

**STATEMENT BY THE COMMUNITY LAW CENTRE SUBMITTED TO  
THE AFRICAN COMMISSION ON HUMAN AND PEOPLE’S RIGHTS AT  
THE 48<sup>TH</sup> ORDINARY SESSION, 10 – 24 NOVEMBER 2010, BANJUL,  
THE GAMBIA**

This statement by the Community Law Centre focuses on children in prison and deprived of their liberty in South Africa and is motivated by their plight. Depriving children of their liberty should remain, as emphasised by international human rights law, a measure of last resort. Their situation warrants attention for a number of reasons:

1. The conditions in both prisons and other institutions where children are deprived of their liberty are generally below what is commonly regarded as acceptable for children.
2. Noting that only children 14-years and older may be detained in prisons, the duration of pre-trial detention is frequently too long and many cases do not proceed to trial.
3. People, and children in particular, deprived of their liberty are vulnerable to ill treatment.

**Background**

On 1 April 2010, the new Child Justice Act 75 of 2008 came into effect. This Act sets out a new regulatory framework for children in conflict with the law. It encapsulates a separate criminal justice system for children, which is geared towards protecting the rights of children, while promoting a spirit of *ubuntu*.

In terms of pre-trial detention, the Act aims to avoid the detention of children by placing an emphasis on different methods to secure a child’s attendance at court. This is done either by way of a written notice<sup>1</sup> or a summons procedure.<sup>2</sup> Even though these provisions are welcomed, the Act, in section 20, still allows a police official to arrest a child, based on such an official’s discretion that various factors exist. Considering that most SAPS officials exercising such discretion will not be senior officers, but ones that act on instruction (i.e. constables and inspectors), it might be foreseen that exercising discretion on such an important decision might be done incorrectly or even abused. This could lead to children being arrested unnecessarily and possibly detained in police cells and prison, while it would not have been in the best interest of this child to be arrested in the first place and subsequently detained.

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<sup>1</sup> Section 18 of the Child Justice Act 75 of 2008.

<sup>2</sup> Section 19 of the Child Justice Act 75 of 2008.

If it is decided to detain a child, the Child Justice Act makes provision for first placing a child in a child and youth care centre before detention in a prison or police cell.<sup>3</sup> However, the minimum age at which children can be detained in prison is 14 years.<sup>4</sup>

With regard to sentencing children, the Child Justice Act makes provision for a host of different sentencing options, being:

- community based sentences;
- restorative justice sentences;
- fines or alternatives to fines;
- sentences involving correctional supervision;
- sentences of compulsory residence in a child and youth care centre; and
- sentences of imprisonment.<sup>5</sup>

The Child Justice Act is geared towards not institutionalising children, but rather to promote alternative forms of sentencing, especially restorative justice sentences.<sup>6</sup> Section 77, however, allows for sentencing a child to imprisonment, provided that the child is over the age of 14 years at the time of sentencing.<sup>7</sup> This decision is left to the presiding officer who has a duty to exercise his/her discretion, taking all the circumstances into account. The Act allows for sentencing a child to prison, regardless of the the crime(s) committed.

### **Practical situation**

It is of grave concern to the Community Law Centre that there are still children detained in prison who are below the age of 14 years. In its 2009/2010 annual report, the Department of Correctional Services reported that on average between one and five children below the age of 14 years were awaiting trial in prisons, while on average three children below the age of 14 years were sentenced to imprisonment.<sup>8</sup> Even though the Child Justice Act only came into operation in April 2010, an earlier amendment to the Correctional Services Act prohibits the detention of unsentenced children below the age of 14 years.

Statistics made available by the Judicial Inspectorate for Correctional Services show that, as at end March 2010, 1275 children were held in South African prisons, of whom 504 (10 female) were unsentenced and 771 sentenced (11 female). It is furthermore cause for concern that unsentenced children constitute 40% of all children detained compared to their adult counterparts that constitute 30% of all adults detained. This indicates that the necessary urgency is not being applied to adjudicate their cases.

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<sup>3</sup> Section 27(a) of the Child Justice Act.

<sup>4</sup> Section 27(b) of the Child Justice Act.

<sup>5</sup> Sections 72 – 77 of the Child Justice Act.

<sup>6</sup> L Wakefield “South Africa’s compliance with its international obligations: Does the new Child Justice Act 75 of 2008 comply?” *Northern Ireland Legal Quarterly* (forthcoming).

<sup>7</sup> Section 77(3) of the Child Justice Act.

<sup>8</sup> Department of Correctional Services *Annual Report for 2009/10 Financial Year* (2010) 28.

While sentenced children may have access to services in respect of education and training, it is regrettably the case that unsentenced children are not provided with such services by the Department of Correctional Services and have to rely primarily on non-governmental organisations. A consequence of this is that they are denied schooling, even when of compulsory school-going age (15 years).

Recently, a child from Cape Town instituted legal action against the departments responsible for the criminal justice system (Department of Justice and Constitutional Development, Department of Social Development, Department of Correctional Services, the South African Police Service and the National Prosecuting Authority) in the Western Cape Province of South Africa for detaining him for years in both prison and child and youth care centres. During the trial (which was postponed for numerous times) the magistrate dropped all the charges against him, citing that not enough evidence existed to prosecute him.

### **Conclusion**

We would like to bring it to the attention of the African Commission on Human and Peoples Rights that the imprisonment of children requires serious attention in South Africa. These are for the following reasons:

- Even with the legislative mandate (Correctional Services Amendment Act) to not imprison children under the age of 14 years, this continues to happen. Therefore the provisions in the Child Justice Act need to be monitored for compliance.
- All measures need to be put in place to ensure that children are protected from all forms of ill treatment, and where such allegations are made, that these be thoroughly investigated by impartial and competent authorities.
- Children regardless of their age and sentence status should receive comprehensive services from the state to address their personal needs, reduce their risk of reoffending and promote effective reintegration.

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