

QUESTIONABLE CORRECTION: INDEPENDENT OVERSIGHT OF CHILD AND YOUTH CARE CENTRES IN SOUTH AFRICA

Zita Hansungule

APCOF
RESEARCH PAPER

SERIES

19

January 2018



1. INTRODUCTION

The Child Justice Act 75 of 2008 ('the CJA') reformed the way in which legislation interacts with children in conflict with the law. Consequently, children are no longer dealt with in a harsh, punitive manner but in a way that is in accordance with the values underpinning the Constitution of the Republic of South Africa, 1996 (the Constitution), and the fundamental rights contained therein. Both the Constitution and the CJA define a child as a person under the age of 18 years.¹

The CJA expands on, and entrenches, the principles of restorative justice pertaining to children in conflict with the law, at the same time ensuring that such children remain responsible and accountable for offences, if committed. In addition to this rehabilitation strategy, the CJA provides a wide range of sentencing options and forms of punishment for children found guilty of infractions. Detention is a last option, as stated in the Constitution. However, where detention is considered and utilised, the CJA allows courts to sentence children to child and youth care centres (CYCCs) instead of the same correctional services facilities occupied by adults. This is done for a variety of reasons, one of which is of particular relevance here, namely to ensure that the children concerned have access to, inter alia, therapeutic programmes suited to their individual needs.

This sentencing option is an innovative one that ensures not only that the specific needs of a child found guilty of an offence are met, but also that there is accountability for the offences committed. However, as with any other detention facility, independent oversight mechanisms need to be put in place to ensure that children are kept in appropriate conditions, receive appropriate assistance that meets their needs, and are cared for and assisted by trained and/or knowledgeable individuals. Worryingly, such oversight of CYCCs in South Africa is either lacking or has as yet not been undertaken with a view to accurately monitoring and evaluating these facilities and the fulfilment of their duties as mandated by law.

There have been a number of reports pointing to a lack of such monitoring mechanisms. This Research Paper focuses specifically on two such reports brought to the attention of the Centre for Child Law. In both of these cases, it was found that children were living in alarming conditions and had received no education or developmental input, and that staff were not interested in caring for the children. Various other violations were also found. Using these two examples as case studies, this Research Paper aims to highlight the deficiencies in the current oversight model, further support the need for a truly independent oversight mechanism, reiterate the obligations to fulfil these requirements as outlined by international law, as well as explore how such mechanism and obligations might best be implemented.

2. THE LAW ON SENTENCING OF CHILD OFFENDERS AND ON OVERSIGHT OF DETENTION FACILITIES

South Africa is bound by both national and international law instruments that require the protection of the rights of children and the preservation of their best interests in different circumstances. This protection extends to all children, including those who come into contact with the criminal-justice system. The discussion that follows will give a brief overview of this legal landscape, with the aim of establishing a basis for a discussion on oversight of CYCCs that child offenders are sentenced to.

2.1 National law

2.1.1 The Constitution

The South African Constitution, including the Bill of Rights contained therein, has been praised internationally for the inclusive and progressive manner in which it protects both the procedural and substantive rights of all citizens.² As a function of enshrining a broad range of freedoms, the Constitution places a variety of obligations on the state to promote, protect and realise children's rights – this is seen especially in section 28 of the Constitution, that is, the children's rights clause.³

Section 28 provides a number of protections for children, but, for purposes of this Research Paper, attention will be paid to those protections and obligations found in section 28(2) and section 28(1)(g).

Section 28(2) declares that a child's best interests are of paramount importance in every matter concerning the child. The section thus ensures that 'best interests' is interpreted so as to apply to all aspects of the law that affect children, including criminal-justice laws and legislation dealing with child offending.⁴ Section 28(2) creates an independent right and should not be seen merely as a principle.⁵ In deciding what weight courts should accord to the interests of children, the Constitutional Court has held that section 28(2):

*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.*⁶

Section 28(2) must be read in conjunction with the other rights set out in the same section of the Constitution, including section 28(1)(g). Section 28(1)(g) states that every child has the right:

not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age.

In its interpretation of section 28(1)(g), the Constitutional Court has held that the section requires an approach to the sentencing of child offenders that focuses specifically on the individual to be sentenced and on the circumstances and context in which the offence in question was committed. This is in line with section 28(1)(g), which calls for an individualised approach to sentencing.⁷ Such an approach is mandated so as to take into account the best interests of the child concerned in addition to the entire spectrum of considerations relating to the child offender, which will also include the type of offence and the interests of society. While aimed at reform, such considerations do not exclude – and may even require – incarceration as a last resort in respect of punishment.⁸

The Constitutional Court has affirmed the importance of treating child offenders differently from adult offenders by recognising that:

[n]ot only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults.

These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children's crimes may stem from immature judgement, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.⁹

In pursuance of the provisions of the Constitution, the CJA was enacted to give depth to the constitutional obligations to protect and affirm the rights of child offenders, on the one hand, and ensure that they are held accountable for offences committed, on the other.

2.1.2 The Child Justice Act 75 of 2008

The CJA further introduced a specific criminal-justice system and processes for the management of child offenders.¹⁰ The criminal-justice system has, as such, been established in accordance with the values underpinning the Constitution and with the state's obligations under international law. Indeed, Skelton notes that the CJA 'expressly promotes s[ection] 28(1)(g) through a series of measures that aim to minimise pre-trial detention and also offer alternatives to imprisonment'.¹¹ In practice, the CJA aims to provide a separate and more supportive path for child offenders, drawing on punitive mechanisms only as a last resort. The High Court in Pretoria has further affirmed this, noting that the CJA:

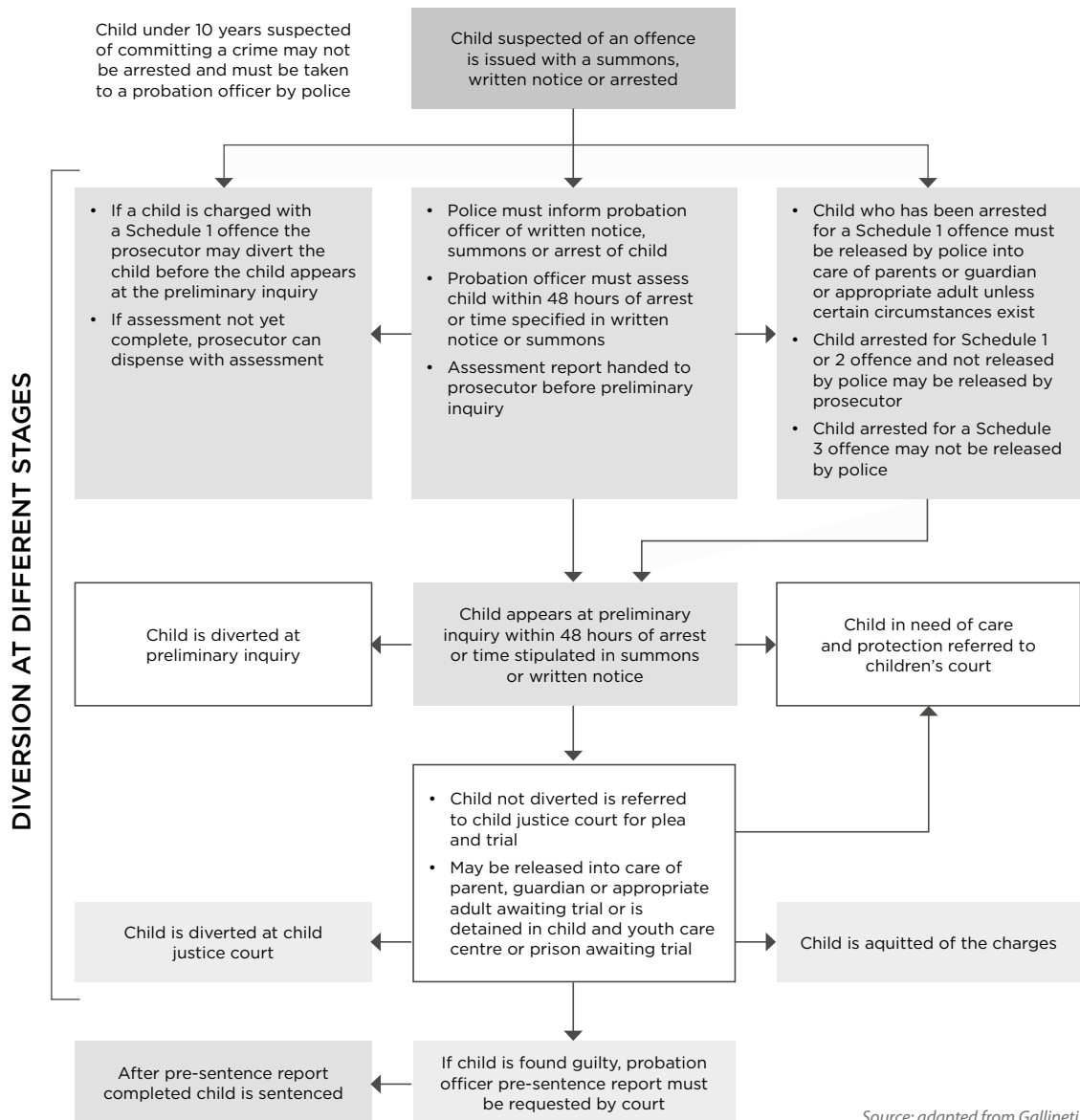
represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care, and correcting errant actions as far as possible by diversion, community-based programmes, the application of restorative-justice processes and reintegration of the child into the community.¹²

These differences are made especially tangible in terms of the procedures and processes that a child should pass through, particularly in comparison with those pertaining to an adult. These include: ensuring that a child attends a preliminary inquiry; diversion options; preliminary inquiries; trials; and only as a last resort, sentencing. Overleaf is a visual representation, by Gallinetti, of a child's passage through the criminal-justice system as managed by the CJA:¹³

The diagram illustrates the rights-based and protective approach adopted by the CJA through the different stages of the criminal-justice system in relation to a child in conflict with the law. The CJA emphasises the need to make use of arrest as a last resort when a child is suspected of having committed a crime; of the release of a child into the care of a parent, guardian or appropriate caregiver after arrest in certain circumstances; and of diversion from the criminal-justice system by a prosecutor for a preliminary inquiry conducted by a child justice court.

If a child is required to appear at a preliminary inquiry before a magistrate, the inquiry must be held within 48 hours of arrest or at the time set out in the written notice or summons. The magistrate conducting the preliminary inquiry may decide to refer the child to a diversion programme or to the care and protection system, that is, to a children's court for determination of whether the child is in need of care and protection.

Figure 1: Child's passage through the criminal justice system as managed by the CJA



If, after the preliminary inquiry, the child proceeds to plea and trial before a child justice court, such child may be released into the care of a parent, guardian or appropriate adult or may be detained in a CYCC or a correctional services facility. The child justice court before which the trial is held may decide to refer the child to a diversion programme.

If the child justice court decides that the trial must proceed and thereafter convicts the child of committing the offence, or offences, that he or she has been charged with, it must consider sentencing options. In relation to sentencing, the CJA has also developed a more nuanced manner of dealing with children and one that is explicitly aligned with the standards laid down by international law.¹⁴ Broadly, the CJA aims to achieve the following in regard to sentencing: to encourage the child to understand the implications of, and be accountable for, the harm caused;¹⁵ to promote individualised responses that strike a balance between the circumstances of the child, the nature of the offence and the interests of society;¹⁶ to promote the reintegration of child offenders into families and communities with the necessary guidance and assistance;¹⁷ and to use imprisonment as a measure of last resort, and for the shortest period of time.¹⁸ The CJA further emphasises the use of non-custodial sentences and creates a number of alternatives to detention before detention, particularly imprisonment, is considered as the appropriate sentencing option for a child who has been convicted of committing an offence.¹⁹

If detention is considered an appropriate sentencing option, the courts have the further option of sentencing child offenders to compulsory residence in CYCCs and not just imprisonment in Department of Correctional Services (DCS) facilities. A CYCC, substantively defined, is a facility that provides residential care for more than six children outside the family environment in accordance with a residential-care programme. The CYCCs that take in child offenders must provide a programme referred to in section 191(2)(j) of the Children's Act 38 of 2005, which states:

- (2) *A child and youth care centre must offer a therapeutic programme designed for the residential care of children outside the family environment, which may include a programme designed for*
 - (j) *the reception, development and secure care of children in terms of an order*
 - (i) *under section 29 or Chapter 10 of the Child Justice Act, 2008.*

Section 29 of the CJA deals with detention, in CYCCs, of children who are alleged to have committed offences. Chapter 10 specifically addresses the sentencing of child offenders convicted of criminal offences. In this regard, the intended impact of diverting children from DCS facilities to CYCCs will be dealt with below, as this aspect is more easily understood in relation to the discussion on the case studies.

2.2 International law

The Constitution, in section 39(1)(b), places an obligation on courts, tribunals or forums to consider international law when interpreting the rights in the Bill of Rights – including those rights that apply to child offenders – especially in terms of determining the scope of the said rights rather than proving their existence.²⁰ The Constitutional Court has commented as follows in this regard:

International agreements and customary international law ... provide a framework within which [the Bill of Rights] can be evaluated and understood, and[,] for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and[,] in appropriate cases, reports of specialised agencies such as the International Labour Organization may provide guidance as to the correct interpretation of [the Bill of Rights].²¹

It is therefore important to examine what international law, as well as regional law, stipulates in terms of the rights of child offenders, especially as regards the matter of detention. The present discussion touches only on those agreements that South Africa has itself ratified and is therefore bound to comply with, rather than proceeding to a more general, normative discussion.

It is important to note, firstly, that the United Nations Convention on the Rights of the Child (CRC) provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'²² The United Nations Committee on the Rights of the Child (UNCRC) notes that, in relation to child offenders, the best-interests-of-the-child principle encourages the state and other duty bearers to view children as different from adults in both their physical and psychological development as well as in respect of their emotional and educational needs.²³ Children are therefore seen as less culpable than adults and should be treated in this manner by the criminal-justice system.²⁴

The CRC further provides specifically for the rights of child offenders deprived of their liberty. Article 37(b) and (c) accordingly states the following:

- (b) *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;*
- (c) *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*

The UNCRC explicitly notes that 'the use of deprivation of liberty has very negative consequences for [a] child's harmonious development and seriously hampers [a child's] reintegration in society'.²⁵ It is for this reason that Article 37 calls for detention to be used as a measure of last resort and for the shortest appropriate period of time, so that a child's right to development is fully respected and ensured.²⁶ However, if a child is in fact detained, certain principles and rules are to be observed. Children should, for instance, be in physical environments that promote rehabilitation.²⁷ They must also have access to education in accordance with their needs and abilities and which prepares them for reintegration. Children should moreover receive adequate medical care throughout their detention,²⁸ while contact with their wider community and/or family, friends and other persons should be encouraged.²⁹ Restraint or force should only be used on a child when there is an imminent threat of injury to themselves or others, when other means of control have been exhausted, and only by those with training in applicable standards.³⁰ Furthermore, disciplinary measures must be employed in a manner consistent with upholding the inherent dignity of the child.³¹ Children must equally be able to make requests or complaints, without censorship, to the central administration, judicial authority or other proper independent authority and be informed of the response without delay.³² Lastly, independent and qualified inspectors should conduct inspections on a regular basis, as well as carry out unannounced inspections.³³

The African Charter on the Rights and Welfare of the Child (ACRWC) contains similar provisions to those contained in the CRC. The ACRWC provides, in Article 4(1), that '[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.

The ACRWC's Article 17 deals with what it terms 'administration of juvenile justice'. The article provides in part as follows:

1. *Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.*
2. *States Parties to the present Charter shall in particular:*
 - (a) *ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;*
 - (b) *ensure that children are separated from adults in their place of detention or imprisonment;*
 - ...
3. *The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, reintegration into his or her family and social rehabilitation.*

In this regard, Gose notes that, while the ACRWC contains important protections for children deprived of their liberty, it also lacks essential protections. The ACRWC is, for example, disappointingly silent when it

comes to guaranteeing a child's liberty,³⁴ an omission which may call into question the credibility of the ACRWC as a comprehensive human rights instrument.³⁵ In addition, there is no mention that the arrest, detention or imprisonment of a child should be used as a last resort and for the shortest period of time.³⁶

Given the above protections provided for child offenders in terms of the Constitution, the CJA and international law – particularly child offenders who have been deprived of their liberty – it is important that CYCCs are held accountable, by way of independent oversight processes and arrangements, for upholding these rights and protections. Indeed, the Guidelines for the Alternative Care of Children developed by the United Nations General Assembly note that facilities providing alternative care, such as CYCCs that child offenders are sentenced to, should be subject to frequent inspections – both scheduled and unannounced – which involve discussions with, and observations of, children and staff.³⁷ The guidelines go on to require the following:

129. *To the extent possible and appropriate, inspection functions should include a component of training and capacity-building for caregivers.*
130. *States should be encouraged to ensure that an independent monitoring mechanism is in place, with due consideration for the principles relating to the status of national institutions for the promotion and protection of human rights The monitoring mechanism should be easily accessible to children, parents and those responsible for children without parental care. The functions of the monitoring mechanism should include:*
 - (a) *Consulting in conditions of privacy with children in all forms of alternative care, visiting the care settings in which they live and undertaking investigations into any alleged situation of violation of children's rights in those settings, on complaint or on its own initiative;*
 - (b) *Recommending relevant policies to appropriate authorities with the aim of improving the treatment of children deprived of parental care and ensuring that it is in keeping with the preponderance of research findings on child protection, health, development and care.*

South Africa currently falls short of the standards laid down by international law when it comes to oversight or independent monitoring of CYCCs to which child offenders are sentenced.³⁸ CYCCs are managed in terms of the legal framework provided by the Children's Act. However, the Children's Act does not create an independent oversight or monitoring body for CYCCs that take in sentenced child offenders. Moreover, no other legislative or policy document establishes an independent oversight or monitoring body mandated to ensure not only that conditions in CYCCs are protective of the rights of child offenders, but also that the needs of these children are met.

What follows is a discussion of the lack of oversight or independent monitoring of CYCCs, and of how this affects the conditions in which child offenders are kept. Such discussion draws on two cases that the Centre for Child Law at the University of Pretoria was involved in.

3. OVERSIGHT OF CHILD AND YOUTH CARE CENTRES FOR CHILD OFFENDERS

When judicial officers rule that a child has committed an offence and that the appropriate sanction is to sentence them to a CYCC, they do so in the belief that the CYCC is the appropriate avenue for rehabilitation, reintegration, and the provision of essential services such as education. The courts, in short, make such orders on the grounds that the CYCC to which the child is referred constitutes an environment conducive to their development and will have a positive impact on them.

However, as shown by the two case studies below, reality may be very different. As will be argued, one of the primary reasons for this is that processes relating to regular and independent oversight of

the CYCCs are not always implemented. The case studies therefore point to the need for independent and regular oversight or monitoring of CYCCs in order to ensure that the conditions and services offered by them meet the standards laid down by the Constitution, legislation and international law.

3.1 Case studies

3.1.1 Case study 1: S v J and Others, unreported judgment of the High Court of South Africa, Eastern Cape Local Division, Bhisho, Case No. 613/2015

In 2016, the Centre for Child Law (the Centre) came to the assistance of a group of boys who had been serving sentences at the Bhisho Child and Youth Care Centre (Bhisho CYCC). The court had carefully selected this sentencing option based on the belief that the boys would benefit from the CYCC's rehabilitation and education programmes.

However, on closer inspection it was found that the caregivers had no interest in providing the boys with the necessary services and care. Of particular relevance here is that the caregivers went on strike for two weeks, leaving the boys and other children unattended and without services. As a result of a lack of supervision and care, the boys had to break into the kitchen in search of food. They were consequently moved by the police and then transferred to prison by order of court. This was done without the boys having any legal representation and, as a result, they served the remainder of their sentences in prison without their original sentences being reviewed, set aside and/or substituted with other sentences.

In response, the Centre approached the Bhisho High Court in March 2016 and obtained an order rescinding the boys' transfer to prison. The court also found it necessary to order that a quality-assurance process be conducted at the Bhisho CYCC in order to evaluate the quality of services, programmes and care. This process was subsequently carried out and a report was produced, which included the following findings:

- Programmes, including those related to therapeutic, recreational, developmental, spiritual and residential needs, were provided only in part or sporadically, and, as a result, the children did not derive the maximum benefit from their time at the Bhisho CYCC;
- There were no operational policies in place, and this had an impact on the operations of the Bhisho CYCC as well on its ability to meet service-delivery requirements;
- The child and youth care workers were derelict in the performance of their duties, which was partly ascribed to a lack of formal training;
- Integrated service delivery was not provided by all the different role players, and this had a negative impact on the development of the children concerned at the Bhisho CYCC;
- Social workers were not consistent in keeping proper records relating to their interventions in respect of individual case files as required in terms of the norms and standards for CYCCs as well as in terms of generic intervention processes;
- Supervision, which was compulsory and critical in ensuring compliance and effective services, was either non-existent or inconsistent, both in respect of social workers and child and youth care staff; and
- Some personnel showed no interest in working with children and were not adequately equipped to be employed in a CYCC where specialised skills and expertise were required.³⁹

Lack of compliance with such essential requirements for the basic management of a CYCC constituted a serious indictment of the Bhisho CYCC and indeed gave rise to significant questions concerning oversight and accountability. As the report further noted:

[S]ervices to children in conflict with the law [are] aimed at holistic interventions, through programmes that are therapeutic, recreational, spiritual, development[al] and residential. The effectiveness of these services and programmes is equally dependent on the availability of competent, suitably qualified and committed personnel that have the best interest of the child at heart.⁴⁰

3.1.2 Case study 2: The MEC for Social Development, Gauteng, and Others v The Minister of Justice and Correctional Services and Others, the High Court of South Africa, Gauteng Division, Pretoria, Case No. 44249/2016

In 2016, the Centre identified irregularities in the manner in which children at the Soshanguve Child and Youth Care Centre ('Soshanguve CYCC') were being treated. The Centre accordingly requested the Pretoria High Court to order that a quality-assurance process be carried out. This was done and the resulting report found, inter alia, the following:

- Some of the children in the Soshanguve CYCC had been sentenced for sexual offences and consequently had to undergo specialised programmes. However, the services officially rendered at the CYCC did not include any of these programmes;
- Some child and youth care workers did not clearly understand their roles and responsibilities. Furthermore, child-care programmes and disciplinary action were inconsistent and many children were left unsupervised;
- The facility itself was in poor condition; for instance, the ablution facilities were not functioning properly, the geyser in the boys' section was broken, and some of the showers also did not function properly; and
- The Soshanguve CYCC did not provide formal education for the children. It also did not provide adult education and training as well as vocational training for the children.⁴¹

These and other concerns highlighted the fact that the conditions in which the children were being kept were not conducive to the children's reform and development. Indeed, the conditions at both the Soshanguve CYCC and the Bhisho CYCC were not in accordance with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), which note that child offenders in institutions must 'receive care, protection and all necessary assistance – social, educational, vocational, psychological, medical and physical – that they may require because of their age, sex, and personality and in the interest of their wholesome development'.⁴²

The irregularities at both CYCCs were finally brought to light and made public as a result of the Centre approaching the High Courts on behalf of the children at the CYCCs, and because the High Courts ordered that quality-assurance processes be carried out owing to the fact that regular visits were not being made to the centres. This in itself is quite concerning, as it gives rise to the question of whether other CYCCs are operating in similar conditions that children have to endure, and whether these conditions are not brought to light because of a lack of regular oversight. In similar vein, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment notes:

*[[I]nappropriate conditions of detention exacerbate the harmful effects of institutionalisation on children. ... [O]ne of the most important sources of ill-treatment of children in [such institutions] is the lack of basic resources and proper government oversight.*⁴³

3.2 Oversight in international law

It should be remembered that detention not only places an onus on the state to confine the individual, but also to ensure that such individual's needs are met during detention. As Muntingh highlights:

*[W]hen the state places a person in custody, the state does so with the understanding that it accepts responsibility for that person's safety and care. ... The point of departure is, and must be, that if the state could have prevented the harm caused, it should have done so. This requires that the state must put in place the necessary mechanisms to proactively monitor and manage risks.*⁴⁴

It is submitted that this includes establishing, or supporting the establishment of, independent oversight mechanisms. It is for this reason that the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) clearly places obligations on

states to prevent torture and cruel, inhuman or degrading treatment or punishment.⁴⁵ Indeed, Article 1 of the CAT defines torture as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person’ for such purposes as punishing the person. Moreover, Article 16 of the CAT obligates states to prevent cruel, inhuman or degrading treatment or punishment which does not amount to torture.

There are also other frameworks dealing with these aspects. For instance, the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted by the United Nations General Assembly in 2002. One of OPCAT’s primary aims is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. Although, South Africa has not yet ratified OPCAT, it is hoped that the South African government will take steps to do so, as the Optional Protocol contains important provisions on the establishment of independent oversight bodies to investigate the treatment of persons deprived of their liberty – including children sentenced to CYCCs – and the conditions in which they are kept. In fact, OPCAT requires states to maintain, designate or establish one or several independent national mechanisms for the prevention of torture at the domestic level.⁴⁶ States are also obligated to guarantee the functional independence of the national preventive mechanisms and the independence of their personnel, to ensure that the experts of the mechanisms have the required capabilities and professional knowledge, and to make available the necessary resources for the functioning of the mechanisms.⁴⁷

The national preventive mechanism must have the power to regularly examine the treatment of persons deprived of their liberty, with a view to strengthening their protection against torture and other cruel, inhuman or degrading treatment or punishment.⁴⁸ In addition to the power to examine the treatment of detained persons, the mechanism must:

- Be able to make recommendations to the relevant authority with the aim of improving the treatment and conditions of persons deprived of their liberty⁴⁹; and
- Be granted:
 - access to all information concerning the number of persons deprived of their liberty in places of detention as well as the number and location of such places of detention;
 - access to all information concerning the treatment of those persons deprived of their liberty and the conditions of detention;
 - access to places of detention;
 - the opportunity to have private interviews with persons deprived of their liberty and other persons with relevant information; and
 - the liberty to choose the places they want to visit and the people to be interviewed.⁵⁰

Furthermore, OPCAT aims to establish standards and requirements that can be used as a basis of comparison of existing mechanisms for monitoring CYCCs, as well as a basis for the establishment of independent oversight mechanisms in respect of CYCCs that child offenders are sentenced to. With this in mind, the following section highlights the gaps that exist with regard to oversight of CYCCs and makes recommendations as to how these gaps can be rectified.

4. OVERSIGHT OF CYCCs IN SOUTH AFRICA

The Judicial Inspectorate for Correctional Services (JICS) monitors DCS facilities and is responsible for the Independent Correctional Centre Visitors (ICCVs). The ICCVs are independent persons who report on conditions of detention and record complaints of prisoners in DCS facilities.⁵¹ CYCCs, however, do not have a comparable oversight mechanism.

4.1 Quality-assurance processes in terms of the Children's Act

The Children's Act makes provision for the conducting of a quality-assurance process in respect of each CYCC. The process must occur within two years of registration of a CYCC and must then be repeated periodically at intervals of not more than three years from the date on which the last quality-assurance process was finalised.⁵²

The quality-assurance process must be carried out by a team connected to the CYCC, which must conduct an internal assessment, as well as by a team not connected to the CYCC.⁵³ The team not connected to the CYCC must be appointed by the provincial head of social development and must:

- Be made up of members from the government and the non-government sector;
- Include at least one member who has specific knowledge, skill and practical experience in the provision of designated child-protection services;
- Have a team leader appointed by the provincial head of social development; and
- Include any person the provincial head of social development deems appropriate.⁵⁴

Ignoring for the moment the practical concerns, there are some immediate concerns in terms of the quality-assurance process requirements as provided for in the Children's Act. For instance, the frequency of the quality-assurance process is not sufficient to ensure transparency and protection in the functioning of CYCCs that child offenders are sentenced to.⁵⁵ Moreover, the Children's Act and the Regulations provide that the independent quality-assurance team must be made up of government and non-government member. However, one need look no further than the composition of the teams in the above case studies to realise that persons from the non-government sector did not form part of the quality-assurance process team. This consequently casts doubt on the 'multidisciplinary' nature of the quality-assurance process teams. In addition, the appointments of non-government persons are not funded, thus creating difficulties in attracting people qualified to take part in the quality-assurance process.⁵⁶

Further concerns relate to the level of oversight that the Children's Act provides over CYCCs, including the fact that, even though the Regulations require that CYCCs have a written complaints procedure in order to allow children to highlight their concerns about particular incidents or staff members,⁵⁷ it is doubtful that this will be seen as legitimate by the children if there are serious rights violations, because the procedure is managed by the staff of the CYCC itself.⁵⁸ Moreover, if a CYCC employee or official reports abuse or neglect, this has to be investigated by the Department of Social Development and the South African Police Service.⁵⁹ However, no mechanism exists that ensures that investigations have been carried out and acted upon.⁶⁰

The quality-assurance process teams as such do not seem to align with OPCAT requirements in respect of a national preventive mechanism for monitoring treatment and conditions in places of detention. A more thoughtful and strategic process will have to be developed in order to transform the quality-assurance process teams into what is envisaged by OPCAT. While there are various possible ways of doing this, this Research Paper highlights only one such mechanism.

4.2 Establishment of a children's rights unit within the South African Human Rights Commission

A possible option for ensuring that specialised and regular oversight and monitoring of CYCCs is carried out is the establishment of a children's rights unit within the South African Human Rights Commission (SAHRC). This would fall both within the mandate and purpose of such institution. The SAHRC, as a creation of the Constitution, is an independent body that is subject only to the Constitution and the law.⁶¹ The SAHRC is furthermore mandated to be impartial and must exercise its powers and perform its functions without fear or favour,⁶² and no person or organ of state may interfere with the functions of the SAHRC.⁶³ The SAHRC was further established to promote respect for human rights and a culture of

human rights, to promote the protection, development and attainment of human rights, and to monitor and assess the observance of human rights in South Africa.⁶⁴ It has the power to investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated, to carry out research, and to educate.⁶⁵

The above-mentioned provisions in the Constitution show that a deliberate effort was made to ensure that the SAHRC operates as an independent institution free from any undue influence in investigation and reporting on human rights abuses. The South African Human Rights Commission Act 40 of 2013 (the SAHRC Act) further regulates the functioning of the SAHRC.

The SAHRC Act provides, inter alia, that the SAHRC has the power to make recommendations to organs of state at all levels of government when it considers it necessary that certain action be taken for the adoption of progressive measures for the promotion of human rights and the furtherance of such rights.⁶⁶ The SAHRC is also competent to carry out studies necessary for reporting on, or relating to, human rights, and to request any organ of state to provide it with information on any legislative and executive measures adopted by such organ of state relating to human rights.⁶⁷

The SAHRC Act, in section 13(3), further empowers the SAHRC:

- (a) *to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress. Where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum; and*
- (b) *to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.*

The SAHRC is thus a powerful human rights enforcement body that plays an important role in upholding the Constitution. Investigations by the Commission are weighty and the institution has the power to ensure the proactive enforcement of human rights.⁶⁸ The establishment of a children's rights unit within the SAHRC would thus go a long way towards upholding and promoting the rights of children in various ways. The children's rights unit would also have the same powers and functions as assigned to the SAHRC by the Constitution and the SAHRC Act.

In relation to independent oversight of CYCCs that detain children who have committed offences, the children's rights unit would have constitutionally and legislatively established powers to investigate the treatment, care and conditions that such children experience in the CYCCs. The unit would also be bound to ensure that constitutional and legislative obligations are met, as well as those obligations and principles set out in terms of international law. Furthermore, if South Africa were to ratify OPCAT, the children's rights unit would be able to align its functions with the obligations set out in respect of the preventive mechanism as described in OPCAT.

5. CONCLUSION

This Research Paper has given a broad overview of the child justice system in South Africa as provided for in the Constitution and the CJA. The paper also set out the international law obligations that this child justice system has to comply with. This was done in order to establish a basis for the discussion of the deprivation of liberty of child offenders, particularly child offenders sentenced to CYCCs. The national and international legal framework sets out the rights and freedoms that must be protected and

affirmed when children in conflict with the law navigate the criminal-justice system and are deprived of their liberty.

It is these rights and freedoms that form the basis for the Research Paper's discussion of the need for independent oversight of CYCCs that take in children in conflict with the law. CYCCs are regulated by the Children's Act. However, the monitoring function provided for by the Children's Act does not sufficiently allow for oversight of CYCCs that take in the aforementioned children. The Children's Act provides for monitoring through quality-assurance processes, but these processes fall short in certain respects. Among other things, there is a lack of diversity of the role players that make up the quality-assurance process teams, and the frequency of the process is also insufficient. The case studies described in the present Research Paper paint a picture of quality-assurance processes being carried out sporadically and as a result of court intervention. The case studies further show CYCCs falling far short of the requirements, both in respect of physical conditions as well as services offered to children. The CYCCs discussed were not environments conducive to rehabilitation and possible reintegration of children in conflict with the law. It could be argued that, had regular oversight and implementation of recommendations arising from such oversight occurred, the CYCCs concerned might have been in better condition and more suitable for catering for the needs of the children placed in their care.

OPCAT obligates state parties to establish systems involving regular visits by oversight bodies. These bodies must be independent, must be composed of experts, and must have the necessary resources to carry out oversight functions and make recommendations to ensure better functioning of detention facilities. South Africa is therefore encouraged to ratify OPCAT and put in place mechanisms to implement the provisions therein.

There are various possible avenues by which South Africa can use OPCAT to ensure a better independent oversight mechanism for monitoring and evaluating CYCCs. The Research Paper discusses one such option, namely the establishment of a children's rights unit within the SAHRC. The SAHRC is an independent institution established by the Constitution and regulated by national legislation. It has been created to ensure the promotion of, and respect for, human rights and has the power to investigate, report and make recommendations regarding the observance of human rights. A children's rights unit would, *inter alia*, play the role of an independent oversight body that investigates the conditions and services in CYCCs that take in children in conflict with the law (and other CYCCs and detention facilities that children are found in). The unit would also have the requisite independence and, it is hoped, necessary expertise to ensure that the functioning of such CYCCs is in line with the Constitution and the standards laid down in terms of international law.

ENDNOTES

- 1 The CJA further applies, at the discretion of the Director of Public Prosecutions, to people who were 18 years or older but under the age of 21 years at the time that they were handed a written notice, served a summons or arrested.
- 2 A Skelton (2015) South Africa. In: T Liefwaard & JE Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Switzerland, Springer Publishing, p. 14.
- 3 Ibid.
- 4 A Skelton (2009) Constitutional Protection of Children's Rights. In: T Boezaart (ed.), *Child Law in South Africa*, Cape Town, Juta & Co, p. 280.
- 5 *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) at para 17, and Skelton (n 2 above), p. 280.
- 6 *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 42.
- 7 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC) at para 32.
- 8 Centre for Child Law (n 7 above) at para 29.
- 9 Centre for Child Law (n 7 above) at paras 27–28.
- 10 A Skelton (2013) Children. In I Currie & J de Waal (eds), *The Bill of Rights Handbook*, Cape Town, Juta & Co, p. 617.
- 11 Ibid.
- 12 *S v CKM and Others* 2013 (2) SACR 303 (GNP) at para 7.
- 13 J Gallinetti (2009), *Getting to Know the Child Justice Act*, Cape Town, Children's Rights Project, Community Law Centre, p. 65.
- 14 M Courtenay & Z Hansungule (2014) Protecting the Rights of Children in Conflict with the Law: A Review of South Africa's Child Justice Act. In: P Proudlock (ed.), *South Africa's Progress in Realising Children's Rights: A Law Review*, Cape Town, Children's Institute, p. 156.
- 15 CJA, section 69(1)(a).
- 16 CJA, section 69(1)(b).
- 17 CJA, section 69(1)(c) and (d).
- 18 CJA, section 69(1)(e).
- 19 CJA, sections 72–79; Courtenay & Hansungule (n 14 above), p. 157.
- 20 I Currie & J de Waal (eds) (2013), *The Bill of Rights Handbook*, Cape Town, Juta & Co, p. 147.
- 21 *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; 1995 (2) SACR 1 at para 35.
- 22 United Nations Convention on the Rights of the Child, Article 3.
- 23 General Comment No. 10 (2007), Children's Rights in Juvenile Justice CRC/C/GC/10 (25 April 2007), p. 5.
- 24 Ibid.
- 25 Ibid.
- 26 Ibid.
- 27 General Comment No. 10 (n 23 above), pp. 23–24.
- 28 Ibid.
- 29 Ibid.
- 30 Ibid.
- 31 Ibid.
- 32 Ibid.
- 33 Ibid.
- 34 M Gose (2002) *The African Charter on the Rights and Welfare of the Child*, Cape Town, Community Law Centre, University of the Western Cape, pp. 69–70.
- 35 Ibid.
- 36 Ibid.
- 37 Resolution adopted by the General Assembly: Guidelines for the Alternative Care of Children A/RES/64/142 (24 February 2010), p. 18.
- 38 This Research Paper focuses on CYCCs to which child offenders are sentenced, but independent monitoring of all CYCCs, including CYCCs to which children awaiting trial are sent as well as CYCCs that care for children who have been found to be in need of care and protection by the children's courts, is an area that needs serious and urgent improvement.

- 39 Province of the Eastern Cape, Social Development (April 2016), Bhisho Child and Youth Care Centre Developmental Quality Assurance Assessment Report, pp. 6–7.
- 40 Province of the Eastern Cape (n 39 above), p. 7.
- 41 Gauteng Province, Social Development (October 2016), Developmental Quality Assurance Report: Soshanguve Child and Youth Care Centre (Secure Care Centre), pp. 6–31.
- 42 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, para 26.2.
- 43 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Mendez, A/HRC/28/68 (5 March 2015), p. 15.
- 44 L Muntingh (2012) Children Deprived of Their Liberty: Protection from Torture and Ill-Treatment. In: A van Niekerk, S Suffla & M Seedat. (eds), *Crime, Violence and Injury in South Africa: 21st Century Solutions for Child Safety*, Houghton, PsySSA, p. 163.
- 45 Ibid. South Africa ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1998.
- 46 OPCAT, Article 17.
- 47 OPCAT, Article 18.
- 48 OPCAT, Article 19.
- 49 Ibid.
- 50 OPCAT, Article 20.
- 51 Muntingh (n 44 above), p. 164.
- 52 Children’s Act, section 211(1) and Regulation 89(1) and (2).
- 53 Children’s Act, section 211(2).
- 54 Children’s Act, Regulation 89(5)(a)–(d).
- 55 Muntingh (n 44 above), p. 166.
- 56 South African Human Rights Commission (November 2017), Discussion Paper: Establishing a national Preventive Mechanism in South Africa, p. 6.
- 57 Children’s Act, Regulation 74(1)(b).
- 58 Muntingh (n 44 above), p. 166.
- 59 Ibid.
- 60 Ibid.
- 61 Constitution, section 181(2) & (4).
- 62 Ibid.
- 63 Ibid.
- 64 Constitution, section 184(1)(a)–(c).
- 65 Constitution, section 184(2)(a)–(d).
- 66 SAHRC Act, section 13(1)(a).
- 67 Ibid.
- 68 J Klaaren (2017) South African Human Rights Commission. In: S Woolman & M Bishop (eds), *Constitutional Law of South Africa*, Service 6, Cape Town, Juta & Co.

ABOUT THE AUTHOR

Zita Hansungule

Zita Hansungule is the senior project coordinator of the Centre's Research, Monitoring and Evaluation Project. She began working full-time at the Centre for Child Law in 2012 as the assistant project coordinator. She obtained her LLB degree in 2011 from the University of Pretoria. In 2016, she clerked at the Constitutional Court and obtained her LLM degree, also from the University of Pretoria. She returned to the Centre in 2017.

Zita Mulambo Hansungule
Senior Project Coordinator
Research, Monitoring & Evaluation
Centre for Child Law, University of Pretoria

Email: zita.hansungule@up.ac.za
Tel: +27 12 420 4502

The Centre for Child Law

The Centre for Child Law is an impact litigation and advocacy organisation based at the University of Pretoria. The Centre's vision is to establish and promote child law and uphold the rights of children in South Africa, within an international and regional context, particularly insofar as these interests pertain to their legal position.

The Centre aims to, amongst other things, reform aspects of the child justice system through strategic litigation, advocacy and collaboration in order to ensure compliance with the Constitution, the Child Justice Act and International and Regional Law. One of the ways the Centre aims to do this is by promoting oversight mechanisms for child offenders in child and youth care centres through advocacy and collaboration.



ABOUT APCOF

The African Policing Civilian Oversight Forum
Building 23B, Unit 16
The Waverley Business Park
Wyecroft Road, Mowbray 7925
South Africa

Tel: +27 21 447 2415
Fax: +27 21 447 1691
Email: info@apcof.org.za
Web: www.apcof.org.za
Twitter: @APCOF
Facebook: African Policing Civilian Oversight Forum

This publication is No. 19 in the APCOF Research Series each of which comprises a Research Paper, a Policy Brief and a Press Release. For these and other publications, please visit www.apcof.org.za.

The opinions expressed in this paper do not necessarily reflect those of the African Policing Civilian Oversight Forum (APCOF). Authors contribute to the APCOF Research Series in their personal capacity.

© APCOF 2018
Designed and typeset by COMPRESS.dsl

This publication was made possible through the support of the Open Society Foundation for South Africa.



www.apcof.org.za

