whose children are with them' (Council Of Europe, 2009: pt. 9.3);
- 'in situations where babies and young children in prison with their mother have to be separated from her, this (must be) done gradually, so that the process is as painless and non-threatening as possible' (*Ibid.*, pt. 9.4);
- 'children staying in prisons with their mothers (must be) given access to crèches outside the prison, offering them opportunities for socialisation with other children and alleviating the detrimental social effects of imprisonment on their personal development'(*Ibid*., pt. 9.5).

[14] Four countries (Finland, Germany, Portugal and Sweden) have recently allowed fathers to have children living with them, although in Sweden this is 'a recent policy change and so has not happened in practice' (Quaker United Nations Office, 2011: 1).

Lagouette states that the acceptance of Resolution 1663 shows 'that there is a consensus within the council of Europe on the necessity to take the special needs of women with babies in prison in to consideration' (Lagouette, 2011: 51).

3.4 *Conclusion*

An infant or young child whose mother is deprived of her liberty sees many of his or her basic rights affected. However, this review of international instruments shows that with the exception of the recently adopted Bangkok Rules and some regional standards (for example the African Charter on the Rights and Welfare of the Child, and the European Prison Rules), the issue of the infants and young children who are incarcerated with their mothers has received minimal attention. In light of the 2011 Day of General Discussion, which addressed the theme of 'Children of Incarcerated Parents' it is hoped that gaps in policy will soon be addressed. In the interim there are provisions in international and regional frameworks which can, and should be interpreted and implemented to protect such children and to ensure the realisation of their rights.

Even though the UN Convention on the Rights of the Child (the CRC) does not specifically make mention of the rights of infants and young children who are incarcerated with their mothers, it does contain provisions which are relevant to this group. The CRC highlights that a child has a right to live with his or her parent/s unless it is deemed to be incompatible with the child's best interests. The state is obliged to provide special protection for a child deprived of a family environment and to ensure that appropriate alternative family or institutional placement is available. In all decisions which impact upon the child, including the time or age of separation from the imprisoned mother, the child's best interests must be a primary consideration. Furthermore, the child should not be discriminated against as a result of the incarceration of his or her mother.

Some of the common points arising out of the international and regional norms that were discussed in this chapter can be summarised as follows:

- children living in prisons with their mothers are not offenders and should not be treated as such;

- every effort should be made to make the prison environment in which a child resides resemble that of the outside community;
- children living in prison must have contact with other family members and with the outside community;
- non-custodial sentences should, where possible, be considered as alternatives to incarceration for convicted mothers.

Given the paucity of provisions dealing specifically with the rights of this distinct group of children, it would be beneficial for States to use the Bangkok Rules in particular as guidelines in revising and drafting country specific legislation. Although this particular set of Rules was developed for the context of women prisoners, at this stage they provide the most comprehensive basic international framework to both assess whether prison systems are equipped to comply with children's rights and needs, and to develop new legislation.

The European Prison Rules (the EPR), and particularly the provisions of Resolution 1663 (2009), represent a further example of the recognition by an inter-governmental body of the plight of children affected by the imprisonment of their mother. Like the ACRWC, the EPR recognises the best interests principle and states that infants may accompany a parent in prison only when it is the best interests of the infants concerned. While the EPR are not binding on South Africa, as Mubangizi (2004) explains, according to Section 39(1)(*b*) of the Constitution, South Africa is obliged to consider it.

The effective implementation of provisions pertaining to children's rights is the responsibility of all governments. The international human rights instruments which are discussed in this chapter should therefore be reflected in some form in South African domestic law, as discussed in the following chapter. Chapter 4 deals with the South African specific legislation, policies and practices regarding infants and young children incarcerated with their mothers.

CHAPTER 4 – LEGISLATION, POLICIES, PROCEDURES AND PRACTICES REGARDING INFANTS AND YOUNG CHILDREN INCARCERATED WITH THEIR MOTHERS IN SOUTH AFRICAN PRISONS

4.1 *Introduction*

International standards, such as those discussed in the previous chapter, should be regarded as the minimum accepted standards for the protection of human rights. It is the responsibility of individual states and those who draft legislation, regulations, policies and programmes to further develop these standards with the aim of offering stronger protections to, in the case of this study, children incarcerated with their mothers. Unfortunately, according to Schoeman (2011: 81), the reality in many states is that 'the good intention of human rights conventions and charters are not carried through into legislation and policy'.

In Part 4.2 of this chapter the general provisions in national legislation which can be applied to the children who are incarcerated with their mothers in South African prisons will be discussed. The specific legislation, policies, procedures and practices regarding these infants and young children are considered next. Particular attention will be given to the issue of the separation of such children from their mothers. Following this, in Part 4.3, the South African cases of *S v M* [Centre for Child Law as amicus curiae) 2008 (3) SA 232 (CC) (hereafter, *S v M*), *MS v S* (Centre for Child Law as *amicus curiae*) 2011 (2) SACR 88 (CC) (hereafter, *MS v S)*, as well as *S v Howells* 1999(1) SACR 675 (C) (hereafter *S v Howells*), which all considered the best interests of the children, before sentencing the relevant mothers, will be referred to. This chapter concludes with an examination of South Africa's compliance with international obligations relevant to children incarcerated with their mothers.

4.2 *Legislation, Policy and Practices*

4.2.1 *General Provisions*

4.2.1.1 *The Constitution of the Republic of South Africa, 1996*

The Constitution of the Republic of South Africa (the Constitution) is based on a foundation of a culture of human rights and recognises that children are particularly vulnerable to violations of their rights. Provision is made in Section 28 for the protection of the specific and unique interests of children. As the 'supreme law of the Republic' the Constitution binds all organs of state and, according to Section 8(1), applies to all law, including Section 20 of the Correctional Services Act (Act 111 of 1998). When considering prisoners in South Africa, and in this case imprisoned mothers and their young children, the following values as contained in Section 1(*a)* of the Constitution are relevant: human dignity, equality and the advancement of human rights and freedoms. The rights of arrested, detained and accused persons in Section 35 are also pertinent. Section 35(2)(*e)* provides that everyone who has been detained, has the right 'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense of adequate accommodation, nutrition, ... and medical treatment'. In Section 35 (2)(f)(ii) the rights of those who are detained to communicate with, and be visited by that person's next of kin are described. Although the infants and young children who are incarcerated with their mothers are not prisoners, and should not be treated as such, when subjected to conditions of detention they are entitled to the same rights as other detained citizens.[15]

Section 28 of the Constitution draws on international conventions and treaties in the protection of children. With particular reference to this study the following rights in Section 28 are applicable:

- family care or parental care, or to appropriate alternative care when removed from the family environment [28(1)(b)];

[15] Children are entitled not only to the rights contained in Section 28 , but 'also to all other rights in the Bill pertaining to them' (Robinson, 2009: 12).

- basic nutrition, shelter, basic health care services and social services [28 (1)(c)];
- protection from maltreatment, neglect, abuse or degradation [28 (1)(d)]; and
- a child's best interests are of paramount importance in every matter concerning a child [28 (2)].

The right to family care or parental care requires the family or parents of a child, or the state, to provide care to that child. Skelton (2009: 285) states that the aim of this right is to ensure that children are 'adequately cared for, and to prevent legal or administrative action which separate children from their parents or care-givers'. Robinson (2009: 25) explains that according to Section 28(1)(*b*) it would appear 'that the family is to be regarded as the primary institution within which the child must grow up'. In the case of *S v M* the court found that Section 28(1)(*b*) read together with Section 28(2)[16] requires the law to 'make best efforts to avoid, where possible, any breakdowns of family life or parental care that may threaten to put children at increased risk' (para. 20).

This *dictum* places an obligation on the courts when imposing a sentence, to consider the effects that imprisonment of a primary care-giver would have on the child. This has direct relevance to the infants and young children who are incarcerated with their mothers since, if a non-custodial sentence were imposed, the issue of separating the child from its mother would not need consideration. It can also be applied to the specific issue of separating the child from his or her mother, and calls for an individualised determination of the best interests of the child in order to avoid 'any breakdowns of family life or parental care that may threaten to put children at increased risk' (*S V M* : para. 20). For the children who have been incarcerated with their mothers it must be ensured (as far as possible), that alternative care arrangements following separation will not put them at risk. If suitable plans cannot be made it may be better to allow such children to continue residing in prison with their mothers until more appropriate arrangements can be made.

Section 28(1)(*c*) of the Constitution provides that children have a right to basic nutrition, shelter, basic health care services and social services. During the time that the child accompanies his or her mother in prison it would be the responsibility of the state, and more

[16] Section 28(2) provides that the 'child's best interests are of paramount importance in every matter concerning the child'.

specifically of the Department of Correctional Services (the DCS), to ensure compliance with these rights[17]. Section 28(1)(*d)* refers to the child's right to be protected from maltreatment, neglect, abuse or degradation. According to this right the children who are incarcerated with their mothers must not be subjected to any form of abuse, either from prison authorities or from other inmates. Furthermore, they have the right to be protected from neglect in this environment.

Section 28(2) states that the best interests of the child are of paramount importance in every matter concerning the child. The best interests principle as contained in the Constitution is more emphatic than the provisions in the CRC and the ACRWC (as discussed in Chapter 3). Ngidi (2007: 1) states that this provision has 'effectively ... been interpreted by our courts to mean that in every matter concerning a child, whatever decision is made, must be in the best interest of the child'. Heaton (2009: 3) explains that the 'field of application of the best interests of the child has been expanded from family law and children's rights to "every matter concerning the child"' and because of this expansion, the child's best interests 'must be central in all fields of South African law' (*Ibid.*). This provision places an obligation on the state to carefully consider whether or not to impose custodial sentences on mothers in circumstances where this would not be in the child's best interests. The cases of *S v M* and *S v Howells* (as discussed in Part 4.3.2) are two cases in point.

The case of *Minister of Welfare and Population Development v Fitzpatrick and others* [2000 (3) SA 422 (CC)] is another example of a South African case which was decided on the basis of the 'best interests of the child' principle. The Constitutional Court declared that Section 18(4)(f) of the Child Care Act 74 of 1983 was invalid because it prohibited the adoption of a South African child by non-citizens (Skelton, 2009: 280). Furthermore the court found Section 18(4)(f) was 'too restrictive because it limited the best interest of the child, which would sometimes be achieved through being adopted by non-South African parents' (*Ibid.*). The court was therefore promoting a flexible and individualised approach to the case.

This best interests principle should also be applied when decisions are being made with regards the separation of the child from his or her incarcerated mother. In a presentation to

[17] By contrast, mothers in some Indian prisons have reported that no 'cribs, baby food or warm milk' were provided for their infants (Robertson, 2008: 16).

the Correctional Services Portfolio Committee[18] the South African Human Rights Commission (the SAHRC) recommended an individual-based approach when taking decisions concerning children (SAHRC; 2007: 3). In the case of *S v M* the CC held that '[a] truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved' (para. 24). Furthermore, in the case of *AD v DW* (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC) the court found that the best interests of each child must be examined on an individual basis and not in the abstract (para. 55). The application of these *dicta* to this study would require that before a child turns two years of age and is separated from his or her imprisoned mother, an individualised examination of the situation of the particular child would be conducted to determine whether separation at age two would be in the child's best interests.

The best interests principle as contained in the Constitution can, however, be limited. According to Skelton (2009: 280): '[d]espite the emphatic words of 'paramount importance', it does not serve as a trump to automatically override other rights, and as a right in a non-hierarchical system of rights, is itself capable of being limited' (Skelton, 2009: 280). In the case of *S v M* the court declared that 'the fact that the best interests of the child are paramount does not mean that they are absolute' (para. 26). The court further explained that:

> The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned (para. 42).

Thus, in keeping with this ruling, the best interests principle needs to be determined on a case-by-case basis, and according to Skelton, is an indicator of the strength of the best interests principle of the Constitution. She (2009: 283) states that

[18] This presentation was entitled: 'The Impact of Imprisonment on Women and Children: Are We Acting in Children's Best Interests'

> [a] truly child-centred approach requires an in-depth consideration of the needs and rights of the particular child in the "precise real-life situation" he or she is in. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child.

Applied to this study, the potential of the best interests principle to be limited means that if the interests of society, for example for safety, outweigh those of the child, a primary care-giver will not necessarily be granted a non-custodial sentence. Furthermore, if it is deemed to be in the child's best interests to continue residing in prison with his or her mother but the financial costs of maintaining the child in prison are prohibitive, the best interests of the child will not necessarily trump the need for the DCS to remain within its financial budget.

4.2.1.2 *The Children's Act 38 of 2005*

The Children's Act, No. 38 of 2005 (the CA) provides for special attention to be given to children in especially difficult circumstances [Section 2(*g*)]. The children in this study would qualify as 'children in especially difficult circumstances' based on at least two factors: their mothers have been convicted of a crime, and they have been removed from the family environment to live in a prison. The general principles set out in Chapter Two of the CA reiterate the principle of the 'best interests of the child' in very strong wording, stipulating that 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied' (Section 9). Section 6 (2) indicates that '[a]ll proceedings, actions or decisions in a matter concerning a child must –

(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard ...;
(b) respect the child's inherent dignity;
(c) treat the child fairly and equitably;
(d) protect the child from unfair discrimination on any ground ...;
(e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age...

In Section 7(1) factors are listed that need to be considered when the best interests of the child standard is applied. As was explained in Part 3.2.2.2 the concept of the best interests of the child has been criticised for its vagueness. Section 7(1) partly addresses this criticism by listing fourteen factors that must be taken into account whenever the best interests of the child are being considered. Relevant to young children who are incarcerated with their mothers are:

(a) the nature of the personal relationship between –
(i) the child and the parents, or any specific parent;

(b) the attitude of the parents, or any specific parent, towards –
(i) the child; and
(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent,..., to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
(i) both or either of the parents;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child –
(i) to remain in the care of his or her parent, family and extended family; and
(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's-
(i) age, maturity and stage of development;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(k) the need for the child to be brought up within a stable environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by –
(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour.

While all of these factors are potentially applicable to the situation of children who are incarcerated with their mothers, a review of all the factors is beyond the scope of this study. A brief mention will therefore be made of some of them and how they relate to the best interests of this group.

Section 7(1)(c) relates to the parents' ability to provide for the child and puts a strong emphasis on the emotional, as well as intellectual well-being of the child. Thus, while the prison environment may not be the ideal environment for a child, the mother's ability to provide for the child's emotional well-being needs to be taken into consideration when deciding whether to allow the child to remain with her. Section 7(1)(*g*) refers to the child's age and stage of development as factors to be considered when determining the best interests of the child. As was discussed in Part 2.3, two years of age is still considered a critical time in terms of bonding and attachment. Attention therefore needs to be given to the suitability of individual alternative care arrangements before it can be determined whether such arrangements will be in the two year old child's best interests.

With reference to the separation of the child from his or her incarcerated mother, Section 7(1)(*d*)(*i*) refers to the potential effects on the child 'of any change in the child's circumstances, including the likely effect on the child of any separation from both or either of the parents'. Section 7(1)(*h*) deals with the child's emotional security in making decisions regarding the child's best interests. It is difficult, if not impossible, to determine the exact outcome of decisions on a child's future emotional security. However, it is suggested that an individual case study of the suitability of all possible care options available, would serve the child better than an inflexible rule which determines that at age two all children are required to be separated from their incarcerated mothers.

The need for a child to be brought up in a stable environment [Section 7(1)(*k*)] is linked to the child's emotional security. Before the decision is taken to separate a child from his or her incarcerated mother, it needs to be ensured, as far as is possible, that the alternative care options provide stability, security and love in order for the child to thrive. If alternative options do not provide these elements, it may be that allowing the child to remain with his or her mother past the two year cut-off while more suitable arrangements are made, would be in the child's best interests.

As might be expected, South African domestic law, as contained in the CA places the primary responsibility for bringing up children upon their parents [Section 18(2)]. If children are separated from their mothers they will be catered for under Section 7(1)(*k*). Furthermore, they will be deemed to be children in need of care and protection, as provided for in Section 150. Section 150(f) finds that a child is in need of care and protection if the child 'lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being'**.** If the circumstances in which a child resides in prison with his or her mother are not safe, then it would be deemed in the child's best interests to secure appropriate alternate care. In such a situation the DCS refers such cases to the Department of Social Development (the DSD).

4.2.2 *Policy, Legislation and Practise Relating Directly to Children who Accompany their Incarcerated Mothers*

In South African prisons the 'proportion of women to men is exceptionally low, even by international standards' (Du Preez, 2006: 3). For the period 2009/2010, women constituted '1,63% of the total inmate population' (Department of Correctional Services, 2010: 27).[19] While the numbers of children who accompany their mothers in prison are small the rights of each of these infants and toddlers as valuable members of society who are dependent on others, remains a priority.

[19] Further statistics and information on mothers and their children in South African prisons will be given later in chapter 4.

According to the DCS (2010: 13), a contributing factor to the very low numbers of incarcerated women in South African prisons is the priority that is currently been 'given to reducing the numbers of females in custody'. While no explanation was given for this prioritisation, the DCS stated in its Annual Report for the 2009/2010 financial year that it is of the view that heavily pregnant women and mothers who have just given birth should not be imprisoned and 'their sentencing or implementation of their sentencing postponed' (Department of Correctional Services, 2010: 27). Luyt described factors contributing to the decline in the female inmate population as: the use of correctional supervision as an alternative to imprisonment since 1991/2, together with 'special remissions on sentences, along with ... special amnesty for sentenced women with children under the age of 12' (Luyt, 2008; 305).

In keeping with international standards as discussed in the previous chapter, women in South African Prisons are detained in separate facilities [see Rule 8(a) of the UN Standard Minimum Rules for the Treatment of Prisoners in part 3.2.3]. As of March 2010 there were 8 female correctional centres in South Africa and 90 correctional centres for men and women (kept separately in different sections) (South African Government Information: Correctional Services). South African prisons are overpopulated by on average 150% (Hesselink and Dastille, 2009: 65). The level of overcrowding at female correctional centres varies from prison to prison. Unfortunately statistics from South African studies into female correctional centres have produced somewhat conflicting results. One study stated that in July 2009, the 'Pretoria female correctional centre was 167, 46% overcrowded while the Johannesburg female correctional centre experienced a 75% overcrowding rate' (*Ibid.* p 66). However, a more recent study by Luyt and Du Preez in 2010 (2010: 93) indicated that 'overcrowding is not a general problem in female centres but isolated instances of overcrowding does [*sic*] occur'.

What is significant however, is that the female prisoner population in South Africa is very small, and according to Luyt (*Ibid.* p: 89) the outcome of being a minority in 'one of the ten largest correctional systems in the world ... may end in extreme marginalisation'. Important for this study is the fact that most prisons in South African where women are held were never designed to meet the needs of women, and they certainly were not designed with the best interests of children in mind (Du Preez, 2008: 6). Aside from facility design, other factors

such as: the availability of food and clean water, overcrowding, lack of cognitive stimulation and inadequate play equipment, lack of father-figures, noise-levels, access to medical services and medicines, treatment of young children by prison staff, contact with other family members and the community, lack of heating etc. all need to be considered in determining whether it is in the child's best interest to remain with his or her mother if she is incarcerated.

As of Saturday 31 March 2010 there were 129 babies and toddlers in South African prisons with their mothers (DCS, 2010: 24). As stated in Part 2.2.4, the number of children incarcerated with their mothers is low because '...most imprisoned mothers would rather have their children taken care of by someone outside the prison' (Du Preez; 2008: 2). However, some mothers opt for bringing children with them to prison because of a 'lack of supervision for the child in open society' (Luyt, 2010: 107). Prior to 1994 mothers who were imprisoned with their babies were housed in the same facilities as the rest of the general female population. It was only in 1996 that the 'need for specialised care for this group of offenders were (*sic.*) recognised and the concept of the ideal Female Correctional Centre was developed' (Schoeman, 2006: 6). Separate mother and baby units were created with 'the aim to provide sound physical, social and mental care and development for infants of imprisoned mothers' (*Ibid.*).

The treatment of female prisoners and the children incarcerated with them in South African prisons is governed by the Correctional Services Act 111 of 1998 (the Act). In 2008 the Act was amended by the Correctional Services Amendment Act 25 of 2008 (the CSAA). Section 20 of the Act now reads as follows:

> Mothers of young children
>
> 20. (1) A female inmate may be permitted, subject to such conditions as may be prescribed by regulation, to have her child with her until such child is two years of age or until such time that the child can be appropriately placed taking into consideration the best interest of the child.
>
> (1A) Upon admission of such a female inmate the Department must immediately, in conjunction with the Department of Social Development, take the necessary steps to facilitate the process for the proper placement of such a child.
>
> (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 National Commissioner must ensure that a mother and child unit is available for the accommodation of female inmates and the children whom they may be permitted to have with them.

The wording of Section 20(1) indicates that mothers are 'permitted' to have their children in prison and this practice is subject to such conditions as may be prescribed by regulation [Section 20(1)]. Such regulations are contained in the DCS B-Orders (2005, chapter 21) and in the *Infants and Mothers Policy (*no date).[20] The *Infants and Mothers Policy* orders that a female offender must apply in writing to keep her infant with her in prison (Section 7.9). Furthermore, Chapter 21 of the DCS B-Order 1, stipulates that admission of an infant and mother is only permitted when no other suitable accommodation and care is available at that point (B-Order 1: Chapter 21 Section 3.1). It is important to note that neither the Act nor the policy framework mentions the opinions and wishes of the child's father or other relatives in the decision-making process. This is in contradiction to Chapter 3 of the CA which promotes co-operative parenting [Section 3(19-20)].

The Act also states that a mother may have her child with her 'until such a child is two years of age or until such time that the child can be appropriately placed taking into consideration the best interest of the child' [Section 20(1)]. This point is reiterated in DCS B-Order 1 (2005; Chapter 21, Section 1.0): 'The accommodation of an infant in the correctional centre/prison remains an interim measure and suitable placement needs to be addressed actively'.

In terms of the CSAA a child can now remain in prison with its mother only until it is two years of age. Prior to the 2008 amendment a mother was allowed to keep her child in prison with her until the child was five years of age (Section 20 of the Act). The DCS (White Paper on Corrections in South Africa, 2005: 79) indicates that policy dealing with female offenders with children must be 'flexible enough for adjustment on the basis of proper assessment of the particular family circumstances of the child outside of the correctional centre, and alternative arrangements that can be made'. The White Paper on Corrections gives no

[20] The *Infants and Mothers Policy* developed out of recognition of principles in the 2005 'White Paper on Corrections in South Africa' as well as the Department of Correctional Services Strategic Plan. The aim of the policy was to 'ensure that care and treatment of young children in the DCS is practiced in [our] Correctional Centres according to set standards' (DCS, *Infants and Mothers Policy,* no date).

indications of the age at which a child should be separated from its incarcerated mother and it is therefore difficult to interpret where such flexibility was intended to be applied.[21] At the time of the drafting of the White Paper on Corrections in South Africa the age of separation was five years of age (as stipulated by the Act).

Current policy states that when the child reaches the age of two, the DCS, together with the DSD, is required to take steps to assist with the suitable placement of the child [Section 20(1A)]. It would appear that the position of the DCS is based on the ideal that every child would be taken from its mother and placed in a loving and stable environment which fosters continued contact with the child's mother. Schoeman and Basson (2006: 1-27) conducted research into South African prisons and suggested that allowing children to remain in prison with their mothers for longer than the first two years of life the negative effects begin to outweigh the positive results of mother-child bondin. It was the study undertaken by Schoeman and Basson which resulted in the age of separation being reduced from five years to two years (Hesselink and Dastile, 2009: 65).

In South Africa it is common for alternative care for this group of children to be arranged with family members, or foster parents, and if neither of those options are available or suitable, then placement in a residential facility is organised (Makhaye, 2010: 1). Once children are removed from prison their well-being should be monitored, either by prison officials or by social welfare bodies. No research, published or otherwise, was found on the suitability of the arrangements made for children who have been removed from their mothers in South African prisons. Regarding the post-prison monitoring of these children the DCS's B-Order 1 policy states that once an infant has been 'placed-out' an 'external organisation' must monitor the child and render supportive services after placement (para. 15.5). No explanation is given in this policy as to what such an 'external organisation' is. It is also required that a progress report must be submitted to the social worker and DCS official concerned 'in order to keep the mother informed on a quarterly basis' (DCS; B-Order 1: para. 15.5).

[21] Despite repeated attempts by the author to contact the Department of Correctional Services to obtain clarity on the interpretation and application of the phrase 'flexible enough' no response was obtained.

Section 20(2) of the Act (Act 111 of 1998) states that the DCS 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'. Based on the high levels of poverty in South Africa many of the infants who reside in South African prisons might get better food, clothing and health care than they would have in the community (Schoeman and Basson, 2006: 13). A Corrections Coordinator of the Pretoria female correctional centre stated that 'it is known that some pregnant females commit petty crimes such as shoplifting prior to the birth of their babies' (Hesselink and Dastile, 2009: 66). By doing this 'the pregnant mother receives a lighter sentence, and she knows that she will receive adequate to good medical care and regular access to such medical services during the birth of her baby' (*Ibid.).* Hesselink and Dastille suggest that some impoverished mothers might thus perceive a period in a South African prison as an opportunity to access better nutrition, clothing and health care for herself and her baby than she would have been able to provide on the outside (*Ibid.*)

In 1996 Mother and Baby Units were established in South African prisons to provide physical, social and mental care for babies and young children who live in prison with their mothers. Although the intention was that these units should provide crèche facilities with professional childcare workers, it was found that in terms of facilities and developmental opportunities there was a gap between policy and reality (Schoeman and Basson: 2006: 21 - 23). In 2010 Luyt and Du Preez (2010: 108) interviewed female prisoners in South Africa. Some of the female prisoners who were housed in the 'normal' (ie not mother and baby units) claimed that 'children who slept on the floor were exposed to the rats running around'. Of those mothers interviewed in this study, nearly half were concerned that there was insufficient food for their children, and all the mothers 'agreed that the food was not nutritious enough' (*Ibid.* p: 107). If such conditions are the norm then allowing children to accompany their mothers in prison would not be in their best interests. Further research into the actual practice and living conditions (particularly in the new mother and baby units) is needed to determine if a disparity between policy and practice still exists.

Section 20(3) of the Act places an obligation on the National Commissioner to ensure that, where practicable, a mother and child unit is available for the accommodation of female prisoners and the children incarcerated with them. In 2010 the DCS launched the Imbeleko Project with the intention of creating safe and friendly conditions for mother-child

interactions within the prison environment. The Project also focuses on finding alternative placement for children older than two years of age outside correctional facilities. This would be either with a family member or guardian chosen by the mother, or in the event where there is no suitable guardian, the child will be placed in a foster care unit. The DCS assures that the child 'would still maintain the psychological and emotional contact with the mother through arranged visitations' (DCS, 2011).

In a further attempt to meet the requirements of Section 20(3) of the Act, on 18 August 2011 South Africa opened its first unit for imprisoned mothers and their incarcerated children at Pollsmoor Prison in Cape Town. The Correctional Services Minister, Nosivivwe Mapisa-Nqakula was quoted as saying that the unit was not a 'guesthouse', but at the same time 'children should not be punished' for the sins of their parents. In its official press release at the launch, the DCS (2011) stated that this

> [M]odel establishment offers a dedicated medical facility for both mother and child, has a kitchen that mothers can use to prepare meals and warm milk for the babies, a fully functional nursery and facilities where the women can attend rehabilitation programmes. It is spacious and will offer the children freedom of movement and expose them to basic necessities such as fresh air, grass, trees, direct sunlight and all of which were considered luxurious to all babies growing behind bars.

The second of five such centres was launched on 26 August 2011 at the Durban Westville Correctional Centre. A further 3 similar facilities are expected to be created in the Gauteng, the Free State and the Eastern Cape (DCS, Government Documents, no date).

4.3 *The Jurisprudence of the South African Courts*

In South Africa the judiciary is 'responsible for decisions regarding imprisonment' (Luyt, 2008: 307). There are no South African cases, current or past, which deal specifically with the issue of children incarcerated with their mothers, or with the separation of these children from their mothers. However, the South African Constitutional Court has dealt with cases relating to the best interests of children when their primary caregivers are being sentenced. Three such cases which are considered useful to this study will be examined. The

recommendations in each of these cases demonstrate that the best interests principle cannot be exercised in a generalised manner and, in the context of this study, would require a flexible policy to be applied.

In the case of *S v M* [Centre for Child Law as amicus curiae) 2008 (3) SA 232 (CC)] the CC led by Justice Sachs, addressed the best interest of the child and described the duties of a court considering a sentence for a primary caregiver. The woman accused ('M'), the primary caregiver of three sons, aged 16, 12 and 8, had been convicted of a series of frauds and was facing imprisonment. She had not been married to either of the two fathers and neither of the fathers lived with 'M' and her sons. In handing down a sentence the CC weighed up the competing rights of the best interests of the child with the community's right to be safe from crime, and imposed a non-custodial sentence based on the principle of restorative justice. Bearing in mind the facts of the case, as well as the rights of the sons as contained in Section 28 (2) and Section 28 (1)(b) of the Constitution, the Court held that the children's interest would only be assured if they remained in the care of their mother.

In focussing on the 'best interests of the child' principle the Court set out guidelines to promote uniformity in its application. These guidelines are widely quoted in national and international jurisprudence.

The precedent established in *S v M* requires all South African courts to give particular attention to the best interests of the child when sentencing a primary caregiver. This landmark ruling is applied in both bail proceedings as well as sentencing and has 'often, though not always, resulted in a non-custodial sentence' (Skelton, 2011: slide 16). According to guideline four, where a non-custodial sentence is imposed, the court must be satisfied that the children's needs will be met and that measures are in place to do so. In *S v M* the Court appointed a curator *ad litem* to investigate the children's situation and represent their interests. In order for the guidelines to be followed, the courts will be required to conduct individual assessments of the children affected.

In describing the application of the guidelines Justice Sachs stated that 'a balancing act has to be undertaken on a case-by-case basis. It becomes a matter of context ...' (para. 37). Thus the steps in guideline three, which state that:

> [i]f 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,

should include individual assessments to determine whether it would be in the child's best interests to leave the prison at age two, or to continue staying with the mother until the mother is released or until better alternative plans can be made.

Although the best interests principle must be applied in every matter concerning a child, its application does not mean that the rights of the child will automatically trump those of the rest of society. If this were the case, convicted mothers would never be handed custodial sentences. In *S v M* Justice Madala explained, in a dissenting judgement, that in a 'situation where the children will not suffer hardship, a primary caregiver may have to be incarcerated if there are aggravating factors justifying such an eventuality' (*S v M,* para. 107). Skelton (2011: slide 14) states that when applying this judgement if possible imprisonment will be 'detrimental to the child, then the scales must tip in favour of a non-custodial sentence, unless the case so (sic.) serious that they would be entirely inappropriate'.

In applying the guidelines established in *S V M* to this study, it is submitted that in some circumstances (for example when the mother is herself also soon to be released from prison, or when there are no relatives or friends available or willing to assume responsibility of the child) the child's interests may also only be assured if they remain in the care of their imprisoned mother. Such circumstances, and the ensuing conclusions, can only be uncovered via an individual examination of each child's situation.

In *MS v S* (Centre for Child Law as *amicus curiae*) 2011 (2) SACR 88 (CC) the facts of the case were in many respects similar to those of *S v M.* However the defining difference that resulted in a custodial sentence being imposed was that she was not the sole caregiver of the children, as in the case of *S V M.* In *MS v S,* Mrs S was the married mother of two young children. She was convicted in the Regional Court on charges of forgery, uttering and fraud and sentenced to five years' imprisonment with conditional correctional supervision.

Mrs S applied for leave to appeal in the CC contending that 'the sentencing court and the Supreme Court of Appeal failed to adequately consider the best interests of the children during the sentencing process' (para. 2). Her application was unsuccessful because the Court decided that her case was different to *S v M* because Mrs S was married and her husband was available to take care of the children while she was in prison. The court obtained a further report from a curator and stated that 'nothing in the report of the curator suggests that the children will be inadequately cared for should their mother be incarcerated in accordance with the sentence imposed on her' (para. 65). In order to ensure that the children would be appropriately cared for in her absence, the Court ordered the DCS to appoint a social worker to visit the children on a regular basis. Skelton (2011: slide 32) said that it was 'regrettable' that the CC held that the precedent set in *S v M* applied only to single primary caregivers.

Although the case of *MS v S* resulted in the original custodial sentence being upheld, of relevance to this study are the individual assessments of the affected children which were conducted prior to the sentence being upheld, and the fact that the CC appointed a curator *ad litem* to monitor the care of the children and to report on whether the children should be found in need of care and protection as envisaged in Section 150 of the CA [para. 67(4)]. Following the precedent established in these two cases, an individual assessment of the needs of each child would determine decisions that would serve their best interests. Rigidly applying Section 20 of the Act without such an investigation would not afford the child such protection.

In the case of *S v Howells* 1999 (1) SACR 675 (C) the court made a similar order to that in *MS v S* to deal with the situation of minor children after the sentencing of their mother to a term of custody. In this case the Department of Welfare and Population Development was requested to investigate the affected children's circumstances (Order 3.1), as well as to ensure that they were properly cared for during their mother's imprisonment (Order 3.1.1). What distinguishes this case from *MS v S* was the further request made of the Department of Welfare and Population Development: to take steps to ensure that the children remained in contact with their mother while she was in prison (Order 3.1.2); and to ensure that everything reasonably possible was done to ensure that the children and their mother were reunited upon her release, and to ensure the 'promotion of the interests of the family unit thereafter'. Orders 3.1.1 and 3.1.2 would be applicable when and if the decision is taken to separate a child

incarcerated with its mother. The DCS B-Order 1 stipulates that 'as far as practically possible and in the best interest of the child, the mother and child relationship should be nurtured and promoted' (Section 15.11). As discussed in Part 4.2.2, it is unfortunate that there are no practical guidelines to assist the implementation of this guideline. This could render this particular section ineffective.

The relevance that these cases have for the topic of this paper can be summarised as follows: although the best interests principle is not absolute and its application is not without difficulty, its purpose is to protect the interests of children both individually and collectively. In order to determine the best interests of a particular child, the unique circumstances of that child need to be considered. Furthermore, by making non-custodial sentences a priority (including during pre-trial sentencing) and by promoting alternatives and community-based restorative sentences, the difficulties raised in the process of deciding the appropriate age at which the child should exit the prison can largely be overcome. Skelton (2011: slide 33) asserts that "avoidance of remand detention and sentences of imprisonment for primary or 'main' caregivers is a preventative strategy that more countries should be encouraged to use".

4.4 *South Africa's Compliance with International Obligations Relevant to Children Incarcerated with their Mothers*

This section contains a brief analysis of the extent to which South Africa fulfils its obligations under the international human rights frameworks referred to in Chapter Three. In the context of this study South Africa is bound to consider the 1948 Universal Declaration of Human Rights, the CRC and the ACRWC. Whilst the other international and regional instruments which were highlighted in chapter 3 do not have binding status for South Africa, it must be remembered that the courts are required to consider international law which is binding, as well as so-called 'soft' international law which is not binding (Mubangizi; 2004: 47) [22]. Mubangizi (*Ibid*.) states that the 'term "international law" [in Section 39(1)(*b*) of the

[22] Since the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) are not legally binding, South Africa is under no legal obligation to implement them. However, they were acknowledged in the Correctional Services Annual Report for the 2009/10 Financial Year (see part 4.2.2) and this acknowledgement represents a concerted effort by the DCS to keep

Constitution] should and has been interpreted generously to allow recourse to treaties such as the European and American Conventions on Human Rights, to which South Africa is not and cannot be a party'. It can be deduced that international law plays an important role in the protection and advancement of human rights in South Africa.

Mubangizi explains that prior to certain international legal principles being afforded binding status on domestic law in South Africa, they have to be assimilated into the domestic legal system by way of legislation (*Ibid.*). A number of standards and principles contained in the international instruments examined in Chapter 3 have been domesticated in South Africa through legislation and policy provisions. As discussed the chief piece of domestic legislation relevant to this study is the Act. However, although the Act has provisions which relate directly to children who accompany their mothers in prison (Section 20), the Constitution, as the supreme law of the land, provides the greater general protection for these children.

4.4.1 *The Duty to Uphold the Best Interests of the Child*

The best interests principle is declared in the Constitution [Section 28(2)] and in the Children's Act (Section 9) and it is recognised in Section 20(1) of the Correctional Services Act. The Department's B-Order 1 *Infants and Mothers Policy* states that the best interests of the child shall be a primary consideration when considering the child's placement (Section 7.10).

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abreast of and implement, international human rights frameworks. As was stated in Part 4.2.2 the Bangkok Rules currently constitute the most comprehensive and specific international instrument relating to the treatment of women prisoners and their children. Of direct relevance to this study is the fact that the Bangkok Rules state that decisions about when a child is to be separated from its mother (or father) must be based on individual assessments and the best interests of the child (Rule 52). It is submitted that an assessment of Section 20 of the Act and how it compares with international frameworks, such as the Bangkok Rules, may aid in bringing national policy into line with international trends and practices.

4.4.2 *The Duty to Protect Children from all Forms of Discrimination*

The Constitution refers to the principle of equality in Section 9 and prohibits unfair discrimination of any kind. Likewise the CA protects children from unfair discrimination on any ground (s 6(*d*)]. The Department's *Infants and Mothers Policy* states that one of the objectives of the policy is to ensure this group a 'satisfactory degree of care free from any form of discrimination' (Section 6.1).

4.4.3 *The Duty to provide Safe Environments and Appropriate Services*

One way of pursuing the best interests of this group of children is reflected in the DCS's effort to improve facilities, through initiatives such as the Imbeleko project. The DCS's B-Order 1 also gives detailed specifications regarding the accommodation and care of infants, medical and health care, development and stimulation of the infants and the nutrition of the infants. While these efforts constitute progress in the realisation of the rights of these children it has to be acknowledged that sometimes there is a hiatus between policy and practice, and sometimes children experience conditions such as those described in Part 4.2.2.

4.4.4 *The Duty to Prevent the Unnecessary Separation of Parent and Child*

The Constitution affirms the right of children to family care or parental care in Section 28(1)(b) and the CA states that children need 'to remain in the care of his or her parent, family and extended family' [Section 7(1)(f)]. However, the provision in Section 20(1) of the Act that a child may remain with its mother 'until such child is two years of age or until such time that the child can be appropriately placed taking into consideration the best interest of the child' could in practise be deemed to be in contradiction with the sections of the CRC, the Constitution and the CA referred to above.

For some children, alternative care plans may also be less favourable than remaining with the mother in prison. In such instances, the effect of a policy decision that is rigidly applied and forces the separation of a two year old child from the only environment and carer the child knows, may be catastrophic. The Act would then not be fulfilling its own aim of seeking

appropriate placement for the child that takes into consideration the best interest of the child. It would also not be meeting the Constitutional or CA requirements of rendering the child's best interests of paramount importance.

It is further submitted that by rigidly applying a ruling that states that children must be separated from their mothers at age two the State is, in effect, interfering with the child's family care [as expressed in the Constitution, Section 28(1)(b)] which the Act has allowed and encouraged to develop. What is needed is flexibility and decisions which are based on the unique circumstances of each child [*Fitzpatrick v Minister of Social Welfare and Population Development* [2000] 7 BCLR 713 (CC)].

Article 9 (3) of the CRC refers to the responsibility of the State in enabling the child to have regular contact with his or her parent. The Department's B-Order 1 stipulates in Section 15 (which deals with the placement of the infant) that '[a]s far as practically possible and in the best interest of the child, the mother and child relationship should be nurtured and promoted'. However, no written policy was found stating that the Department has any practical measures in place to ensure the realisation of the child's right to have continued regular contact with his or her mother.

The provision which allows a child to maintain contact with his or her incarcerated mother is positive, but without the practical systems to assist the child and the new primary carer, it has the potential of becoming an empty directive. A practical outcome of the combination of the low numbers of female prisoners in South Africa and the vastness of South Africa, is that it is not always possible to incarcerate mothers near their families (Du Preez, 2006: 32). As a result, maintaining physical contact with an incarcerated mother is likely to be difficult for many children.

4.4.5 *The Duty to Provide Continuity of Care and Special Protection to the Child Temporarily Deprived of His or Her Family*

The following provisions in Section 20 of the Act can be seen as fulfilling the requirements under Article 20 of the CRC, in as much as they call upon the Department to:

- facilitate the process for the proper placement of the child [s (1A)];
- be responsible for the food, clothing, health care and facilities for the child while the child is in prison [Section 20(2)]; and,
- ensure that a mother and child unit is available to accommodate the mother and child [Section 20(3)].

To some extent Section 20(2) would also be seen as meeting the requirement of Article 6(2) of the CRC which declares that states must ensure to the 'maximum extent possible the survival and development of the child'. It is reminded that at times there is a hiatus between the good intentions of policy and the practical reality that is experienced in South African correctional facilities. In a study conducted by Heselink and Dastile (2010, 76) it was stated that:

> Clothing, bottles, pacifiers, nappies, toiletries (i.e. powder and creams) and toys are mostly donated by organisations; non-governmental organisations and individuals, and all the mothers stated that there is a severe shortage of baby baths; walking rings; nappies; blankets; milk formula; toiletries and clothes...

It is submitted that the recently established mother and baby units will need to be evaluated to establish whether or not they meet the requirement of the CRC of ensuring to the 'maximum extent possible the survival and development of the child' [Article 6 (2)].

4.4.6 *The Duty to Assist Parents with their Child-Rearing Responsibilities*

The DCS's *Infants and Mothers* policy declares in the background to its policy that the DCS recognises the social significance of the role of mothers and is committed to 'taking appropriate measures to ensure the full development and advancement of mothers with their

infants' (Section 3). The DCS's B-Order 1 states that one of its aims is to create as many opportunities as possible for mothers to exercise and develop their parental responsibilities, duties and skills (Section 4). Two specific provisions in Section 12 of this policy are worth quoting:

> 12.5 A programme in effective parenting must be made available to mothers in a correctional centre/prison and should also be expanded to fathers.
> 12.7 Programmes offered to female prisoners must include child development and stimulation.

From the above provisions it would certainly appear that the Department is attempting to meet its obligations under Section 18(2) of the CRC. At the launch of the Mother and Child Unit at Pollsmoor Prison the Minister of the DCS emphasised that mothers would be able to attend rehabilitation programmes (DCS, 2011). Furthermore, in the study by Luyt and Du Preez (2010: 103) referred to in Part 4.2.2, it was found that some of the female prisoners were 'working towards obtaining a school certificate', some were 'receiving vocational training', and some were 'participating in other training courses'. While such programmes may not be aimed at improving parenting skills *per se*, they do have the potential of improving incarcerated mothers job prospects upon release, thus allowing them to provide for their children.

4.4.7 *The Duty to Provide Appropriate Medical and Health Care for Pregnant Women and Infants*

South Africa complies with Rule 23 of the UN Standard Minimum Rules for the Treatment of Prisoners (the SMR; see Part 3.2.3) which stipulate that adequate care be provided to the mother and the infant. Section 9.2 of the B-Order 1 conforms with the SMR requirement that the fact that the child was born in prison should not be recorded on the birth certificate. The DCS's B-Order 1 outlines detailed provisions for the care of pregnant women, as well as for the medical and health care of infants who are incarcerated with their mothers (s 10).

4.4.8 *The Duty to Ensure that Children are Able to Engage and Interact with People in their Community of Origin*

In South Africa policy states that contact visits must be made possible between the infant and the other members of his or her family but no details are supplied about the frequency or duration of such visits (DCS B-Order, no date: 12.3). Section 19(3) of the Act refers to additional visits which child inmates should be allowed to have in order to remain in contact with their families. However, as with the DCS B-Order policy, Section 19(3) of the Act is general in its application and stipulates that the 'National Commissioner must, if practicable' ensure that these children receive additional visits. It is submitted that the clause 'if practicable' does little to ensure that these children are enabled to remain in contact with their families.

Visits in South African prisons are a maximum of forty minutes long but in reality this time is often shortened to allow more prisoners to receive visitors (Luyt, 2008: 318). According to Luyt (*Ibid*.) this problem is compounded by 'directives that dictate that family visits should predominantly be granted over weekends. Sadly, weekends have proven to be even more problematic for proper visits, as prisons are managed with only half the normal staff complement over these periods'. Such complications would make it difficult for children who accompany their mothers in prison to maintain their right to have contact with family (especially the father and siblings, but also the extended family) and friends, and to establish relationships with them.

4.5 *Conclusion*

South Africa has detailed policy documents which attempt to address the needs of the infants and young children who are incarcerated with their mothers. The core legislation relevant for children subject of this study, the Constitution, the Children's Act and the Correctional Services Act, all protect the best interests of the child. Over the years the Department of Correctional Services has developed a detailed policy concerning mothers and their infants in South African correctional facilities. The recent opening of several dedicated mother and baby units bears testimony to the Department's recognition of the importance of family life

and in particular, of the right of the child to the care and company of the parent under Article 9 of the CRC.

However, it is submitted that Section 20 of the Act, which imposes a blanket determination of the age at which a child must be separated from his or her mother, does not fully respect the best interests of the child, nor the right of the child not to be separated from his or her mother (Article 9 of the CRC). Section 20 of the Act certainly addresses the interests of the child and while consideration is given to the child's best interests in finding appropriate alternate placement for the child, it is proposed that it cannot be claimed that the principle of the best interest of the child is the overarching principle of the Act.

The best interests of the child cannot be determined at a collective level. They need to be assessed and determined through an individual assessment of the unique circumstances of each particular child. Section 20 of the Act refers to the best interests of the child but also imposes an age by which all children must be separated from their incarcerated mothers. Since a prison environment would not be considered the ideal place of development for anyone, such a provision is most likely to serve the best interests of most children who are incarcerated with their mothers, but for those children for whom alternative care plans render them in a worse situation than they experience with their incarcerated mothers, this provision could be catastrophic. In the words of Skelton (2009: 283; as quoted in Part 4.2.1.1) the application of a pre-determined formula for 'the sake of certainty, irrespective of the circumstances would in fact be contrary to the best interests of the child'.

The precedent established in the case of *S v M* is positive in that courts are obliged to consider the best interests of the child when sentencing a primary caregiver, and it urges them to consider non-custodial sentences. However, no South African cases have addressed the removal of children who accompany their mothers in prison at a pre-determined age.

In the following chapter, two British cases which specifically challenged the legality of the policy relating to age limits for children within mother and baby units will be discussed. Selected examples of international good practice in the care and protection of the children who are incarcerated with their mothers will also be reviewed. Consideration will be given to how these examples can be applied to the South African context.

CHAPTER 5: SELECTED COMPARATIVE ASPECTS IN TERMS OF THE TREATMENT OF CHILDREN INCARCERATED WITH THEIR MOTHERS

5.1 *Introduction*

When children leave prison they may do so with or without their mothers. They leave prison before their mothers if it has been decided that it is in their best interests to do so, or if they have reached the age or developmental level after which they are no longer allowed to stay. Appendix 2 contains a table listing age limits and policies regarding children accompanying their mothers in prisons around the world. Officially the policies range from children not being allowed to accompany their mothers in prison at all, to an upper limit of seven years of age in some Brazilian states. However, there are documented cases of children being well past the age/developmental limit of that particular region but still residing in prison because either they were forgotten in the prison system, or because no alternative care was found. Robertson (2008: 27) reports on 'some Indian children aged 15 still living in prison because nobody came to collect them'. Appendix 2 indicates that some states, such as Austria, Australia and Bangladesh include a degree of flexibility in their regulations, by allowing children to remain with their mothers even if the official limit has been reached if the mother is shortly to be released.

One of the purposes of this study is to assess whether South Africa can learn from other countries in terms of the treatment of children incarcerated with their mothers. Thus, Chapter 5 examines the following themes:

- avoiding the incarceration of mothers with young children;
- provision for children incarcerated with their mothers;
- age of release and;
- leaving the prison and post-release services available to children who were incarcerated with their mothers.

5.2 *Avoiding the Incarceration of Mothers with Young Children*

During the 1990 UN Congress on the Prevention of Crime and Treatment of Offenders, it was declared that the use of imprisonment for pregnant women or mothers with infants or small children should be 'restricted and a special effort should be made to avoid the extended use of imprisonment' for this category of offenders [para. C 5(*f*)]. Around the world, most women offenders are convicted of petty, non-violent offences, and are therefore not a danger to society and do not need to be imprisoned for reasons of public safety (Robertson, 2008: 31). Protecting the best interests of children might necessitate the use of alternative sentences for convicted mothers, such as community orders or probation, or as is the case in some countries, deferring imprisonment until the children are more mature. This section examines the sentencing practice in some states for women who have caring responsibilities.

The Italian Government has been sensitive to the needs of convicted women and mothers, as well as to the children affected. In 2011, the Decree of Law No. 2568, which will be implemented in January 2014, was approved. This Decree stipulates that pregnant women or mothers with children below 6 years of age who are in pre-trial proceedings can spend a part of their sentence in home detention. This is on condition that they have already served one third of their sentence, are assessed to be at low risk of committing further offences and have children under the age of 10 years (Associazione Comunita Papa Giovanni XXIII, 2011: 4). This Decree amends earlier Italian law which already foresaw the possibility of home detention for parents of young children, who have to serve sentences longer than 4 years (Italian Law 663/86).

In Georgia, legislation allows for a suspension of the sentence for a pregnant woman up until a year after her pregnancy. Otherwise, mothers who have been incarcerated can keep their infants with them until they are three years of age (Penal Reform International, 2011: 2). Armenian law stipulates that pregnant women or women with children under the age of three, except those imprisoned for serious crimes and with a sentence of more than five years, can be exempted from punishment (Art. 62 of the Criminal Code of the Republic of Armenia, 2003).

Mothers and children in Russian prisons live in separate quarters and mothers are not involved in the daily care of their children who are incarcerated with them. Children who accompany their mothers in prison, are therefore deprived not only of their freedom but also of their main caregiver. Although the Russian prison system is not particularly child-friendly, the Criminal Code of the Russian Federation of 1996 provides that a sentence may be reduced, postponed or even cancelled for pregnant women or for women with children under the age of 14 years [Article 82(1) of the Criminal Code of the Russian Federation, 1996]. This applies only to women who are convicted of less serious offences, that is, those for which a prison sentence of five years or less may be imposed [Article 82(1)]. Once the child reaches age 14 the sentence is reviewed and a decision is taken on whether or not to impose the original sentence. The deferral of a sentence until the child is more mature aligns with the ideal of not interfering with the mother/child bond.[23]

Given even a basic understanding of child development and the impact that forced separation could have on a young child, in cases where a custodial sentence must be imposed on a mother, the deferral of such a sentence until the child is older could be considered in a South African context. In its 2009/10 Annual Report, the DCS stated that it is of the view that women who are pregnant or who have just given birth should 'not be incarcerated, and their sentencing or implementation of their sentencing [should be] postponed' (DCS; 2010: 27). It must be remembered that South Africa has ratified the ACRWC, which in Article 30 promotes the use of non-custodial sentences for this group of women. However, currently there is no national legislation which stipulates the use of non-custodial sentences or the deferral of sentences, for women who are pregnant or who have infants or young children. The 2005 White Paper on Corrections made the generalised statement concerning female offenders that there is 'greater potential for successful rehabilitation through alternative

[23] Although in theory this penal code is promising, according to the International Centre for Prison Studies (2008: 134) in reality this particular section of the penal code is rarely practised. The decision to reduce, postpone or cancel a mother's sentence is 'made after arriving in prison, not by the courts, and the option is only available 6 months after arriving at the prison' (International Centre for Prison Studies, 2008: 134). It has been suggested that 'the courts should make any decisions regarding the postponing etc of a custodial sentence' (*Ibid.*).

sentences' (DCS; 2005: 79). However, to date this suggestion has not been formalised in national legislation or policy.

Despite the fact that there are no official policy guidelines advocating the use of non-custodial sentences for women who are pregnant or who have young children, the reduction in numbers of incarcerated mothers in South African prisons is evidence that non-custodial sentences are in fact being used for this group of female offenders. In Part 2.2.1 of this study it was noted that the use of correctional supervision as an alternative to imprisonment since 1991/2 together with 'special remissions on sentences, along with ... special amnesty for sentenced women with children under the age of 12' are factors contributing to the decline in the female inmate population' in South Africa (Luyt, 2008; 305).

The case of *S v M* [Centre for Child Law as amicus curiae) 2008 (3) SA 232 (CC)][24] established judicial precedent in describing the duties of a court considering a sentence for a primary caregiver. As discussed in Part 4.3, the CC ruled that the best interests of the child principle must be applied by a court when sentencing the primary carer of minor children, and, in so doing, established guidelines for courts to follow. The guidelines are based on the premise that the sentencing court must establish whether a convicted person is a primary carer, and if so, what the effect of a custodial sentence (handed to the primary carer) may be on the children.

While the guidelines established in *S v M* are widely used, it is suggested that the deferral of sentences, as applied in, for example, Georgia, Russia and Armenia, could add further sentencing options that take into account the needs of the child. Likewise, the use of alternative sentence options, such as home detention for those convicted mothers who qualify for such sentences, may better serve these women, their children and their communities.

5.3 *Provision for Children Incarcerated with their Mothers*

While the focus of this study is on policy flexibility in terms of age of separation, prison facilities are relevant because policy flexibility may mean that some children continue

[24] As discussed in Part 4.3.

residing in prison after the normal limit has been reached. The conditions of incarceration for women with children vary considerably between countries and even between facilities within the same country. Some countries will not allow children to be incarcerated with their mothers unless appropriate facilities, such as child-friendly accommodation, are available (Robertson, 2008: 11). Common to most facilities that allow children is the provision of special rules for children living in prison. Children have special needs which must be addressed and because they are not prisoners, they should be protected from being treated as such. The examples below illustrate some of the differences in the way children who are incarcerated with their mothers are provided for.

Ideally, young children who are incarcerated with their mothers should be housed in mother and child units, separate from the general prison population. These facilities should ensure the safety of the children residing in them, and they should provide the children with stimulating and age-appropriate environments. Children should be given adequate nutrition and suitable medical treatment and they should be immunised as they would be outside prison.

In the Netherlands a great deal of effort has been made to provide children incarcerated with their mothers with a home-like environment:

> ... children up to the age of four are accommodated at Ter Peel ... set in 25 acres of wooded land with no high wall and minimal security. Because of this, most of the 102 mothers who used the unit in its first two years were convinced that their children did not realise they were staying in a prison ... At Ter Peel, ten rooms were converted to provide a purpose built, self contained unit suitable for babies and toddlers (Caddle and Crisp, 1998: 3).

In many countries, once a woman is sentenced she is incarcerated immediately with no time to make preparations for her children's welfare (Roberston, 2008: 9-10). A simple practise in the Netherlands has potentially positive long-term effects for affected children. Sentenced prisoners in this country are given time between being sentenced and beginning their imprisonment in which they can arrange alternative care for their children living outside prison, as well as collect toys, clothing and other personal effects for the children who will accompany them in prison (Taylor, 2004: 35).

Provision of accommodation for children who accompany their mothers in Spanish prisons used to be in 'converted accommodation where facilities for the children can be poor' (International Centre for Prison Studies, 2008: 55). The Department of Prison Services in Spain has set a goal to remove all children from prison by the year 2012. Currently children can stay with their mothers in prison until they are three years of age. With the objective of removing children from prison in mind, two External Mother Units have been constructed, with a further two being planned. These new units are 'designed around the needs of the children with appropriate educational and play facilities' (*Ibid).* The External Mother Units have been planned and built in an effort to reconcile the fact that prison is not considered a suitable environment for children, with the belief that Spain considers mothers to have a right to be with their young children (Feintach, unpublished in Mason-White, 2010: 19).

Unlike the newly created mother–baby units in South Africa, which are converted prison cells that continue to resemble prisons the new Spanish External Mother Units have been 'designed entirely with the goal of providing a normal, harmonious environment for mothers and children' (*Ibid.*). The construction of the units has occurred alongside the development of policies which have the primary aim of keeping mothers out of prison through 'parole, semi-liberty and monitoring technologies' (*Ibid.*).

In many countries, state support for mothers and their incarcerated children is supplemented by NGOs and religious groups. The Associazione Comunita Papa Giovanni XXIII (hereafter, 'the Associazione') is an international lay association, which as part of its work with the socially excluded, has established family homes in which prisoners, adults and youth, among others, are offered an alternative to imprisonment in agreement and cooperation with the criminal justice system (*Ibid.* p 1-3). In 2011 the Associazione proposed to the Italian Government the idea of allowing imprisoned mothers with their children to live in its family homes (*Ibid.* p 4). This proposal is still under consideration (*Ibid.* p 5).

The proposal offered by the Associazione is based on the belief that every child has the right to stay with his/her mother provided that that the care and conditions rendered ensure the child's psychological and physical well-being. This project aims to offer

> an adequate life environment to the children by guaranteeing as provided by law, the continuity of care and love by the incarcerated parent (mother or father in case the mother is deceased), while at the same time supporting the parent in her/his parental role by establishing significant relationships and the opportunity to discover values that can help the rehabilitation process and future social reintegration (*Ibid. p 4).*

The Frodenberg Prison in Germany, which houses 16 mothers and their children has been rated as 'the most child-centred system' (Fair, 2009: 5). The children are permitted to stay until the age of six and accommodation is in self-contained flats that 'do not have the appearance of cells' but look more like family houses. Consequently, the children do not notice that they are in prison (International Centre for Prison Studies, 2008: 42). In an attempt to create as normal an environment as possible for the children, the staff do not wear uniforms. Children over the age of two attend pre-school while their mothers work, and in the afternoons the mothers play with them. The 'rules about the times when women are allowed to play with the children, work or watch TV are quite strict' (*Ibid.* p 43). Staff at the prison assist the mothers to raise their children. If a mother commits an offence while in the mother and baby unit, she immediately gets transferred to a closed prison and is separated from her child. However, 'in the last 11 years only 8 women have been transferred to a closed prison and only 10% of the women have been reconvicted' (*Ibid.*).

The women's prison at Preungesheim in Germany also offers a comprehensive programme for incarcerated mothers and their children. A unique feature of this programme concentrates on school-age children, who are not permitted to reside at the prison, but those who live in the surrounding area need not be deprived of their mothers (Kauffman, 2001: 64):

> On the radical premise that parenting and housework are as valuable labor as working in a factory or fast-food establishment, mothers who are eligible for work release can leave the prison daily to work for their own families. They must rise at 5a.m. and take public transportation to their children's homes in time to roust them out of bed for school. Once the children are fed, clothed and out the door, mothers are responsible for housekeeping, shopping and general household management. If they have to leave the house for more than one hour, they must call the prison for permission. When the children return from school, the mothers are responsible for their supervision, doctors' appointments, cooking, homework and all the myriad tasks that consume parents' time and energy. Once their

> children are tucked into bed, the mothers leave them in the care of another adult family member or caretaker and return to the prison to sleep. (*Ibid*.)

While this feature of the Preungesheim prison system certainly is 'radical' it merits investigation due to potential financial savings (children will not need to be accommodated in institutions if there is no other suitable alternative care) as well as due to the stability of care it potentially offers to the children of convicted mothers. Not only does it offer the child continuity of care, but it also allows the child to live a 'normal' life with normal activities and continued contact with other family members and the community.

With reference to children incarcerated with their mothers and contact, several countries have measures in place to promote children's contact with the outside world:

> Portugal and Colombia allow children to leave for a holiday with non-imprisoned relatives if the parents request it... Scotland allows the child to go on excursions both with and without their imprisoned mother....In Canada and Scotland mothers are allowed to join their children on short excursions, and in Scotland mothers are given permission at regular intervals to visit their homes in the community... In England and Wales mothers may nominate two people to take their children for trips outside prison, and at least one prison has 'baby walkers' who 'take the babies out in their prams to get used to the noise and sights of the environment outside the jail' [QUNO, 2011(b): 4].

In Spain contact with the community and with other family members is encouraged, and children attend schools and preschools in the community. Children are also able to spend weekends or holidays with family members outside of the prison. The units discussed above also focus on social and emotional aspects, such as strengthening mother-child relationships. (Feintach, unpublished in Mason-White, 2010: 19).

A particularly innovative step taken in some Indian states has been the establishment of crèche facilities and nursery schools for children of prisoners, children of prison officials and children living close to the prison (Tomkin, 2009: 42). This scheme prevents 'duplication of provision (one crèche for prisoners' children, another for everyone else) or the creation of crèches with very small numbers of users ...' (Robertson, 2007: 32). Furthermore, by allowing them to mix with other children the joint facilities also aid in alleviating the problem

of children living in prison becoming socially isolated (*Ibid.).* The potential for these children to be discriminated against and stigmatised as a result of their parents' incarceration will need to be monitored.

In concluding this section, it is acknowledged that prison is not the ideal environment for a child to live in, but sometimes accompanying his or her mother in prison is the least bad option available. In such situations it is incumbent upon states to ensure that the children who live with their mothers in prison are not treated as offenders and that measures should be put in place to protect the children's best interests.

South Africa has detailed policy outlining the care of children who accompany their mothers in prison. The recently created mother-baby units are a positive step towards normalising the prison environment for these children. Further steps such as granting a convicted mother time between being sentenced and beginning her imprisonment would allow her to prepare her child/ren for the change, as well as to gather necessary toys and personal effects for the child. Enabling children to attend outside crèches and nursery schools, as well as putting measures in place to facilitate their interaction with the local community and with other family members could also be further developed in the South African context. Innovative schemes such as the one established in Preungesheim prison, which permits a mother to be involved in the daily care of her children outside the prison merit further investigation.

5.4 *Age of Release*

Robertson (2008: 33) states that it is not possible to define the 'optimum age or stage at which a child should leave prison' because individual differences between children and the conditions in which they reside would make such a recommendation 'a gross over-generalisation'. The purpose of this section is not to examine the practices of other states with regard age of release as this has briefly been covered both in Chapter Two, as well as in the introduction to this chapter. The focus of this section will be on two British cases which, because of their similarities, are most often referred to as the joint cases of *R(P) v Secretary of State for the Home Department and another; R (Q and another) v Secretary of State for the Home Department and another* [2001] EWCA Civ 1151 (hereafter, '*P and Q'*). Both cases considered the issue of separation of children from their imprisoned mothers at a specific age.

One of the reasons given for the reduction in age limit at which a child must be removed from a South African prison and from his or her mother is based on the unsuitability of the prison environment as described in Part 4.2.2. The cases of *P and Q* give a counter argument to this approach. The applicants in *P and Q* challenged Prison Service policy on mother and baby units under the Human Rights Act 1998. More specifically they challenged the policy contained in Prison Service Order No 4801, which states that children should be removed from their mothers at the age of eighteen months.

P and Q were both mothers who had been convicted of crimes and who resided with their children in mother and baby units. As the 18 months limit approached they both challenged the Prison Service policy arguing that it violated both their rights, and those of their children, to respect for their private and family life, as contained in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The Divisional Court dismissed the women's claims on the grounds that the Prison Service was entitled to have a policy on these matters, and that this policy was 'founded on a premise for which there was objective justification' (Para. 98). The judgement was overturned by the Court of Appeal, which acknowledged that the Prison Service was indeed allowed to have a policy (Para. 99), but considered that the policy must admit greater flexibility (Para. 101). Furthermore, it was judged that the Prison Service was not entitled to insist that all children must leave a unit by the age of 18 months at the latest, however 'catastrophic the separation might be in the case of a particular child, however unsatisfactory the alternative placement available for the child,' (Para. 100).

The Court of Appeal stated in Para. 83 that: '[I]t is clear that family life has been established between these children and their mothers. Compulsory separation is, on the face of it, a serious interference by the state in the children's right to respect for that family life.' However the Court did agree that in 'the great majority of cases, almost all of these considerations would point to separating mother and child at or before the age of 18 months ... But there may be very rare exceptions where the interests of mother and child coincide and outweigh any other considerations' (Para. 106). In situations which are deemed to contain 'rare exceptions' the Court of Appeal considered that the Prison Service needed to exhibit greater flexibility for two inter-related reasons:

- The first is the policy's own declared aim, both in general and in individual cases is to promote the welfare of the child ... if the effect of the policy upon an individual child's welfare will be catastrophic, then the policy is not fulfilling its own objectives. The policy documents themselves contemplate the need for individual consideration (Para. 101);
- The second reason is that the interference with the child's family life which the Prison Service has allowed and encouraged to develop must be justified under Article 8(2) (of the European Convention on Human Rights) (Para. 102).

The Court gave different decisions regarding the two mothers based on the fact that the one mother was to be released soon and could thus be allowed to keep her baby for the remainder of her sentence. It was in this case that the evidence before the court was 'sufficient to suggest that this might be such an exceptional case as to justify a departure from the policy' (Para. 115). The other mother still had a long sentence and it was decided that it would be in the child's welfare to remove the child from the unit.

It is suggested that the cases of *P and Q* which challenged the legality of the policy relating to age limits for children within mother and baby units, provide a productive lead for South Africa to investigate. Although the age of separation differs, there are definite similarities between the English prison service policy and the South African Correctional Services Act (see part 4.4.4).

Subsequent to these cases Munro (2002: 303) assessed the 'impact on the prison service of 'the Court of Appeal's acceptance that the enforced separation of imprisoned mothers from their children is a potential violation of their Article 8 rights to respect for private and family life'. In examining the suitability of prison environments for babies and young children Munro (*Ibid*. p: 310) argued that the Prison Services defence of the age of separation, in the two cases discussed above, based on the 'unsuitable nature of the unit environment' is questionable. She reasoned that the Prison Services had a responsibility to alter prison environments and mother and baby units in order to render them more fitting for their purpose. Munro (*Ibid*.) stated that '[p]rison service mother and baby units facilities elsewhere in Europe already offer better amenities in this regard. In consequence, many are able to offer accommodation to far older children without any apparent detrimental effect upon their welfare'.

This is an important counter-argument to the defence of the unsuitable living environment and its link to the reduction of the age[25] at which a child can remain with its mother in South African prisons. Clearly, the provision of facilities which are conducive to the healthy development of babies and young children has policy and resource implication. However, the importance attributed in *P and Q*, as well as in Chapter Two of this study, indicate that this would be a worthwhile investment.

5.5 *Leaving the Prison*

5.5.1 *Children Exiting Prison with Mother*

Children leave the prison with their mother if she has completed her sentence or if she has been given an early release. Since the limit for children to remain in prison with their mothers in South Africa is set at two years of age, for most of these children the only life they will have experienced is in prison. If they have any experience of life outside of prison, it is safe to assume that they would have been too young to remember such experiences. Many of these children, and their mothers, may have difficulty integrating into the community. Both the children and their mothers will need to be prepared for the release and they will need ongoing post-release support.

Some states around the world (see Appendix 2; QUNO, 2011) allow for flexibility in regulations in order to avoid separating then reuniting mother and child shortly afterwards (Robertson, 2008: 20). Such flexibility serves the best interests of these children as the trauma of separating them from their primary carer and placing them in unfamiliar environments with unfamiliar people is prevented. Those states that apply flexibility with regard to extending children's stay in prison most often do so if the mothers' sentence is almost completed and if the completion of her sentence coincides with the time for the children to leave.

In Finland, for example, the age limit is two years, but this is extendible to three years if the child's best interests 'indispensably require it' (Appendix 2; QUNO, 2011). In Portugal the

[25] From five years of age to two years of age , as per the Correctional Services Amendment Act 25 of 2008

three year age limit is extendible to five years if appropriate prison conditions are present, if the consent of the other parent has been obtained and if such extension has been deemed to be in the best interests of the child (Appendix 2; QUNO, 2011). Policy in Singapore stipulates the age limit as three years, but this is extendible to four years with the special approval of the Minister of Home Affairs. Canada's policy states that children can stay with their mothers up until the age of four years on a full-time basis, and up to age six on a part-time basis. Part-time living in Canadian prisons means that children between the ages of four and six years are permitted to spend holidays and weekends with their incarcerated mothers (*Ibid.*). Although Canadian policy does not stipulate flexibility with regard to the limit that children may remain in prison, in practice its policy allows greater leeway than other States which do not provide for full-time and part-time limits.

Section 20(1) of the Correctional Services Act, which reads as follows

> A female inmate may be permitted, subject to such conditions as may be prescribed by regulation, to have her child with her until such child is two years of age or until such time that the child can be appropriately placed taking into consideration the best interest of the child,

has the potential to be interpreted so as to allow decision-makers the discretion to make individualised decisions, based on the best interests of each individual child. Such individual decisions might in some cases lead to children over the age of two years being maintained in prison up until the release of their mothers or until an older age.

It is preferable for a child to leave prison with its mother. This happens if the mother has completed her sentence, if she has been given early release or if there is flexibility in prison policy allowing a child to remain in prison past the official age limit until the mother's sentence is complete. In the great majority of cases, separating the mother and child at or before the age of two years, as is the policy in South Africa, will be in the child's best interests. But there may be exceptions, and it is in exceptional cases that policy flexibility with regard the age of separation would serve the best interests of the individual child.

5.5.2 *Children Exiting Prison Without Mother*

While living in prison is not ideal for any child, separating young children from the only environment and the only people they are familiar with will constitute a major and dramatic change in both the children's and their mothers' lives. Sometimes children will leave prison prior to them reaching the age limit of that particular jurisdiction. This may happen if it has been deemed that remaining in prison is not in the child's best interests, or if the mother is being transferred to another prison without appropriate childcare facilities, or if the mother has died.

Children who leave prison without their mothers will need greater preparation than those who leave with their mothers. Transitional plans, for example overnight or weekend visits to the child's new place of care, would help to ease the child into the change. Some States allow the mother temporary leave to help settle the child into his/her new life (Bastick and Townhead, 2008: 55). In Jharkland state, India, in order to prepare the children for life outside prison prison officials take those children who are going to be separated from their mothers on visits to the zoo and for picnics and movies (Robertson, 2008: 23). Children living in Holloway prison in London, UK, are 'taken outside prison so they can get used to the noise of traffic' (*Ibid.* p 29).

Robertson (*Ibid*. p: 30) states that a problem for children leaving prison is 'that of creating or rebuilding relationships with outside family members and the community'. Considering the relatively young age at which children in South Africa are required to leave prison, and the fact that at age two children are particularly emotionally dependant on their mothers (see chapter 2), this is of particular relevance to the question of whether a more flexible approach should be taken to the removal of children from their mothers in prison in this country. Should the decision be taken to remove the child from prison, the child should be prepared well in advance of the removal.

Proponents of the attachment theory (see Chapter 2) state that although by age three or four physical separation is no longer such a threat to a child's bond with the attachment figure (in this case the mother), with younger children 'physical separation can cause anxiety and anger, followed by sadness and despair' (Porter, 2003). Therefore, in order to try and protect

the child's best interests, before the child is separated from his/her mother it would be necessary to not only introduce the child to the new carer, but to allow sufficient time for the child to start forming a bond with him/her. In South Africa, the common practice is the arrangement of care with family members, or foster parents, and if neither of those options are available or suitable, then placement in a residential facility is organised (Makhaye, 2010: 1).

Once children are removed from prison their well-being should be monitored, either by prison officials or by social welfare bodies. This is particularly important when the child leaves without his or her mother. Worldwide there is a dearth of reporting of post-prison care of such children and it is therefore difficult to determine what type of support they receive. One State that does offer post-prison care is Chile, where for six months after the child's departure, officials make 'home visits, telephone calls and pre-school visits ...(and) look for evidence of good mother/child contact (arranged by the carer), education, nutrition and health' (Robertson, 2008: 2). Another example of good practice can be found in Spain, where once the mothers and children leave the unit, they will continue to be monitored by the Department of Prison Services, together with the help of NGOs. The intention is to track the children until age 18 (Feintach, unpublished in Mason-White, 2010: 20).

The failure to monitor the post-prison care of these children can lead to them living in unstable or inappropriate situations, and can also result in mothers being unable to reunite with their children once they are released because they are unable to trace their whereabouts. As was shown in Part 4.2.2 the DCS B-Order 1 policy orders that once a child has been 'placed-out', the child must be monitored and supportive services must be given but the policy is vague in terms of who should render such services.

When a child has been removed from prison, contact with his/her mother is greatly reduced. The ease, nature and frequency of visits will be dependent on factors largely out of the control of both the child and the mother. Children who have been separated from their mothers will be reliant on others not only for arrangements to travel to prison, but will also lack persuasive ability because of their immature communication skills. These potential barriers may be exacerbated if the child is placed far away from the prison and the new primary carer/s do not have the financial means to regularly meet the travel costs of reaching

prisons. Continued contact with the child's mother may be restricted or even prevented, if the new carer is unwilling to allow it. Therefore, when a child leaves prison before his/her mother, it can sometimes be difficult for the mother to regain her relationship with her child. Challenges to mothers regaining their relationship with their children could be: 'practical (finding accommodation close to the children), procedural (being allowed to regain custody of children) or emotional (regaining a close emotional bond)' (Robertson, 2008: 26).
The state's responsibilities to care for children does not end with their placement with relatives or in an institution. Article 9(3) of the CRC places an obligation on the State to assist such children to have regular contact with their parents, and to ensure that the adverse effects of separation on their emotional development are minimised. Practical measures to enable regular contact may include 'providing financial assistance to cover the cost of travel to the prison, as well as minimizing bureaucratic procedures' (Atabay, 2008: 71).

Voluntary organisations can also assist in this regard. *Storybook Dads* is an innovative practice established in the UK and Northern Ireland to assist in the maintenance of contact. Incarcerated fathers and mothers are recorded or filmed reading a story and this is then made into a CD or DVD and sent to the children. The children can then hear, and sometimes see, their parents even when they can't physically be with them. The organisation is founded on the premise that 'keeping families together helps to reduce re-offending by up to 6 times' (http://www.storybookdads.co.uk/index.html). *Shine for Kids* is an Australian organisation that works in partnership with the New South Wales Department for Corrective Services to assist children of prisoners. *Shine for Kids* sets up a 'Video Visit' facility in a suitably equipped venue such as a local library or community centre which enables children and parents to talk to each other when a face-to-face visit is not possible. The calls utilise a camera, microphone and speakers so that both parties can view each other as well (http://www.shineforkids.org.au/index.htm).

It is suggested that there are many voluntary organisations in South Africa that could assist incarcerated parents and their children in the establishment of similar practices as *Storybook Dads* or *Shine for Kids*.

The separation of a child from his or her incarcerated mother should be undertaken with sensitivity and only when suitable alternative care arrangements for the child have been

identified. Preparation needs to begin before the separation and transitional plans are recommended to ease the child into the change. States have a responsibility to enable the continued and regular contact of mother and child and must ensure that practical measures are put in place, either through state initiatives or in partnership with voluntary and non-governmental organisations. The DCS B-Order 1 policy regarding infants and mothers is detailed but it is suggested that more attention could be given to separation issues as well as to post prison care and monitoring.

5.6 *Conclusion*

Children who are incarcerated with their mothers are not offenders and should not be treated as such. The aim of policy dealing with this group of children should be to ensure them adequate care and protection. The common thread throughout this study has been that the best interests of the children should always be a primary consideration. After a review of the policies and practices of different states it is evident that there are many different responses to the issue. Good practise suggests that each child's situation should be considered individually. However, there are also certain general practices that can be followed in order to produce the most favourable outcomes for the children concerned.

When mother and child leave the prison together, both will need to be prepared for their release and reintegration back into the community. Some states allow for flexibility in regulations in order that a mother whose sentence is almost complete can keep her child with her, and the two can leave together when her sentence is complete. Other states allow for the release of mothers to some form of semi-liberty or other alternative by the time the child has to leave so as to not have to separate the child from his or her mother. It is suggested that Section 20(1) of the Act has the potential to be interpreted so as to allow decision-makers the discretion to make individualised decisions.

When children leave without their mothers, the impact of separation on these children will potentially be more dramatic than if they were to leave with their mothers. The importance of quality pre- and post-separation support for these children cannot be overemphasised. Although the Department of Correctional Service's B-Order 1 policy states that 'as far as practically possible and in the best interests of the child, the mother and child relationship

should be nurtured and promoted' (Section 15.6), this is a generalised statement which promises much but without practical guidelines, may not render great assistance to the children and mothers concerned. The DCS states in its B-Order 1 policy that the children who are separated from their mothers must be monitored and supportive services must be rendered. It is suggested that the practices of Chile and Spain in this regard are studied and more specific guidelines are implemented.

It is also suggested that an in-depth study of the mother-baby units in, for example, the Netherlands, Germany and Spain, is undertaken to establish how these countries have attempted to normalise the prison environment for the benefit of those children who are incarcerated with their mothers.

In those individual cases where the separation of the child from its incarcerated mother is deemed not in the child's best interests the cases of *P and Q* , in which the court found compulsory separation to constitute a 'serious interference by the state in the children's right to respect for [that] family life'(*P and Q*, Para. 83), also merit further study.

Bearing in mind lessons learned from the evidence in previous chapters, in chapter 6 conclusions and recommendations with regard the separation of young children from their mothers and from the South African prison environment will be presented.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.1 *Conclusions*

Although at present the number of infants and young children in South African prisons is not high they still require attention and protection. As the former president of South Africa, Nelson Mandela once said, 'one cannot judge a nation by how it treats its most illustrious citizens, but by the treatment it metes out to its most marginalized – its prisoners' (Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa; Mission to the Republic of South Africa, 2004: 2). Considering the fact that the young children incarcerated with their mothers are not prisoners, how much more should it be ensured that they are not denied their rights? Ultimately, the separation or non-separation of the child from his or her mother should serve the best interests of the child, regardless of the child's age.

Prisons are not ideal for children. However, it is also not ideal for a child to be separated from the love and protection of his or her mother. The reality is that crime is committed everyday by men and women, and when convicted, society expects perpetrators to be held accountable for their actions. Allowing a young child to accompany his or her mother in prison under circumstances that foster the child's development would grant a mother and child time together, and would permit her to assume responsibility of her child and to parent her child. In this sense the recently established South African mother and baby units can be seen as supporting motherhood. However, according to Schoeman (2011: 81)

> [E]ven though there is a pro-active movement to allow incarcerated women to keep their children with them during incarceration, limited attention has been given to the forced separation of incarcerated mothers and their children once the child has reached the maximum age he/she is allowed to stay with their incarcerated mother.

Section 20 of the Correctional Services Act (the Act, as amended by the CSAA) stipulates that female inmates may be permitted to have their children with them until such children are two years of age. The overall aim of this study has been to critically examine this piece of legislation in order to assess whether it is compatible with children's rights and their best interests.

In Chapter Two it was suggested that the benefits of maintaining contact between mother and child can outweigh the potentially negative effects of living in the prison environment. Simple activities, such as breastfeeding, can have beneficial results. Breastfeeding enables mother-child bonding which in turn may lead to a greater sense of security for the child. Taking children for day trips outside the prison can also expose them to the normal features and activities within the community. When appropriate facilities are provided in prisons for these children, the benefits become more significant. The recently created South African mother and baby units, with their child-friendly facilities and resources, should therefore assist in overcoming the potentially negative effects of child incarceration.

There appears to be a lack of empirical evidence on the optimum age of separation of a child from his or her incarcerated mother. Much of the literature would suggest that, given appropriate alternate care arrangements, separation at age two should be satisfactory for most children. However, in situations where stability and care are not provided it is suggested that the trauma of separation from his or her incarcerated mother, coupled with unsuitable alternate care options, could have detrimental effects on the child and his or her development. It is in such circumstances that flexibility in terms of the age of separation would serve the child's interests better than an inflexibly applied policy.

There is a broad recognition of the need for special consideration for children living in difficult conditions. General practice around the world is for only infants and young children to be incarcerated with their mother, with older children being removed from their mother and cared for on the outside. Policies governing this practice vary from country to country, and even within particular jurisdictions. Some countries allow for a degree of flexibility in the rules regarding the maximum age limits, particularly if the mother herself is shortly to be released (Robertson, 2008: vi). Allowing the child to stay longer than the official maximum would avoid the separation of mother and child, only for them to be reunited months or even weeks later. In terms of the CSAA the age of separation was reduced from five years of age in South Africa to two years of age. It was suggested in Part 5.5.1 that Section 20(2) of the Act has the potential of being interpreted to allow decision-makers the flexibility to make individualised decisions based on the best interests of each child. It was stated that such individual decisions might in some cases lead to children over the age of two years being

maintained in prison up until the release of their mothers or until an older age. However, as yet, this potential has not been formalised in written policy in South Africa.

In assessing whether the imposition of a rigid, age-based rule for the removal of children from their mothers is in the best interests of all children it was found that the issue of young children incarcerated with their mothers has received minimal attention in international human rights frameworks (Tomkin, 2009: 13). However, the UN Convention on the Rights of the Child (the CRC), in particular, is comprehensive in the protection it offers children and many of its provisions can be applied to this vulnerable group. The concept of best interests is the broad principle underlying the CRC. According to the CRC, in all decisions which impact upon the child, the child's best interests must be a primary consideration [Article 3(1)]. The CRC prohibits discrimination of any form against the child due to the incarceration of his or her mother. As was stated in Part 3.2.2.1 the Committee on the Rights of the Child interpreted the non-discrimination principle as placing an obligation on states to 'actively identify individual children and groups of children the recognition and realization of whose rights may demand special measures' [General Comment no. 5 (2003), para. 12). State's roles towards this particular group of children are far more relevant because this group has been identified as more vulnerable and in need of special care and assistance (Alejos, 2005: 16).

According to the CRC a child has the right to live with his or her parents unless it is deemed to be incompatible with the child's best interests. For the child incarcerated with his or her mother, such a determination would need to be made on an individualised case-by-case basis. The CRC also requires states to provide special protection for a child deprived of a family environment and to ensure that appropriate alternate family or institutional placement is available. Special protection would involve planning and preparation prior to the child's separation from its mother, as well as on-going regular post-prison monitoring. In the event that placement with family is not possible, then institutional care becomes an option, but as was pointed out in Part 3.2.2.1 low-quality institutional care can be detrimental to the child's physical and psychological development, as well as to his or her social adjustment. Therefore, if at the age of two family placement is not possible and institutional care is envisaged, it is suggested that an assessment of the child's circumstances would be more consistent with international human rights frameworks and the best interests principle. Such an approach would require a flexible and individualised policy with regard age of separation.

The two British cases of *P and Q* (part 5.4) provide guidance on issues of separation of children from their mothers at a specific age. Both these cases challenged the legality of the policy relating to age limits for children within mother and baby units. While the court agreed that in most cases separation at the required age would be deemed in the child's best interests, there may be 'rare exceptions' where that is not the case (Para. 106). The finding of the court was that compulsory separation constitutes a 'serious interference by the state in the children's right to respect for [that] family life' (Para.83). Like a common thread, the rulings in these two cases, reiterate the importance of an individualised, case-by-case analysis of the child's best interests when dealing with the issue of age of separation. To impose a generic policy would be to deny the child the assurance that his or her best interests are being given paramount importance in decisions affecting him or her.

The Committee on the Rights of the Child has addressed a range of concerns relating to children of prisoners during states' reporting processes and in its concluding observations. Amongst other issues the Committee addresses children incarcerated with their mothers and the often inadequate environments in which they live. Given the concern expressed by the Committee over the plight of these children '*Children of Incarcerated Parents*' was the topic for the 2011 UN Committee on the Rights of the Child's Day of General Discussion. The general consensus at the day was that the children of incarcerated parents are 'too easily ignored in the criminal justice system' (Robertson, 2012: 2) and it was therefore consistently stated that priority needs to be given to the best interest of the child at all stages of the judicial system.

The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) which were adopted in 2010, have introduced a set of directives for policymakers dealing with the issue of children of prisoners in the context of women offenders. The Rules stipulate that children must be taken into account at all stages of the judicial system. At this stage the Bangkok Rules provide the most comprehensive basic international framework to assess current prison practices and how they conform to children's rights and needs, as well as to develop new legislation. Although the Bangkok Rules are not binding legislation, states have been urged to 'take immediate steps to assess their prison standards against them and to review legislation as well as practice in order to ensure implementation' (Penal Reform International, 2011: 1).

It was agreed at the 2011 UN Day of General Discussion that, when sentencing a parent, a guiding principle should be for the courts to take into account the best interests of the child and the impact of potential sentences on children (Robertson, 2012: 15). The South African Constitutional Court (The CC) made a landmark ruling in the case of *S v M* when it required that the impact on children should be taken into account when sentencing offenders who are primary carers. If the proposed incarceration of the primary carer will be detrimental to the child, a non-custodial sentence must be favoured, unless the crime was so serious that this would be inappropriate.

The ideal is to see fewer mothers being given custodial sentences, in the best interests of children. The best interests principle as enshrined in our constitution and in the CRC needs to continue to play a large role in sentencing. The best interests of the child can only be effectively determined on a case-by-case basis. However, in pursuing those same best interests, relevant legislation, policies and practices must provide for those mothers who are in custody with their infants and young children.

In situations where mothers are incarcerated, the ruling in *S v Howells* 1999 (1) SACR 675 (C) can be used to protect the child's best interests. In *S v Howells* the Department of Welfare and Population Development was required to take steps to ensure that the children remained in contact with their mother while she was in prison (Order 3.1.2) and to ensure that everything reasonably possible was done to ensure that the children and their mother were reunited upon her release, and to ensure the 'promotion of the interests of the family unit thereafter'. Such a ruling would be applicable if, and when, the decision is taken to separate a child from its incarcerated mother.

In concluding, it has been stated that the 'family is the fundamental unit of society and the starting point for the protection and education of children' (Tomkin, 2009: 49). This view is reflected in international, regional and national frameworks and policies which require states to protect the family. For those children incarcerated with their mothers compulsory separation would constitute a violation of their right to family life. For these children there may come a stage when the issue of separation has to be dealt with, but it is at such times when a flexible approach to the age of separation is suggested. A flexible approach would require an individualised analysis of the child's best interests in terms of the most appropriate

time to separate mother and child. Such flexibility is in agreement with Rule 52(1) of the Bangkok Rules which advocates an individual assessment of the child's best interests. As has been suggested already in this paper, the potential for flexibility does exist in Section 20 of the Act. However, it is also submitted that since it is merely potential and not policy, prison authorities might have too much discretion in interpreting this section. This might result in a lack of uniform practices and thus some children might be disadvantaged.

6.2 *Recommendations*

Based on the extensive literature review that was conducted for this study the following recommendations are given in suggested order of importance:

6.2.1 *Policy Recommendations*

1. *Assess the impact of Section 20 of the Act on children*

In 2011 Scotland's Commissioner for Children and Young People (the SCCYP) proposed that the UN Committee on the Rights of the Child should issue a *General Comment* on the rights of the children of incarcerated parents. The SCCYP suggested that state parties should conduct 'Children's Rights Impacts Assessments' on all existing and proposed legislation and policy ... and evaluate the actual impacts of such law, policy and practice on children, with particular regard to the children of incarcerated parents'(Scotland's Commissioner for Children and Young People, 2011: recommendation 2). In light of this submission, it is suggested that Section 20 of the Act is assessed and evaluated in terms of the actual impacts of this policy on the children affected.

2. *Clarify section 20 of the Act*

While alternatives to incarceration for mothers with infants and young children would be the preferred option, the reality is that mothers are sentenced to terms of imprisonment. There is therefore, an important and urgent need to address the issue of children incarcerated with their mothers, and with reference to this particular study, to address the issue of the separation of such children from their mothers. Building upon international human rights standards and norms, in particular the Convention on the Rights of the Child and the more recent Bangkok Rules, it is submitted that the potential for flexibility that exists in Section 20(1) of the Act should be clarified via a policy decision by the Department of Correctional

Services. It is suggested that the need for an individualised assessment of the best interests of the child is included in Section 20(1).

3. *Provide for an individual investigative process*

It is further proposed that provision is made in Section 20 of the Act for an individual assessment process which should be initiated prior to the child turning two years of age. The purpose of the investigation would be to determine the exact circumstances of the individual child and how his or her interests would best be served; through separation and placement in alternate care, or by allowing the child to continue residing in prison past its second birthday.

When deciding whether to separate mother and child, the following points from the case of *P and Ors v Secretary of State for Home Department and Anor* [2001] EWCA Civ 1151, could be used as guidelines (Para. 105). Three main factors should be considered:

- The extent of the harm anticipated to be caused by separation from the mother. This would depend upon three further factors: the quality of the relationship between mother and child; the arrangements made for the transition; and the arrangements made for contact after separation;
- The extent of the harm that may be caused by allowing the child to remain in the prison environment. Factors influencing this would be the facilities offered in the prison, as well as the services which could be provided by social services to compensate for the deficiencies in the prison environment; and,
- The quality and suitability of alternative care arrangements.

4. *Provide practical guidelines to ensure the continued relationship between mother and child*

Upon separation the DCS B-Order 1 stipulates that ‘as far as practically possible and in the best interest of the child, the mother and child relationship should be nurtured and promoted’ (Section 15.11). As discussed in Part 4.4.4, it is unfortunate that there are no practical guidelines to assist in the implementation of this guideline. The lack of guidelines could render this particular provision ineffective. It is suggested that practical measures could include the ‘provision of financial assistance to cover the cost of travel to the prison, as well

as the minimization of bureaucratic procedures which may hinder such contact' (Atabay, 2008: 71).

5. ***Give recognition to the father's wishes when making decisions concerning the child's care***

In Part 4.2.2 it was highlighted that neither the Act, nor the relevant DCS policy, mention the opinions and wishes of the child's father or other relatives in decisions concerning the admission of a child into prison with its mother. This is in contradiction with Chapter 3 of the Children's Act which promotes co-operative parenting. It is suggested that the Act be amended to reflect the concept of co-operative parenting in decisions regarding the incarceration of a child with its mother.

6. ***Assess the viability of deferred or suspended sentences for convicted mothers who are the primary carers of dependent children***

It is suggested that the examples of Georgia and Russia, which both have provisions for deferred and suspended sentences for convicted mothers with child-caring duties, are evaluated in terms of their viability for inclusion in South African prison policy.

7. ***Assess and implement the UN Rules for Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders***

Since the Bangkok Rules currently constitute the most comprehensive international guidelines which can be applied to children who are incarcerated with their mothers it is suggested that a team is established to assess these Rules, as well as South Africa's compliance with them. It is also suggested that the following specific Rules, which are applicable to the separation of children from their incarcerated mothers, are studied and implemented into South African policy and practice:

- Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national law [Rule 52(1)];

- The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials." [Rule 52(2)]; and,

- After children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised." [Rule 52(3)].

6.2.2 Recommendations for Further Research

1. Assess the impact of being raised in prison

Schoeman (2011: 85) suggested that '[L]ongitudinal studies should be done to determine the impact being raised in a prison environment has on a child's physical, cognitive and psych-social development and functioning'. Such research could inform policy relating to children incarcerated with their mothers, as well as the age and timing of separation. Optimal duration of breastfeeding should be an important element in deciding on policies which stipulate how long the child should be living with the mother (IBFAN, 2011).

2. Investigate the suitability of alternate care arrangements

While the DCSs B-Order 1 states that once an infant has been 'placed-out' an 'external organisation' must monitor the child, no research was found on the suitability of arrangements made for children who have been separated from their mothers. It is suggested that a study is conducted on affected children's circumstances and their alternate care arrangements. Schoeman (2011: 85) suggests that a [C]omparative analysis to determine the impact of various alternative care placements (in correctional centre with mother, foster care with a family member and foster care) on the functioning of children of incarcerated woman (*sic.*) should be explored'.

6.2.3 *Recommendation for Sentencing Practice*

1. *Allow time between sentencing and beginning imprisonment to make plans for dependent children*

As happens in, for example the Netherlands (see Part 5.3) and as is advocated in Rule 2(2) of the Bangkok Rules, it is suggested that mothers who are sentenced to imprisonment are given time between being sentenced and beginning their imprisonment in which they can arrange alternative care for their children living outside prison, as well as to collect personal effects for the children who will accompany them in prison. This is a simple practice, which will involve little policy change, but which can have potentially positive long-term effects for affected children.

APPENDIX

APPENDIX 1*: Selection of 'Bangkok Rules' relating to children residing in prisons with their mothers.*

"Adequate attention shall be paid to the admission procedures for women and children, due to their particular vulnerability at this time." [Rule 2(1)]

"Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children." [Rule 2(2)]

"The number and personal details of the children of a woman being admitted to prison shall be recorded at the time of admission. The records shall include, without prejudicing the rights of the mother, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status." [Rule 3(1)]

"All information relating to the children's identity shall be kept confidential, and the use of such information shall always comply with the requirement to take into account the best interests of the children." [Rule 3 (2)]

"Women prisoners shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities, as well as the individual woman's preference and the availability of appropriate programmes and services." (Rule 4)

"The accommodation of women prisoners shall have ... a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or ...." (Rule 5)

"The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues;" [Rule 6(a)(c)]

"If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided." (Rule 9)

"In developing responses to HIV/AIDS in penal institutions, programmes and services shall be responsive to the specific needs of women, including prevention of mother-to-child transmission." (Rule 14)

"Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children ..." (Rule 15)

"Prison staff shall demonstrate competence, professionalism and sensitivity and shall preserve respect and dignity when searching both children in prison with their mother and children visiting prisoners." (Rule 21)

"Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison." (Rule 22)

"Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children." (Rule 23)

"Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies." [Rule 33(3)]

"The regime of the prison shall be flexible enough to respond to the needs of pregnant women, nursing mothers and women with children. Childcare facilities or arrangements shall be provided in prisons in order to enable women prisoners to participate in prison activities." [Rule 42(2)]

"Particular efforts shall be made to provide appropriate programmes for pregnant women, nursing mothers and women with children in prison." [Rule 42(3)]

"Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers." [Rule 48(1)]

"Women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so." [Rule 48(2)]

"Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners." (Rule 49)

"Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children." (Rule 50)

"Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services." [Rule 51(1)]

"The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison." [Rule 51(2)]

"Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national laws." [Rule 52(1)]

"The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials." [Rule 52(2)]

"After children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised." [Rule 52(3)]

"Where a child living with a non-resident foreign-national woman prisoner is to be removed from prison, consideration should be given to relocation of the child to its home country, taking into account the best interests of the child and in consultation with the mother." [Rule 53(3)]

"The provisions of the Tokyo Rules shall guide the development and implementation of appropriate responses to women offenders. Gender-specific options for diversionary measures and pretrial and sentencing alternatives shall be developed within Member States' legal systems, taking account of the history of victimization of many women offenders and their caretaking responsibilities." (Rule 57)

"Taking into account the provisions of rule 2.3 of the Tokyo Rules, women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pre- trial and sentencing alternatives, shall be implemented wherever appropriate and possible." (Rule 58)

"Appropriate resources shall be made available to devise suitable alternatives to women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to womens contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services." (Rule 60).

"When sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds." (Rule 61)

"Decisions regarding early conditional release (parole) shall favourably take into account women prisoners' caretaking responsibilities, as well as their specific social reintegration needs." (Rule 63)

"Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children." (Rule 64)

"Efforts shall be made to organize and promote research on the number of children affected by their mothers' confrontation with the criminal justice system, and imprisonment in particular, and the impact of this on the children, in order to contribute to policy formulation and programme development, taking into account the best interests of the children." (Rule 68)

"Efforts shall be made to review, evaluate and make public periodically the trends, problems and factors associated with offending behaviour in women and the effectiveness in responding to the social reintegration needs of women offenders, as well as their children, in order to reduce the stigmatization and negative impact of those women's confrontation with the criminal justice system on them." (Rule 69)

"Publication and dissemination of research and good practice examples shall form comprehensive elements of policies that aim to improve the outcomes and the fairness to women and their children of criminal justice responses to women offenders." [Rule 70(2)]

United Nations Rules for the Treatment of Women Prisoners and
Non-custodial Measures for Women Offenders (the 'Bangkok Rules').

APPENDIX 2

FRIENDS WORLD COMMITTEE FOR CONSULTATION (QUAKERS)

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BABIES AND CHILDREN LIVING IN PRISON:

AGE LIMITS AND POLICIES AROUND THE WORLD (2011)

This submission is a simple table detailing, to the best of our knowledge, the policies in different States regarding children living in prison with an imprisoned parent. It covers only those States for which we have information, and focuses on the policies

Unless otherwise stated, States only allow children to live in prison with a mother. The information given here was gathered over several years from various sources, some of which may be more reliable than others and which may not reflect current policy or practice.

State	Limit for children living in prison	Additional information	Date information collected	Source
Afghanistan	5 years		2010	BBC Newsnight
Argentina	4 years		2010	Personal Communication with Argentinian NGO
Australia	1-6 years, depending on state	In all states chief executive has considerable discretion to act in child's best interests	2000	APCCA
Austria	2 years, extendible to 3 years	Extendible by prison director if remaining sentence is less than a year	2011	Response to 2011 survey
Bangladesh	4 years, extendible to 6 years	Extendible with permission of superintendent	2003	OMCT
Belgium	2 years		2000	Eurochips website
Brazil	6 months to 7 years, depending on state		2010	Personal communication, Brazilian prison official
Brunei (Daressalem)	3 years		2000	CRC/C/61/Add.5, para. 132

Bulgaria	1 year, extendible to 3 years	Extendible if no suitable outside carers	Undated	PRI Women in Prison handbook
Burkina Faso	2 years	Pregnant women may not be executed	2006	ACRWC
Burundi	2 years		Undated	QUNO folder
Colombia	3 years		2011	Response to 2011 survey
Cambodia	6 years		2011	LICADHO
Canada	4 years full-time, 6 years part-time (federal system)	Part-time living in prison is during holidays and weekends	2011	Response to 2011 survey
Chile	2 years		2008	*Children Imprisoned by Circumstance*
China	Not permitted (3 years in Hong Kong)		2010 (2000 for Hong Kong)	Personal communication, Chinese justice official (for mainland); APCCA (for Hong Kong)
Croatia	3 years		2010	Eurochips email
Cuba	1 year (possibly more)	Mothers can breastfeed until 1 year	2010	UPR
Democratic Republic of the Congo	1 year		1994	*Prison Conditions in Zaire*
Denmark	3 years	Children may stay with fathers as well as mothers	2007	QCEA
Ecuador	3 years		2011	Response to 2011
Egypt	2 years		2008	*Children Imprisoned by Circumstance*
Eritrea	No upper limit		Undated	*Faniel Soloman LLB essay*
Estonia	4 years, extendible to 5 years		2011	*Response to 2011 survey*
Fiji	6 years		2011	*Email from Penal Reform International*
Finland	2 years, extendible to 3 years	Extendible to 3 years if child's best interests 'indispensably require it';	2011	*Response to 2011 survey*

		children may stay with fathers as well as mothers		
France	18 months, extendible to 2 years		2006	*Children of Imprisoned Parents*
Germany	Below school age	Usually leave by 3 years	2011	*Response to 2011 survey*
Ghana	2 years or when weaned	Medical officer determines if child weaned	2011	*Response to 2011 survey*
Greece	2 years		Undated	*Eurochips website*
Hungary	1 year		2011	*Response to 2011 survey*
Iceland	18 months the norm		2011	*Response to 2011 survey*
India	6 years		2008	*Children Imprisoned by Circumstance*
Indonesia	2 years		2000	*APCCA*
Ireland (Republic of)	3 years		Undated	*Eurochips website*
Israel	2 years		2010	*Personal communication, Israeli Ministry of Justice official*
Italy	6 years	Pregnant women should not be imprisoned	2011	*Agi.it website, COPING DoW*
Japan	1 year		2000	*APCCA*
Kenya	4 years		2011	*ACRWC report, AllAfrica.com*
Kiribati	While lactating		2000	*APCCA*
Kyrgyzstan	3 years		2008	*Children Imprisoned by Circumstance*
Latvia	4 years	On release, mothers given two sets of identity papers for the children, one indicating residence in prison and one not	2007	*QCEA*
Luxembourg	2 years		2011	*Response to 2011 survey*
Malaysia	3 years		2009	*UPR*

Mauritius	5 years		2009	*UPR*
Mexico	6 years		2008	*BBC News*
Mongolia	18 months	Women prisoners who give birth are allowed home for 18 months to care for their babies and then return to prison	2000	*APCCA*
Netherlands	4 years	4 years only in open prison ; 9 months in closed prisons	2006	*Children of Imprisoned Parents; response to 2011 survey*
New Zealand	2 years		2009	*UPR*
Niger	5 years		2009	*ACRWC*
Nigeria	18 months		2007	*Personal communication, Nigerian prison official*
Norway	Not permitted	Policy to be reviewed shortly	2011	*Response to 2011 survey*
Pakistan	6 years		2011	*Dawn.com*
Poland	3 years	Guardianship Council can extend or reduce time limit	2011	*Response to 2011 survey*
Portugal	3 years, extendible to 5 years	5 years allowed only with appropriate prison conditions, consent of other parent and after considering interests of child	2011	*Response to 2011 survey*
Republic of Korea	18 months		2011	*Wn.com*
Romania	1 year		2010	*COPING DoW*
Russian Federation	Unknown	Women with children up to 4 years old given postponed sentences	2009	*UPR*
Sierra Leone	2 years	Limit is in practice not in law	2010	*Salford conference*
Singapore	3 years, extendible to 4 years	Extendible with special approval of Minister for Home Affairs	2003	*UN ODS*
Slovenia	2 years		2011	*Response to 2011 survey*
South Africa	2 years		2010	*Personal communication, South African*

				judge
Spain	6 years	Formely 3 years, but now 6 in special external mother-child units being developed	2011	*Personal communication, Spanish-American prisons researcher*
Sri Lanka	5 years		2010	*Dailynews.lk*
Sudan	6 years		Undated	*Prison Conditions in Sudan*
Sweden	1 or 2 years	2 years in open prisons. Children can also stay with fathers		*COPING DoW response to 2011 survey*
Switzerland	3 years		2011	*Response to 2011 survey*
Tanzania	Until normal lactation period expires		2009	*ACRWC*
Thailand	3 years		2008	*QUNO folder*
Turkey	6 years	Children under 3 are with mothers in cells, between 3-6 may go to prison kindergartens	2011	*ICPS news digest*
Ukraine	3 years		2011	*Response to 2011 survey*
United Arab Emirates	2 years (Dubai only)		2011	*Khaleejtimes.com*
United Kingdom	9 or 18 months	Age limit depends on institution, can be extended if in child's best interests	2011	*Response to 2011 survey*
United States of America	Not permitted to 3 years, depending on state	Usually only for mothers who will finish their sentence before the child reaches the age limit	2010	*Mothers Behind Bars*
Venezuela	3 years		2008	*Children Imprisoned by Circumstance*
Viet Nam	2 years		2000	*APCCA*
Zambia	4 years		2011	*Human Rights Watch*

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