



## The Criminal Capacity of Children in South Africa

International Developments  
& Considerations for a Review

A Research Report by  
Ann Skelton &  
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**Legal Disclaimer**

Information contained in this publication is specifically on criminal capacity provisions as relating to children who allegedly committed offences. In particular, the information contained in this report does not constitute legal advice.

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# 1

## The Purpose of this Research

The purpose of the research is to give an overview of the different debates and international developments on the establishment of a minimum age of criminal capacity and the *doli incapax* presumptions with a view to assist the South African Parliament in its legally mandated review of the minimum age of criminal capacity. The facts and findings in this research report may also be used as a basis for starting a debate on questions such as what the minimum age should be, and whether the current legal presumptions should be retained or discarded.

# 2

## International Instruments

### 2.1 Introduction

While there is a long history of developments in child justice before the United Nations Convention on the Rights of the Child, 1989<sup>1</sup> ("the CRC"), the CRC and related international instruments provide the seminal international framework within which children in conflict with the law should be managed.<sup>2</sup> In addition there are a number of principles, minimum rules and standards in the arena of international law which deal specifically with children in conflict with the law. Prominent in this regard are the United Nations Standard Minimum Rules on the Administration of Juvenile Justice, 1985 ("the Beijing Rules"), the United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990 ("the Riyadh Guidelines"), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 ("UN JDL Rules").

Article 3(1) of the 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 interest of the child shall be a primary consideration. This provision resonates in Article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990 ("the African Charter") and in section 28(2) of the Constitution of the Republic of South Africa, 1996.

This criterion should guide courts and legislative bodies. A child is a defendant whose age, in relation to his or her physical and psychological development and emotional and educational needs, demands particular consideration.<sup>3</sup>

Article 40(3) of the CRC therefore requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. This important requirement is reiterated by the African Charter.<sup>4</sup>

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1 United Nations Convention on the Rights of the Child, 1989. Available at [http://www.centreforchildlaw.co.za/images/files/childlaw/un\\_convention\\_rights\\_of\\_the\\_child.pdf](http://www.centreforchildlaw.co.za/images/files/childlaw/un_convention_rights_of_the_child.pdf). Accessed on 11 August 2011.

2 Gallinetti J (2009) *Getting to know the Child Justice Act* Child Justice Alliance 9.

3 Ferreira N "Putting the Age of Criminal and Tort Liability into Context: A Dialogue between Law and Psychology" (2008) 16 *The International Journal of Children's Rights* 29 at 29.

4 Article 4 of the African Charter provides that "[t]here shall be a minimum age below which children shall be presumed not have the capacity to infringe the penal law".

The Beijing Rules add to this principle by stating that the beginning of the age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.<sup>5</sup>

In the official commentary on the Beijing Rules, the following important observations are made: Firstly, that the minimum age of criminal responsibility differs widely across different States owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for behaviour deemed by the law to be criminal. Secondly, if the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.). Finally, the Beijing Rules conclude that efforts should be made to agree on a reasonable lower age limit that is applicable internationally.

Having accepted that States Parties must set a minimum age of criminal responsibility and since none of the aforementioned international instruments set an actual minimum age of criminal responsibility, the issue now to be decided is what the appropriate age limit is to ensure adequate protection for the rights of the child, while still allowing society to be protected from crime.

Flattery comments, with reference to the Beijing Rules, that age limits are arbitrary since there is no “magical transformation into a mature and responsible adult on a child’s 12th birthday, nor a sudden understanding of what constitutes a serious offence at the age of 10.”<sup>6</sup> He continues to acknowledge the necessity of a minimum threshold and suggests that it should be accompanied by an element of flexibility to take into account a child’s actual understanding.<sup>7</sup>

Odongo comments on the Beijing Rules that while a set minimum age of criminal responsibility might be considered arbitrary; the choice that a State makes when selecting such age must not be arbitrary.<sup>8</sup>

The United Nations Committee on the Rights of the Child (the body responsible for monitoring the implementation of the CRC) has continuously expressed its concern with regard to the vast international differences in setting a minimum age.<sup>9</sup> It has called for a comprehensive juvenile justice policy reflecting a more unified approach to the question of minimum age (amongst other things) so as to lessen the disparities amongst the States Parties and to raise international standards.

As a result of these concerns, the definitive guide to implementing effective child justice was released by the Committee on the Rights of the Child in the form of General Comment No. 10 of 2007: Children’s Rights in Juvenile Justice (“General Comment No. 10”).

General Comment No. 10 elaborates on the nature of States Parties’ obligations in terms of Article 37 and Article 40 of the CRC and the implementation of these obligations at national level. It also addresses the subject under present discussion: the minimum age of criminal responsibility. In this particular regard, the obligation is clearly

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5 Rule 4.1.

6 Flattery J “The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System”. Available at [www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf](http://www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf) at 30. Accessed on 05 February 2011.

7 Flattery J “The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System”. Available at [www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf](http://www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf) at 30. Accessed on 05 February 2011.

8 Odongo G O (2007) “A Case for Raising the Minimum Age of Criminal Responsibility: Challenges Regarding the Age of Criminal Responsibility”. Available at <http://www.africanchildforum.org>. Accessed on 11 August 2011.

9 An assessment of the many Reports and Concluding Observations of the Committee on the Rights of the Child makes the foundation of this submission plain.

stated and based on universal wisdom: A fixed minimum age of criminal responsibility of not lower than 12 years was established and it was recommended that States Parties should progressively raise the minimum age where possible.<sup>10</sup> General Comment No. 10 provides that any age below 12 years is unacceptably low. The inference can therefore be made that such a low age is also in contravention of the CRC. This aspect of the General Comment was an important milestone as it put an end to the issue as to what the international standard for an appropriate minimum age of criminal responsibility should be.

Prior to the release of General Comment No. 10, the Committee on the Rights of the Child held a Day of General Discussion on the Administration of Juvenile Justice on 17 November 1995 ("Day of General Discussion") where the conclusion was reached that the general principles of the CRC had not been sufficiently reflected in national legislation or practice. With particular reference to non-discrimination it expressed concern about instances where criteria of a subjective and arbitrary nature (such as the attainment of puberty, the age of discernment or the personality of the child) still prevailed in the assessment of the criminal responsibility of children and in deciding upon the measures applicable to them.<sup>11</sup> It was stressed that criminal responsibility should be based on objective criteria.<sup>12</sup>

Thereafter, in General Comment No. 10, the Committee on the Rights of the Child took a step further and commented that the use of two minimum ages of criminal responsibility such as is occasioned by the retention of the rebuttable presumptions for certain categories of children is discriminatory in that it is in contravention of Article 2 of the CRC. It was noted that the presumption of *doli incapax* is not only confusing but also leads to children being treated differently according to their maturity and the nature and quality of the rebuttal evidence adduced by the prosecution.<sup>13</sup> The Committee noted further that, in practice, this results in the use of the lower age limit in cases of more serious crimes.<sup>14</sup>

The Committee on the Rights of the Child also expressed its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. It was strongly recommended that States Parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.<sup>15</sup>

While General Comment No. 10 does not constitute binding international law, it can nevertheless play a significant role in the interpretation of the issue of an acceptable minimum age of criminal responsibility at the domestic level.<sup>16</sup>

The objective of establishing a reasonable minimum age of criminal responsibility and ensuring that children under that age are not criminalised was reaffirmed in August 2010 when the United Nations Interagency Panel on Juvenile Justice Reform ("the IPJJR") published its Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes.<sup>17</sup> The desired outcomes of this objective were identified as follows:<sup>18</sup>

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10 General Comment No. 10 at paragraph 32.

11 Summary Report on Committee on the Rights of the Child Day of General Discussion, Available at [http://www2.ohchr.org/english/bodies/crc/docs/discussion/juvenile\\_justice.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion/juvenile_justice.pdf), at paragraph 218. Accessed on 08 August 2011.

12 Summary Report on Committee on the Rights of the Child Day of General Discussion, Available at [http://www2.ohchr.org/english/bodies/crc/docs/discussion/juvenile\\_justice.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion/juvenile_justice.pdf), at paragraph 226. Accessed on 08 August 2011.

13 "The Minimum Age of Criminal Responsibility: 10 or 12 years?" 2008 (10)1 *Article 40* 8 at 9.

14 General Comment No. 10 at paragraph 30.

15 General Comment No. 10 at paragraph 34.

16 Sloth-Nielsen J "A New Vision for Child Justice in International Law" (2007) 9(1) *Article 40* 1 at 1. The South African Constitutional Court has taken cognisance of General Comments. See for example *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) para 29-31 where the Court took note of General Comments issued by the United Nations Committee on Economic, Social and Cultural Rights.

17 Interagency Panel on Juvenile Justice Reform (2010) "Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes" United Nations Office on Drugs and Crime 37.

18 Interagency Panel on Juvenile Justice Reform (2010) "Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes" United Nations Office on Drugs and Crime 37.

- The population is informed and supportive of the change in the age of criminal responsibility;
- The law is amended and a minimum age is set or the previous minimum age is raised.
- Law enforcement and justice officials are aware of the minimum age of criminal responsibility and respect it in their decisions.
- Children under the age of criminal responsibility are not treated as criminals.

In dealing with the impact of the proposed reforms to bring national laws pertaining to the minimum age of criminal responsibility in line with the CRC and its related instruments, the IPJJR noted that the implementation of the change will be influenced by the manner in which criminal incidents involving children under the minimum age of criminal responsibility are treated, as it warned of the risk that children under the age of criminal responsibility may still be deprived of their liberty, but without the legal guarantees offered by the justice system.<sup>19</sup>

Thus, when considering the appropriate minimum age of criminal responsibility it is also important that the lack of due process guarantees has been a major source of criticism of countries that have set a very high minimum age of criminal responsibility, such as 16 or 18 years of age. For children under the minimum age, it then often means intervention by the State, but outside of the justice system in which those due process guarantees are safeguarded, in theory at least. Hearings and decisions outside that system, including those held or made by administrative bodies, are not bound by the same rules and may, it is feared, easily take on an arbitrary nature, with the overutilization of deprivation of liberty for social welfare reasons becoming a significant risk.<sup>20</sup>

## 3

### The Position in Foreign Jurisdictions

In the first instance, it is important to note that the concept of criminal responsibility does not bear the same meaning in all jurisdictions. In particular, in some countries one age hides another since the official age of criminal responsibility may not be the lowest age at which a child can be involved with the justice system, because the system allows a lower age exception for a serious offence.<sup>21</sup> Alternatively, the minimum age may be applicable to all offences except serious crimes.<sup>22</sup> Yet another alternative approach exists in that some countries with a low minimum age have a system of “steps” whereby different measures are applicable for specified age groups.<sup>23</sup> It is therefore important to keep in mind that the minimum age of criminal responsibility in each country is in no way an automatic indication of the way a child will be dealt with after committing an offence.

The developments pertaining to the minimum age of criminal responsibility in several foreign jurisdictions which amended their legislation pursuant to ratifying the CRC will now be examined.

19 Interagency Panel on Juvenile Justice Reform (2010) “Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes” United Nations Office on Drugs and Crime 37.

20 UNICEF Innocenti Digest on Juvenile Justice 1998. Available at <http://www.unicef-irc.org/publications/pdf/degest3e.pdf> at 4. Accessed on 05 March 2011.

21 UNICEF Innocenti Digest on Juvenile Justice 1998. Available at <http://www.unicef-irc.org/publications/pdf/degest3e.pdf> at 5. Accessed on 05 March 2011.

22 UNICEF Innocenti Digest on Juvenile Justice 1998. Available at <http://www.unicef-irc.org/publications/pdf/degest3e.pdf> at 4. Accessed on 05 March 2011. The Children, Young Persons and their Families Act, 1989 of New Zealand being a case in point wherein the minimum age of criminal responsibility is set at 14 years except for murder or manslaughter where the minimum age of 10 applies together with the presumption of *doli incapax*.

23 UNICEF Innocenti Digest on Juvenile Justice 1998. Available at <http://www.unicef-irc.org/publications/pdf/degest3e.pdf> at 4. Accessed on 05 March 2011.

### 3.1 Australia

The laws regulating the imposition of criminal responsibility on children in Australia are based on a child's age and his or her knowledge of the wrongfulness of a criminal act. Since 2000 the statutory minimum age of criminal responsibility is 10 years in all Australian jurisdictions.<sup>24</sup> Between the ages of 10 and under 14 years, a rebuttable presumption operates to deem a child incapable of committing a criminal act.<sup>25</sup>

For children between the ages of 10 and under 14 years to be held criminally responsible for their acts, the prosecution has to prove either that the child knew that his act was wrong or that he had the capacity to know that his act was wrong, depending on the jurisdiction.<sup>26</sup>

To rebut the presumption of *doli incapax*, according to the Australian Law Reform Commission, the prosecution must prove that the accused child knew that the criminal act which he is charged with was wrong at the time it was committed.<sup>27</sup> Urbas writes that the following basic principles have been recognised by the Australian courts as governing the operation of the presumption of *doli incapax*:<sup>28</sup>

- The standard of proof for the evidence brought forward to prove that an accused child had sufficient appreciation of the wrongfulness of an act is that such evidence must be "strong and clear beyond all doubt and contradiction".
- Secondly, the aforesaid evidence "must not consist merely of evidence of the acts amounting to the offence itself".
- Finally, the prosecution must show that the accused child knew the particular act to be "seriously wrong, as opposed to something merely naughty or mischievous".

Urbas discusses the problems that occur with the rebuttal of the presumption of *doli incapax* in practice. He observes that while there seem to be significant evidentiary obstacles, it has been observed that the prosecution, in attempting to rebut the presumption of *doli incapax*, is allowed considerable evidentiary concessions whereby normally inadmissible, highly prejudicial material is deemed admissible.<sup>29</sup> According to Urbas this evidence regularly takes the form of admissions by the accused during police interviews, notably including admissions in relation to earlier acts of misconduct which is, of course, rarely admissible to prove an issue in a criminal trial.<sup>30</sup> Even where an accused makes no admissions showing consciousness of wrongdoing, the prosecution may introduce evidence of surrounding circumstances from which such consciousness may be inferred which may include evidence of attempts to run from police or to hide the facts.<sup>31</sup>

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24 The last Australian jurisdiction to amend its law pertaining to the minimum age of criminal responsibility was Tasmania. Section 18(1) of its Criminal Code, 2000 reflects the minimum age of criminal responsibility as being 10 years. For an account of the laws that regulate the minimum age of criminal responsibility and the operation of the presumption of *doli incapax* in each Australian jurisdiction see Urbas G "The Age of Criminal Responsibility" (2000) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1 at 3.

25 Urbas G "The Age of Criminal Responsibility" (2000) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1 at 1.

26 Mathews B "Time, Difference and the Ethics of Children's Criminal Responsibility" (2003) 5(2) *Newcastle Law Review* 65 at 66.

27 Australian Law Reform Commission (1997) "Seen and Heard: Priority for Children in the Legal Process" *Australian Law Reform Commission Report No. 84* at paragraph 18.20.

28 Urbas G (2000) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1 at 4.

29 Urbas G (2000) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1 at 4.; Australian Law Reform Commission n 27 above at paragraph 18.19

30 Urbas G (2000) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1 at 4..

31 Ibid.

Mathews submits that despite the presence of the rebuttable presumption, it rarely operates in the accused child's favour regardless of the jurisdiction the child finds himself in.<sup>32</sup> He writes that "[w]hat originated as a protective presumption of irresponsibility to protect young offenders from harsh punishment has now been read down and often simply ignored, so that children of 10 years or more are usually at best judged for normalcy for their age. If found to be of normal intelligence for his or her age, a child is deemed to know whether certain acts are right or wrong. This is a generic judgment of children who occupy a society featuring compulsory education and media and information saturation, and this judgment is perhaps motivated by a cynical perception of children who no longer inhabit a time of innocence for long."<sup>33</sup>

When the aforesaid comments on the practical application of the presumption of *doli incapax* are considered it becomes obvious why Crofts writes that the validity and fairness of the rebuttable form of the presumption has been increasingly questioned in Australia in recent years.<sup>34</sup> Crofts argues for the retention of the presumption but his statement in his concluding remarks that the presumption and its practical application is misunderstood<sup>35</sup> and his call to "take the presumption seriously"<sup>36</sup> indicates that the presumption of *doli incapax* is not offering Australian children between the ages of 10 and 14 years the protection that it was intended to.

In 2005 the Committee on the Rights of the Child expressed its concern that Australia's minimum age of criminal responsibility of 10 years is set too low<sup>37</sup> and recommended that it should bring its juvenile justice system in line with the CRC and other United Nations standards in the field by raising the age of criminal responsibility to an internationally acceptable level.<sup>38</sup>

## 3.2 Ireland

In Ireland the age of criminal responsibility is governed by the Children Act, 2001 as amended by the Criminal Justice Act, 2006.

In 2006 the minimum age of criminal responsibility was raised from 7 to 12 years for most offences.<sup>39</sup> No child under the age of 12 years can be charged with a criminal offence. However, in the case of serious offences such as murder, rape or aggravated sexual assault, an exception to the aforesaid prohibition on prosecution is made for 10 and 11 year old children accused of such offences.<sup>40</sup> Furthermore, the rebuttable presumption of *doli incapax* has been abolished<sup>41</sup> and the consent of the Director of Public Prosecutions is required before any child under 14 years can be charged with an offence.<sup>42</sup>

Even though the aforesaid developments were warmly welcomed in Ireland in that it indicated a revised focus on diversion from the criminal justice system, rehabilitation and of ensuring the best interest of the child,

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32 Mathews B (2003) 5(2) *Newcastle Law Review* 65 at 70.

33 Mathews B (2003) 5(2) *Newcastle Law Review* 65 at 70.

34 Crofts T "Doli Incapax: Why Children Deserve its Protection" (2003) 10(3) *Murdoch University Electronic Journal of Law* 26 at paragraph 2.

35 Crofts T (2003) 10(3) *Murdoch University Electronic Journal of Law* 26 at paragraph 43.

36 Crofts T (2003) 10(3) *Murdoch University Electronic Journal of Law* 26 at paragraph 44.

37 United Nations Committee on the Rights of the Child *UN Committee on the Rights of the Child: Concluding Observations: Australia*, 20 October 2005, U.N. Doc. CRC/C/15/Add.268 available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?Opendocument), at paragraph 73. Accessed on 12 March 2011.

38 United Nations Committee on the Rights of the Child *UN Committee on the Rights of the Child: Concluding Observations: Australia*, 20 October 2005, U.N. Doc. CRC/C/15/Add.268 available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?Opendocument), at paragraph 74. Accessed on 12 March 2011.

39 Section 52 of the Children's Act, 2001 as amended by the Criminal Justice Act, 2006.

40 Section 52(1) of the Children's Act, 2001 as amended by the Criminal Justice Act, 2006.

41 Section 52(3) of the Children's Act, 2001 as amended by the Criminal Justice Act, 2006.

42 Section 52(4) of the Children's Act, 2001 as amended by the Criminal Justice Act, 2006.

Flattery notes his concern that many of the developments are still incompatible with Ireland's obligations under international law.<sup>43</sup>

With reference to children between the ages of 12 and under 14 years accused of committing offences, Flattery submits that there has been a shift of power from the Court to the Director of Public Prosecutions in that the Court no longer rules on the capacity of the child to commit the offence in question but the discretion of the Director of Public Prosecution is relied upon to decide whether or not to prosecute a child.<sup>44</sup>

The final say in any matter concerning a child accused still, however, rests with the Court as it is given the power to dismiss on its merits a case against a child if it determines that the child, having regard to the child's age and level of maturity, did not have a full understanding of what was involved in the commission of the offence.<sup>45</sup> Despite avoiding the use of the term "capacity", the Court is given the power to consider the child's actual capacity and his legal liability for the specific offence in question.<sup>46</sup>

It therefore seems that the Irish legislature attempted to mitigate the harshness of deeming the child aged 12 years and over to be fully capable of committing an offence (regardless of his actual capacity) by firstly requiring the exercise of the Director of Public Prosecutions' discretion to determine whether or not a child over 12 years will be charged with an offence and secondly through the powers of the Court to dismiss the case against a child who did not have a full understanding of what was involved in the commission of the offence.

Finally, it is submitted that, although there is much to be learnt from the position in Irish law, it cannot be followed blindly. The exception created for 10 and 11 year old children who are accused of committing serious offences is not in accordance with the international standard set by the Committee on the Rights of the Child in General Comment No. 10 and in fact stands in direct contrast to paragraph 34 thereof (as referred to above) which strongly recommends that States Parties should not allow, by way of exception, the use of a lower age for serious offences.

### 3.3 Africa

Before considering the developments in selected African states, it is necessary to momentarily reflect on the progress of the African region as a whole. Skelton writes that the ratification of international children's rights instruments, particularly the CRC and the African Charter, has undoubtedly had positive effects on the African continent in that several countries have drafted new legislation pertaining to children in recent years, particularly in Uganda, Ghana, Kenya, Rwanda, Nigeria and South Africa and there are bills pending in a number of other states such as Mozambique and Namibia.<sup>47</sup>

An unfortunate reality about the African region is the lack of resources which is a consistent barrier of implementation of the relevant international instruments.<sup>48</sup> Although several African countries have expressed in law a firm commitment to upholding children's rights in juvenile justice, their ability to achieve effective and

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43 Flattery J "The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System" . Available at [www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf](http://www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf) at 26 Accessed on 05 February 2011.

44 Ibid.

45 Section 76C of the Children's Act 2001.

46 Flattery J "The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System". Available at [www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf](http://www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf) at 27 Accessed on 05 February 2011.

47 Skelton A "The Development of a Fledgling Child Rights Jurisprudence in Eastern and Southern Africa based on International and Regional Instruments" (2009) 9 *African Human Rights Law Journal* 483 at 486.

48 Defense for Children International (2009) *Advocacy Strategies Training Manual General Comment Number 10: Children's Rights in Juvenile Justice* Defense for Children International 6.

consistent implementation in practice is constantly challenged.<sup>49</sup> It is submitted that South Africa is no exception in this regard and is also faced with this challenge. A consideration of an appropriate minimum age of criminal responsibility should therefore take this into account in order to arrive at a solution that would produce positive, effective and realistic results.

### 3.3.1 Uganda

Uganda has been the pioneer in child justice law reform in Africa. In 1990, shortly before ratifying the CRC, the Ugandan Child Law Review Committee was appointed to draft comprehensive new legislation to regulate Uganda's child welfare system as well as situations where children come into conflict with the law.<sup>50</sup> One of the agreed principles to guide the work of the aforesaid committee was that the CRC, the African Charter and other non-binding international instruments would be the guide when legislating for children.<sup>51</sup>

The Ugandan Children Act, 1997, raised the minimum age of criminal responsibility from 7 years to 12 years and abolished the presumption of *doli incapax*.<sup>52</sup>

With regard to children below the minimum age of criminal responsibility that come into conflict with the law, the Ugandan Children Act makes no clear statements but makes provision for the matter to be heard by local government councils that are mandated to take a restorative justice approach with the order they make in such cases.<sup>53</sup> Should the council fail to resolve the matter or should the matter fall outside the jurisdiction thereof, application to the Family and Children's Court for a supervision or care order must be made by a social welfare and probation officer.<sup>54</sup> A positive aspect of this approach is the mandate placed upon the probation and social welfare officer to monitor the child's progress, including continuing interaction with the child's parents while bearing in mind the wishes of the child, during placement of the child anywhere other than with the child's parents.<sup>55</sup>

Odongo comments that the Ugandan law reform process reveals that the debate on raising the minimum age goes beyond the rhetoric of child rights.<sup>56</sup> Therefore, the comparative example of other countries' legislation and research into the ages and offences of children committing crimes were relevant factors that were considered before arriving at the decision to fix the minimum age of criminal responsibility.<sup>57</sup> Importantly, research into the age at which it was reasonable to expect children to fully understand the consequences of their actions and to have the maturity to resist the pressure of peers and adults, was crucial to the Ugandan Child Law Review Committee.<sup>58</sup> Odongo concludes that this is in keeping with the provisions of the Beijing Rules to the effect that, in setting the minimum age of criminal responsibility, the facts of a child's emotional, mental and intellectual maturity must be borne in mind.<sup>59</sup>

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49 Defense for Children International (2009) *Advocacy Strategies Training Manual General Comment Number 10: Children's Rights in Juvenile Justice* Defense for Children International 6.

50 Odongo G O "Child Justice Law Reform Development in Africa and International Standards of the Rights of the Child" (2004) 6(2) *Article 40* 8 at 9.

51 Ramages K A "The Minimum Age of Criminal Responsibility in Selected African States" (2009) 11(1) *Article 40* 6 at 7.

52 Section 88 Uganda Children Act, 1997 (Ch59).

53 Uganda Children Act, 1997 at Sections 20 to 43.

54 Uganda Children Act, 1997 at Sections 20 to 43.

55 Uganda Children Act, 1997 at Section 33.

56 Odongo G O (2004) 6(2) *Article 40* 8 at 9.

57 Ibid.

58 Child Law Review Committee of Uganda (1992) *Report of the Child Law Review Committee* 114

59 Odongo G O (2004) 6(2) *Article 40* 8 at 9.

However, the rationale behind Uganda's development of child justice legislation seems to be based not solely on a desire to strive toward the realisation of the ideology of children's rights but also on the Ugandan Child Law Review Committee's findings that showed that very few children under the age of 14 had been arrested and charged with serious offences during a two year period.<sup>60</sup> The inference can therefore be drawn that the Ugandan Child Law Review Committee based its finding, in part, on the fact that the presumption of *doli incapax* was rarely invoked by the courts in the period before reform.<sup>61</sup>

It is unfortunate that more reliance was not placed on the position as pronounced in international law. However, it has to be borne in mind that the Ugandan law reform process took place long before the clear guidelines that we now have at our disposal were available. Therefore, although the debates in the reform process were largely based on the local contexts of Uganda and a reference to comparative examples, it is of note that the minimum age set in Ugandan law is consistent with the Committee on the Rights of the Child's approach to the minimum age of criminal responsibility and the application of the presumption of *doli incapax* as pronounced in General Comment No. 10.<sup>62</sup>

### 3.3.2 Sierra Leone

When children's rights in Sierra Leone are considered, the country's unfortunate history of poverty and a devastating eleven year civil war must be borne in mind.

However, as the country rebuilds from a decade of civil war, children's rights in child justice has gained increasing attention. An enhanced focus on children becomes clear in the recent developments in policy, in the form of the National Child Justice Strategy, 2006 and in law in the form of the Child Rights Act, 2007 ("the Child Rights Act").

The reform process started in 2000 when the Committee on the Rights of the Child expressed its serious concern regarding Sierra Leone's "extremely low" age of criminal responsibility which was set at 10 years by common law and recommended that the country reviewed its legislation and raised the minimum age accordingly.<sup>63</sup>

The Child Rights Act raised the minimum age of criminal responsibility from 10 to 14 years and brought it into line with international standards on juvenile justice including General Comment No 10.<sup>64</sup>

Active participation by the children of Sierra Leone is a laudable aspect of the law reform process in this country. Defense for Children International - Sierra Leone conducted a nationwide consultation with children, which included children in school, children living on the street and child offenders detained in prisons, where one of the issues discussed was the age of criminal responsibility.<sup>65</sup> The report that followed from the consultation with children was then presented by two children in a national workshop organised by the government's Justice Sector

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60 Odongo G O (2007) "A Case for Raising the Minimum Age of Criminal Responsibility: Challenges Regarding the Age of Criminal Responsibility". Available at <http://www.africanchildforum.org>. Accessed on 11 August 2011.

61 Odongo G O (2005) *The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context* (Unpublished LLD Thesis).

62 Ibid.

63 United Nations Committee on the Rights of the Child UN Committee on the Rights of the Child: Concluding Observations: Sierra Leone, 24 February 2000, CRC/C/15/Add.116, available at: <http://www.unhcr.org/refworld/docid/3ae6afc518.html>. Accessed 24 August 2011.

64 Child Rights Act, 2007 Section 70. Defense for Children International (2007) *From Legislation to Action: Trends in Juvenile Justice Systems across 15 Countries* Defense for Children International 23.

65 Defense for Children International (2009) *Advocacy Strategies Training Manual General Comment Number 10: Children's Rights in Juvenile Justice* Defense for Children International at page 35.

Development Programme.<sup>66</sup> The active participation of children was a key influence in the law reform. As Defense for Children International notes in its manual, children themselves served as effective advocates for their rights and produced convincing evidence obtained from their own experiences and because children are embedded within the society their views were seen as powerful indicators rather than being dismissed as outside critics.<sup>67</sup>

Unfortunately, despite the revision of the law and the progress that has been made there under, research conducted on the administration of juvenile justice after the Children's Rights Act came into operation shows instances of children below the minimum age of criminal responsibility being apprehended, interrogated by the police, charged with offences and convicted in court.<sup>68</sup> It also implies that there is insufficient knowledge of, or a disregard for, the minimum age of criminal responsibility and the legal implications thereof by the police and certain magistrates in the country.<sup>69</sup> This leads to the unfortunate situation where children below the minimum age of criminal responsibility are being put through the rigours of a criminal trial only to be discharged at the point of judgment on the basis of their low age.<sup>70</sup>

According to the United Nations Development Programme on Human Development Index, 2005, Sierra Leone may be ranked as the second least developed country in the world.<sup>71</sup> Despite this fact, children in conflict with the law have been prioritised and have gained increasing attention. Mezmur writes that Sierra Leone sets a good example for other countries with considerably more resources but less political will.<sup>72</sup> Since ratifying the CRC, it has enacted legislation to comply with the relevant international standards pertaining to juvenile justice and was enacted with General Comment No. 10 in mind.<sup>73</sup> It is therefore submitted that the problems that Sierra Leone faces in its child justice system have more to do with the practical application of its new legislation and less to do with incorrect ideology and can therefore be overcome by increased sensitisation as to the implications of the minimum age of criminal responsibility and heightened enforcement of these implications so as to avoid children under the age of 14 being put through trial proceedings.<sup>74</sup>

In the South African context, the legislature in Sierra Leone sets a good example in its fearless commitment to the realization of children's rights in juvenile justice and to the fulfillment of its obligations under international law in spite its constrained resources.

## **4** Minimum Age of Criminal Responsibility and the Presumption of *Doli Incapax* in selected African Countries

Various African countries have reviewed their minimum ages of criminal capacity since the adoption of the CRC in 1989. These reviews have resulted in higher minimum ages of criminal capacity in line with the provisions of the CRC in this regard.

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66 Ibid.

67 Ibid.

68 Audet A (2010) *Beyond the Law: Assessing the Realities of Juvenile Justice in Sierra Leone* Defense for Children International - Sierra Leone at 28.

69 Audet A (2010) at 29 to 30.

70 Ibid.

71 Available at <http://www.undp.org/hdro/HD.html>. Accessed on 09 August 2011.

72 Mezmur B D "A Small Country's Big Efforts at Law and Policy Reform" (2006) 8(3) *Article 40* 11 at 12.

73 Defense for Children International in particular gives a clear indication that General Comment No 10 was relied upon in the process of legislative reform.

74 Audet A (2010) at 30.

## Minimum age of criminal responsibility and the presumption of *doli incapax* in selected African countries<sup>75</sup>

COUNTRY	MINIMUM AGE OF CRIMINAL RESPONSIBILITY	DOLI INCAPAX?	LEGISLATION
Malawi	10	Applies	Penal Code (Amendment) Act, 2011
Ethiopia	9	Never applied	Criminal Code, 2005
Uganda	12	Abolished	Children Act, 1997
Sierra Leone	14	Never applied	Child Rights Act, 2007
Ghana	14	Abolished	Criminal Code (Amendment) Act, 1998

Malawi raised the minimum age of criminal capacity for 7 years to 10 years, which is still regarded too low in terms of international standards, but this is a step in the right direction. They did, however, decide to retain the *doli incapax* presumption, but raised the upper age of the presumption from under 12 years to under 14 years. The rebuttable *doli incapax* presumption is therefore applicable to children 10 years or older but under the age of 14 years.<sup>76</sup>

Uganda and Ghana abolished the *doli incapax* presumption but fixed much higher minimum ages of criminal capacity. It is interesting to note that both these countries raised their minimum ages of criminal capacity to, and above in the case of Ghana, the international acceptable level even before the issuing of General Comment No. 10 in 2007.

# 5

## The South African Position

### 5.1 Introduction

When South Africa ratified the CRC on 16 June 1995, it was one of the countries with the lowest minimum ages of criminal capacity in the world, namely 7 years. Criminal capacity of children was governed by two common law presumptions. In terms of these common law presumptions all children under the age of 7 years were irrebuttably presumed to be *doli incapax* and could thus never be prosecuted. Children between the ages of 7 years or older but under the age of 14 years were rebuttably presumed to be *doli incapax* and if any such child was to be prosecuted, the prosecution had to prove that the accused had the required criminal capacity at the time of committing the offence.

The onus rested on the Prosecution to rebut the *doli incapax* presumption by proving that a child, 7 years or older but under the age of 14 years, had the ability, at the time of the commission of the offence, to:

<sup>75</sup> Ramages K A (2009) 11(1) *Article 40* 6 at 7 - 8, Odongo G O (2005) at 168 - 182 and Audet A (2010) at 28. Also Human Rights Council, 2011. Available at <http://reliefweb.int/node/392384>. Accessed on 20 September 2011.

<sup>76</sup> The Penal Code (Amendment) Act, 2011 (Act 1 of 2011) which came into operation on 28 January 2011.

- appreciate the wrongfulness of his/her actions; and
- conduct himself or herself in accordance with this appreciation of the wrongfulness of such actions.

If the State could not successfully discharge the onus to prove both legs of the above test, the child was not criminally liable for the alleged offence. Proving that the child could distinguish between right and wrong was insufficient to rebut the *doli incapax* presumption. It had to be clear that the child knew that what he or she was doing was wrong within the context of the facts of the case.<sup>77</sup>

The common law presumptions were amended with the implementation of the Child Justice Act, 2008 (Act 75 of 2008) (the Act) on 1 April 2010.

## 5.2 Concerns about the application of the *doli incapax* presumption

A much criticised practice developed in the lower courts whereby the prosecution called the parent or guardian, who had to accompany the child to court in terms of the then applicable section 73(3) and 74 of the Criminal Procedure Act, 1977 (Act 51 of 1977), to testify for the prosecution in that regard.<sup>78</sup> The parent or guardian was usually called to confirm the age of the child offender and to confirm that the child had been taught the difference between right and wrong and whether or not the child had the ability to differentiate between right and wrong at the time when the alleged offence was committed. This practice was unfair because it created the risk that uneducated persons believed that they were giving evidence in mitigation and thereby assisting the child offender.

The presumption was designed to protect children under the age of 14 years, but it was too easily rebutted in the courts. Calls were made for the adoption of a more balanced approach in determining an appropriate minimum age for criminal capacity. The minimum age of 7 years was criticised as being unacceptably low. There was thus a need for better safeguards to make it more difficult to rebut the *doli incapax* presumption by including a requirement that the Prosecution had to lead expert testimony in order to achieve rebuttal, and thereby protecting child offenders more effectively.<sup>79</sup>

## 5.3 Developments that facilitated a review of the minimum age of criminal capacity and the rebuttable *doli incapax* presumption

On instruction of the then Minister of Justice and Constitutional Development, the South African Law Reform Commission (SALRC) launched an investigation into the feasibility of establishing a separate child justice system in South Africa in 1997.

The possibility of raising the minimum age of criminal capacity and a review of the *doli incapax* presumption in the common law formed part of the investigation. An Issue Paper was published for comment during 1997 which proposed three (3) possible options regarding the presumption:<sup>80</sup>

- The first option was to retain the rebuttable presumption with the minimum age of criminal capacity remaining at 7 years of age, but to place more emphasis on rebutting the presumption. Safeguards such

<sup>77</sup> Snyman C R 2002 *Criminal Law* Durban: Butterworths

<sup>78</sup> Van Dokkum N "Unwelcome Assistance: Parents Testifying Against Their Children" 1994 (7)2 SACJ 213 - 221.

<sup>79</sup> Skelton A "Developing a juvenile justice system for South Africa: International Instruments and Restorative Justice" (1996) *Acta Juridica* 180 - 196.

<sup>80</sup> South African Law Reform Commission (1997) Juvenile Justice Project 106 Issue Paper 9. Available at [http://salawreform.justice.gov.za/ipapers/ip09\\_prj106\\_1997.pdf](http://salawreform.justice.gov.za/ipapers/ip09_prj106_1997.pdf). Accessed on 10 August 2011.

as the requirement of expert testimony on the child's development were mentioned but there were also cautions about the cost implications of referrals to professionals for assessment and possible delays in the finalisation of matters where such assessments were to be conducted.

- The second option suggested was to raise the minimum age of criminal capacity from 7 years to 10 years and to retain the rebuttable presumption for children 10 years or older but under the age of 14 years.
- The third option was to raise the minimum age of criminal capacity to 12 or 14 years and to do away with the rebuttable presumption of *doli incapax*.

The Issue Paper was the subject of consultation with both government and civil society role-players.

Towards the end of 1998 the SALRC published a comprehensive Discussion Paper, accompanied by a draft Child Justice Bill, 2002.<sup>81</sup> Comments were invited and wide consultations followed with all the relevant government departments and non-governmental organisations providing services in the field of juvenile justice being specifically targeted for inclusion in the consultation process.

In the Discussion Paper, the SALRC identified three (3) main approaches to the issue of minimum age and criminal capacity.

- The first of these was to retain the common law rule that a child who is 7 or 10 years old but has not yet turned 14 years is presumed to be *doli incapax*, with additional measures to ensure enhanced protection of such children.
- The second approach was to depart entirely from the *doli incapax* presumption, and to set a minimum age of prosecution, not directly linked to the actual criminal capacity of the child.
- The third approach was to have a dual level of minimum age of prosecution, setting a general minimum age, and providing specific exceptions to that rule for crimes such as murder and rape.

In 1999 a two-day seminar, hosted by the Centre for Child Law, was held at the University of Pretoria, to discuss the issue of a minimum age for criminal capacity and whether or not the presumption of *doli incapax* should be retained in South African Law. The contributors were drawn from a range of disciplines including psychology, education, the judiciary and other branches of the legal profession, social anthropology and criminology. Most of the participants were reluctant to see a departure from the *doli incapax* presumption and the majority were in favour of raising the minimum age for criminal capacity to 10 years.<sup>82</sup>

In their report on Juvenile Justice, the SALRC recommended that the minimum age of criminal capacity be raised from 7 to 10 years. The rebuttable presumption of *doli incapax* with regard to children who are 10 years or older but under the age of 14 years be codified.<sup>83</sup> A minimum age of prosecution of 14 years was also recommended, provided that a child under 14 years may be prosecuted upon production by the prosecutor of a certificate from the Director of Public Prosecutions setting out the reasons for the prosecution.

The SALRC considered the effects of the removal of the presumption and concluded that if, upon removal of the presumption, the minimum age is set too low, there is a risk of indiscriminate prosecution of young children

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81 Ibid.

82 Sloth-Nielsen J 'Report on the SA Law Commission Seminar on Age and Capacity' 1999 (2) *Article 40*. See also Davel, CJ 'The Delictual Accountability and Criminal Capacity of a Child: How Big can the Gap Be?' (2001) 34(3) *De Jure* 604 - 609.

83 South African Law Commission (2000) Juvenile Justice Report Project 106. Available at [http://salawreform.justice.gov.za/reports/r\\_prj63\\_insolv\\_2000apr.pdf](http://salawreform.justice.gov.za/reports/r_prj63_insolv_2000apr.pdf). Accessed on 10 August 2011. See also Burchell J & Milton J (2005) *Principles of Criminal Law* (Third Edition) Juta & Co Ltd. 364.

without any form of screening. One of the strongest arguments supporting the retention of the presumption of incapacity for younger children is that, because of the cloak of protection offered by the presumption, one can relatively safely retain a comparatively low minimum age of criminal capacity, knowing full well that only the most developed and mature children will, following the screening process, be found to have criminal capacity.

In 2000 the United Nations Committee on the Rights of the Child noted that South Africa has drafted legislation to increase the legal minimum age for criminal responsibility from 7 to 10 years. The Committee remained concerned that the minimum age of 10 years for criminal capacity was still relatively low. It was recommended that South Africa reassess the draft legislation on criminal responsibility with a view to increasing the proposed minimum age.<sup>84</sup>

#### 5.4 Deliberations in Parliament on the minimum age criminal capacity in the Child Justice Bill (B49 of 2002)

The draft Child Justice Bill (B49 of 2002) (the Bill) published with the Report on Juvenile Justice by the SALRC was introduced into Parliament in August 2002.

Public hearings were held on the Bill in February 2003 and submissions were made by various non-government organisations and individuals. The majority of the submissions supported the raise in the minimum age of criminal capacity to 10 years.

It was pointed out that South Africa incurred an obligation when ratifying the CRC to review the minimum age of criminal capacity and if it was found to be set too low, to raise it. The Portfolio Committee on Justice and Constitutional Development (The Portfolio Committee) was urged to support the age of 10 years as the minimum age for criminal capacity. With regard to the retention of the rebuttable presumption of incapacity of children aged between 10 years or older but under the age of 14 years, it was submitted that it is a useful mechanism in ensuring that children do benefit from this protection which exists in the common law at present. It was also indicated that it is especially apposite in a country such as South Africa, where children from different cultures and traditions and from a wide array of rural, deep rural and urban areas, experience childhood very differently. There are also children with intellectual disabilities who do not mature to full capacity at the same rate as able bodied children.<sup>85</sup>

Deliberations on the Bill by the Portfolio Committee followed in March 2003.

The Bill disappeared from the parliamentary agenda until a new version was published in 2007 and introduced into Parliament in January 2008. Public hearings started in early February 2008 and once again various non-government organisations and individuals presented written and oral submission on various aspects of the new version of the Bill.

This time the majority of the submissions supported a minimum age of criminal capacity of 12 years. Most of the arguments in support of a minimum age of criminal capacity focused on the General Comment in No. 10 stating that a minimum age of criminal capacity below the age of 12 years is not internationally acceptable.<sup>86</sup> It was also submitted

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84 United Nations Committee on the Rights of the Child (2000) *Concluding Observations of the Committee on the Rights of the Child, South Africa*. UN Doc. CRC/C/15/Add.122 (2000). Available at <http://www1.umn.edu/humanrts/crc/southafrica2000.html>. Accessed on 10 August 2011.

85 Sloth-Nielsen J (2003) *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill 49/2002*. Available at <http://www.childjustice.org.za/submissions/SlothNielsen.htm>. Accessed on 10 August 2011.

86 United Nations Committee on the Rights of the Child, Forty-fourth session. Geneva, 15 January - 2 February 2007. *General Comment No.10 (2007)*. CRC/C/GC/10. 25 April 2007. Available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>. Accessed on 11 August 2011.

that the rebuttable presumption that provided “mock protection” should be abandoned.<sup>87</sup> One of the reasons for this submission was the fact that the protective measures (such as compulsory evaluations of criminal capacity) designed to ensure serious and expert attention to the manner of rebuttal of the presumption in each and every case, were no longer part of the 2007 version of the Bill.

The arguments in support of raising the minimum age of criminal capacity to 12 years were very convincing and on 12 March 2008 the Portfolio Committee tentatively settled on 12 years as the minimum age of criminal capacity pending further discussions.<sup>88</sup> In their response to the submissions made in favour of raising the minimum age of criminal capacity to 12 years, the Department of Justice and Constitutional Development recommended that the minimum age of criminal capacity be fixed at 10 years (retaining the *doli incapax* presumption applicable to children 10 years or older but under the age of 14 years). This recommendation relied on the recommendation made by the SALRC in its Report in 2000, based on the consultations with interested parties and public opinion.

On 17 June 2008 the Portfolio Committee decided to set the minimum age of criminal capacity at 10 years. This was a compromise and all parties were requested to agree to it. One of the main reasons why the Portfolio Committee did not raise the minimum age of criminal capacity to 12 years was because there were no reliable or accurate statistics on the number of children between the ages of 10 and 13 who have been accused of committing offences or the type of crimes that they have allegedly committed.<sup>89</sup>

The Bill made provision for a review of the minimum age of criminal capacity within 5 years after implementation of the Act.<sup>90</sup> In an effort to ensure that sufficient statistics and information will be available to conduct an informed review of the minimum age of criminal capacity, section 96(4) of the Act obliges the Intersectoral Committee for Child Justice to gather and report on detailed statistics and information relating to children 10 years or older but under the age of 14 years.

## Criminal Capacity in the Child Justice Act 75 of 2008

### 6.1 Review of the minimum age of criminal capacity

Section 8 of the Act provides for a review of the minimum age of criminal capacity and orders the Minister of Justice and Constitutional Development to submit a report to Parliament not later than 5 years after the commencement of this section. This report must provide statistics on the number of 10 to 13 year-old children who are alleged to have committed offences and also information on the type of offences that they allegedly committed. The statistics should also include the sentences imposed on these children if they were convicted, the number of children whose matters did not go to trial because the prosecutor was of the view that criminal

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87 Sloth-Nielsen J (2008) *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill, 2007 version*. Available at <http://www.childjustice.org.za/submissions/2008Submissions/Julia%20Sloth-Nielsen.pdf>. Accessed on 10 August 2011.

88 Parliamentary Monitoring Group (2008) *Child Justice Bill (B49 - 2002): Department Summary of Submissions* 12 March 2008. Available at <http://www.pmg.org.za/print/11087>. Accessed on 10 August 2011.

89 Parliamentary Monitoring Group (2008) *Child Justice Bill: Department Briefing & Public Hearings*. 5 February 2008. Available at <http://www.pmg.org.za/node/10170>. Accessed on 10 August 2011.

90 Parliamentary Monitoring Group (2008) *Child Justice Bill: Deliberations*. 17 June 2008. Available at <http://www.pmg.org.za/node/12575>. Accessed on 11 August 2011.

capacity would not be proved and the reasons for that decision in each case. The report should also include information on the number of cases where expert evidence on the criminal capacity of the child was led and the outcome of each matter regarding the establishment of criminal capacity. An analysis of the statistics with a recommendation based on the analysis as to whether the minimum age of criminal capacity should remain at 10 years or whether the minimum age of criminal capacity should be raised, must also form part of the report.

## 6.2 Establishment of criminal capacity in terms of the Act

The Act amended the common law principle of criminal capacity by raising the minimum age of criminal capacity from 7 to 10 years, which means that no child under the age of 10 years can be prosecuted for infringement of the penal law.

The Act retained the common law rebuttable presumption of *doli incapax* pertaining to criminal capacity and only amended the presumption by raising the lower age of the presumption from 7 to 10 years. Therefore, in terms of section 7(2) of the Act a child, 10 years or older but under the age of 14 years is presumed to lack criminal capacity, unless the Prosecution proves, beyond reasonable doubt, that the child had the capacity to:

- appreciate the difference between right and wrong at the time of the commission of an alleged offence; and
- act in accordance with that appreciation.

From the provisions in the Act governing the establishment of the criminal capacity of a child, it is clear that it is the intention of the legislature to ensure that the criminal capacity of the child (10 years or older but under the age of 14 years) is considered at the earliest possible point (within 48 hours where the child has been arrested) in the child justice process and thereby ensuring that the child is afforded the protection that the rebuttable presumption clearly offers children between the applicable ages.

To achieve this, the Act provides that every child who is alleged to have committed an offence must be assessed by a probation officer unless assessment has been dispensed with by the prosecutor, and the reasons for such dispensing have been recorded by the inquiry magistrate. One of the purposes of the assessment, in the case of a child who is 10 years or older but under the age of 14 years, is to express a view on whether expert evidence on the criminal capacity of such a child would be required.

After completion of the assessment, the probation officer must compile the assessment report with recommendations on various issues stipulated in the Act, including, where applicable: the 'possible criminal capacity' of the child, if the child is 10 years or older but under the age of 14 years, as well as measures to be taken in order to prove criminal capacity.

The assessment report must be submitted to the prosecutor before commencement of the preliminary inquiry, and in the case where the child offender has been arrested, the preliminary inquiry must be conducted within 48 hours after the arrest.

The prosecutor, who is required to decide whether or not to prosecute a child must, in the case where the child is 10 years or older but under the age of 14 years, take the following factors into account:

- The educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
- the nature and seriousness of the alleged offence;

- the impact of the alleged offence on any victim;
- the interests of the community;
- a probation officer's assessment report;
- the prospects of establishing criminal capacity if the matter were to be referred to a preliminary inquiry;
- the appropriateness of diversion; and
- any other relevant factor.

If the prosecutor is of the opinion that criminal capacity is not likely to be proved he or she must withdraw the charge and may cause the child to be taken to a probation officer for further action, if any (section 9). If the prosecutor is of the opinion that criminal capacity is likely to be proved he or she may divert the matter before the preliminary inquiry, if the child is alleged to have committed an offence referred to in Schedule 1; or refer the matter to a preliminary inquiry.

One of the objectives of the preliminary inquiry is to consider the assessment report of the probation officer, with particular reference to the view of the probation officer regarding the criminal capacity of the child, if the child is 10 years or older but under the age of 14 years, and whether an evaluation of the criminal capacity of the child by a suitably qualified person is necessary. The preliminary inquiry is in essence the first appearance of the child in a lower court.

The diversion of matters is another objective of the preliminary inquiry, but the inquiry magistrate may only divert the matter if he or she is satisfied that the child had the necessary criminal capacity at the time of the commission of the offence (section 49(1)(b)). The Act furthermore states that the inquiry magistrate must consider the assessment report of the probation officer when making a decision regarding the criminal capacity of the child, before diverting the matter during the preliminary inquiry.

The inquiry magistrate, therefore, only considers the criminal capacity of the child (10 years or older but under the age of 14 years) when he or she wants to divert the matter and not when deciding on the placement of the child or when referring the matter to the child justice court.

The inquiry magistrate or child justice court may, of its own accord, or on the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child by a suitably qualified person (psychiatrist or psychologist).<sup>91</sup> In terms of section 11(3) the evaluation must include an assessment of the cognitive, moral, emotional, psychological and social development of the child. This written evaluation report must be submitted to the inquiry magistrate or the child justice court within 30 days of the date of the order.

Section 11(5) provides that, where the inquiry magistrate has found that the child's criminal capacity has not been proved beyond a reasonable doubt he or she may, if it is in the best interest of the child, cause the child to be taken to a probation officer for any further action (section 9). In instances where the prosecutor decided to prosecute the child (10 years or older but under the age of 14 years) and the matter has not been diverted by the prosecutor or the inquiry magistrate, the matter must be referred to the child justice court for plea and trial.

During the trial in the child justice court, the Prosecution must prove, beyond reasonable doubt, the capacity

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<sup>91</sup> A suitably qualified person is a medical practitioner who is registered as such under the Health Professions Act, 1974 (Act 56 of 1974), and against whose name the specialty psychiatry is also registered as well as a psychologist who is registered as a clinical psychologist under the Health Professions Act, 1974. Government Gazette Notice No. R. 273 Available at [http://www.justice.gov.za/legislation/notices/2010/20100331\\_notice\\_childjustice.pdf](http://www.justice.gov.za/legislation/notices/2010/20100331_notice_childjustice.pdf). Accessed on 11 August 2011.

of a child, who is 10 years or older but under the age of 14 years, to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation. Although the onus rests on the State to prove criminal capacity, there is no legal obligation to prove it prior to putting charges to the child or at any specific stage during the prosecution.

According to section 11(2)(b) of the Act, the child justice court must also, when making a decision on the criminal capacity of the child in question for purposes of plea and trial, consider the assessment report of the probation officer and all evidence placed before it prior to conviction, which evidence may include a report of an evaluation on criminal capacity by a suitably qualified person. Where the child justice court has found that the child's criminal capacity has not been proved beyond a reasonable doubt he or she may, if it is in the best interest of the child, cause the child to be taken to a probation officer for any further action.

## **7** Challenges in the Application of the Provisions of the Act Relating to Criminal Capacity

### 7.1 A lack of accurate, reliable and detailed statistics

As indicated the Act provides for a review of the minimum age of criminal capacity not later than 5 years after commencement of section 8. This provision was included into the Act as part of the compromise when the Portfolio Committee decided to set the minimum age of criminal capacity at 10 years despite the fact that there were very convincing arguments to raise the minimum age to 12 years.

All the sections in the Act came into operation on 1 April 2010 and the review should therefore be conducted before 31 March 2015. From the wording of the section it is clear that the intention of the Legislature was to provide for flexibility and to create the possibility for an earlier review.

As stated one of the main reasons why the Portfolio Committee did not raise the minimum age of criminal capacity to 12 years was because there were no reliable or accurate statistics on the number of children between the ages of 10 and 13 who have been accused of committing offences or the type of crimes that they have allegedly committed.<sup>92</sup>

At the time of writing, the Act has been in operation for almost 18 months. During the presentation of the Annual Report on the Implementation of the Act in Parliament, as envisaged by section 96(3), the Portfolio Committee noted with dismay that correct and reliable statistics on children in conflict with the law are still not available. The fact that there was no report or information available with a view on the review of the minimum age of criminal capacity was also noted as a concern during the meeting. It was suggested that the Child Justice Alliance should make contributions about how the review on criminal capacity ought to be done.<sup>93</sup>

The gathering of reliable data on the number of children between the ages of 10 and 13 years (per category) in conflict with the law, the type of offences that they allegedly committed and the outcome of the cases, as well as an analysis of the data is essential for the review of the minimum age of criminal capacity. The fact that there are

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<sup>92</sup> Parliamentary Monitoring Group (2008) *Child Justice Bill: Department Briefing & Public Hearings*. 5 February 2008. Available at <http://www.pmg.org.za/node/10170>. Accessed on 10 August 2011.

<sup>93</sup> Parliamentary Monitoring Group (2011) *Child Justice Act Implementation: Briefing by Department of Justice*. 22 June 2011. Available at <http://www.pmg.org.za/node/27353>. Accessed on 10 August 2011.

no data of these children available for the first year and a half after the implementation of the Act is regrettable.

## 7.2 Shortage of resources to conduct the criminal capacity evaluations

With the inclusion of the evaluation of criminal capacity in the Act, there has been an increase in the number of requests for assessments of criminal capacity (this might be due to the abovementioned uncertainty amongst magistrates) and the Department of Health has been requested to assist with these assessments. However, the Department of Health has indicated that it has a shortage of psychologists and psychiatrists and is not in a position to assist with the evaluation of the criminal capacity of children. Private psychologists and psychiatrists can assist in this regard but they charge expert witness fees and budgets allocated for the evaluations of criminal capacity are quickly exhausted. These shortages in both human resources and budgets result in undue delays in the finalisation of cases involving children 10 years or older but under the age of 14 years whose criminal capacity is uncertain.<sup>94</sup>

## 7.3 Challenges in the forensic mental health assessment of criminal capacity in children

In terms of section 11(3) the evaluation of criminal capacity of a child must include an assessment of the cognitive, moral, emotional, psychological and social development of the child. The *doli incapax* presumption is a complex issue in the context of forensic mental health assessment. The answer to the question as to whether or not a child 10 years or older but under the age of 14 years had the required criminal capacity is a multi faceted one. It takes into account complex areas of human development, human behaviour, individual variation and non-specific concepts such as intelligence and moral development, among others. The evaluation task is made difficult by the inadequacy of psychometric measuring instruments for local use. Mental health professionals' role in the forensic assessment of children is not well documented and there is still a great deal of development and refinement needed in this area for this task to be executed with more clarity and precision. As a result there are not many psychologists and psychiatrists who specialise in the forensic assessment of criminal capacity of children and this shortage causes delays in finalisation of cases.<sup>95</sup> Furthermore, it is placing a further burden on the already stressed child mental health sector.<sup>96</sup>

Another issue which needs consideration, linked to the evaluation of criminal capacity by psychologists and psychiatrists and the accompanying need to differentiate between pathology and normality, is the way in which the *doli incapax* presumption is being applied. In terms of the *doli incapax* presumption, it is presumed that the average or normal child, 10 years or older but under the age of 14 years, does not have the necessary criminal capacity to be held liable for the commission of an offence. It is only in exceptional circumstances where such a child is thought to be more mature than the normal or average child that the State would go about prosecuting and by implication proving the child's criminal capacity. The purpose of the evaluation of the child's criminal capacity should then be to prove that the child is not like the average or normal child, because he or she is more mature than the normal or average child, and therefore he or she could be held liable for the commission of the offence. Therefore, if the presumption is applied correctly, most of the children (average or normal), 10 years or older but under the age of 14 years, in conflict with the law should be regarded as *doli incapax*. This will result

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94 Badenhorst C (2011) *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes*. Open Society Foundation for South Africa, Criminal Justice Initiative, Occasional Paper 10.

95 Pillay A L 'Criminal Capacity in children accused of murder: challenges in the forensic mental health assessment' (2006) 18(1) *Journal of Child and Adolescent Mental Health* 17 - 22.

96 Child Justice Alliance (2011) *Workshop Report on Criminal Capacity of Children*. See Annexure A of this report.

in only the few who are suspected of possessing abnormal maturity to be subjected to scrutiny of their criminal capacity and if their abnormal maturity is confirmed, to be considered for diversion or prosecution.

However, the way in which the presumption is being applied, creates the impression that most children between the said ages are presumed to have the necessary criminal capacity, and are therefore not normal or average. The evaluation is then requested to prove the normal maturity of the child and by implication his or her lack of the necessary criminal capacity whereafter the charges are withdrawn. This then becomes the exception rather than the norm. The result is that children, who are mentally normal, are pathologised and unnecessarily brought into contact with the mental health system. This further exacerbates the burden on the mental health system and consequently takes much needed resources and attention away from children suffering from mental health issues such as foetal alcohol syndrome (FAS) or conduct disorder, and who are very likely to be in conflict with the law and in need of attention and intervention.<sup>97</sup>

#### 7.4 Criminal capacity and sections 77 and 78 of the Criminal Procedure Act 51 of 1977

The provisions of sections 77 and 78 of the Criminal Procedure Act 51 of 1977, dealing with 'Capacity to Understand Proceedings: Mental Illness and Criminal Responsibility' are very important when deciding whether or not to prosecute child offenders and also to determine whether they will follow what is happening during their appearance in a child justice court.

Section 77 provides that the accused must be capable of understanding the proceedings so as to make a proper defence.

Section 78 provides that if an accused person suffers from a mental illness or mental defect which makes him incapable of appreciating the wrongfulness of his act or incapable to act in accordance with such appreciation, he or she shall not be criminally responsible for such act.

These sections are still applicable to children and have not been repealed or amended by the implementation of the Act. However, the Act only refers to these sections in section 48(5)(b), providing for the postponement of the preliminary inquiry for a period determined by the magistrate in a case where there is uncertainty as to the child's capacity to understand the proceedings or where there is a possibility that the child does not have the necessary criminal capacity due to a mental illness or defect.

No reference has been made in the Act to section 77 or section 78 of the Criminal Procedure Act in relation to the trial in the child justice court. As stated, there is no doubt that these sections still apply to children, but the procedures to be followed or the period of postponement in the case of a referral for such an evaluation has not been addressed in the Act.

This creates the risk that the child justice court magistrate may be under the impression that, because of all the attention and consideration that is supposed to have been given to the assessment of the child, and the decision whether or not to prosecute the child, any doubt as the child's capacity in terms of section 77 or section 78 of the Criminal Procedure Act has been considered and attended to.

Furthermore, the Act does not specifically require the probation officer to consider a recommendation for the

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97 Child Justice Alliance (2011) *Workshop Report on Criminal Capacity of Children*. See Annexure A of this report.

referral of the child for an evaluation in terms of section 77 or 78 of the Criminal Procedure Act. This gap also applies to the factors that the prosecutor or inquiry magistrate has to take into consideration before diverting.

It has emerged that mental health professionals conducting evaluations of children in terms of section 77 or 78 of the Criminal Procedure Act are uncertain about how to report a child's lack of criminal capacity that is not as a result of a mental illness or defect. The uncertainty relates to the question whether or not they can or should report on such a lack of criminal capacity if the referral of the child has been done in terms of section 77 or 78 of the Criminal Procedure Act.<sup>98</sup>

## 7.5 Prosecutors' consideration of criminal capacity

When deciding whether or not to prosecute a child 10 years or older but under the age of 14 years, the prosecutor must, amongst other factors, consider the prospects of establishing criminal capacity if the matter were to be referred to a preliminary inquiry. No specific reference is made in this instance to cases where diversion is considered.

If the prosecutor is of the opinion that criminal capacity is not likely to be proved he or she must withdraw the charge and may cause the child to be taken to a probation officer for further action, if any (section 9). If the prosecutor is of the opinion that criminal capacity is likely to be proved he or she may divert the matter before the preliminary inquiry, if the child is alleged to have committed an offence referred to in Schedule 1; or refer the matter to a preliminary inquiry.

The criteria for the consideration of criminal capacity with reference to the prosecutor's decision is a cause of concern because phrases such as "prospects of establishing criminal capacity" and "criminal capacity is likely to be proved" are very vague and do not require substantial or concrete evidence or information as a basis for the decision. There is also no provision for the furnishing or recording of the reasons for the decision based on the "prospects" or "likelihood". This creates the risk for arbitrary application and discriminatory practices in the exercising of the decision whether or not to prosecute a child, 10 years or older but under the age of 14 years. This also raises questions as to the effectiveness of the "protective mantle" provided for by the *doli incapax* presumption and intended by the legislation.

## 7.6 Criminal capacity and guilty pleas

A challenge relating to the establishment of the criminal capacity of legally represented children, 10 years or older but under the age of 14 years, who pleaded guilty and handed in written statements in terms of section 112(2) of the Criminal Procedure Act, recently emerged through case law, before the implementation of the Act. In these cases the courts *a quo* had omitted to consider the criminal capacity of the children in question.

It is trite law that an accused can be convicted without an inquiry by the court, after the submission of a written statement by the accused in terms of section 112(2) of the Criminal Procedure Act. The court must however, be satisfied that the accused is guilty of the offence. The court may ask any questions to clarify any matter raised in the statement and on any matter flowing from the statement.<sup>99</sup>

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98 Child Justice Alliance (2011) *Workshop Report on Criminal Capacity of Children*. See Annexure A of this report.

99 Kriegler J & Kruger A (2002) *Hiemstra Suid-Afrikaanse Strafproses* (Sesde uitgawe) Durban: Butterworths 302:19. See also Du Toit, E et al (2005). *Commentary on the Criminal Procedure Act* (Revision Service 34) Cape Town: Juta & Co, Ltd: 17-1 - 12C and *S v Moya* 2004 (2) SACR 257 (W).

In the matter *Obakeng v S*<sup>100</sup> the conviction and sentence of an 11-year-old child was set aside on appeal on 26 March 2009. In this matter, the accused was charged with one count of murder; he was represented by a legal representative, pleaded guilty to culpable homicide and handed in a written statement in terms of section 112(2) of the Criminal Procedure Act. The State accepted the plea on the lesser charge and the magistrate, who was satisfied that all the elements of the crime of culpable homicide had been admitted, convicted the accused on the said charge. There had been no admission as to the criminal capacity of the accused at the time of the commission of the offence and the court on appeal found that this irregularity cannot be condoned by the fact that the accused was legally represented.

Similarly, in *Mshengu v S*<sup>101</sup> a 13-year-old child, who had legal representation, pleaded guilty on a charge of murder and handed in a statement in terms of section 112(2) of the Criminal Procedure Act, setting out the basis of his plea. He was convicted on his guilty plea and sentenced to 8 years imprisonment. The South African Supreme Court of Appeal set aside the conviction and sentence because the presumption that the accused lacked criminal capacity at the time of the commission of the offence has not been rebutted by the State.

From these cases it is clear that South African courts deal with this aspect in an unguided, haphazard and unsatisfying manner. In both these instances the courts, however, did not use the opportunity to formulate guidelines as to how an inquiry into the rebuttal of the presumption of criminal capacity of a child, 10 years or older but under the age of 14 years should be conducted.

Although both these cases were heard before the implementation of the Act, the provisions in the Act do not take the matter any further. The children in the above cases were charged with serious offences and these cases came under the spotlight because of the heavy sentences imposed by the courts *a quo*. There are no provisions or guidelines in the Act dealing with criminal capacity and guilty pleas by children 10 years or older but under the age of 14 years. There is therefore no reason to believe that similar cases will not be dealt in the same way by courts *a quo* and this presents a challenge in the way that courts deal with the *doli incapax* presumption in cases where children plead guilty.

## 7.7 Criminal capacity and diversion

Certainty about the criminal capacity or lack thereof is also essential when considering the diversion of a case involving a child 10 years or older but under the age of 14 years for various reasons.<sup>102</sup>

Firstly, a matter may only be diverted if there is a *prima facie* case against a child (which includes criminal capacity). It would be unjust to divert the matter of a child who cannot be prosecuted because he or she lacks the necessary criminal capacity. This is even more important if one takes into account that failure to comply with a diversion order may result in the prosecution of the child, in which case the acknowledgement of responsibility by the child may be recorded as an admission by the child, or it may result in a more onerous diversion order against the child.

Secondly, certainty about the child's criminal capacity is essential before diversion of a case because a diversion order from the level two (2) diversion options can run for a period of up to 24 months (if the child is under the age of 14 years) and it will be totally unacceptable, unfair and unlawful to expect a child, who does not have the necessary criminal capacity to comply with an order for such a long period of time.

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100 Case number CA11/2009, North West High Court, Unreported.

101 2009 (2) SACR 316 SCA. Available at [http://www.justice.gov.za/sca/judgments/sca\\_2009/sca09-065.pdf](http://www.justice.gov.za/sca/judgments/sca_2009/sca09-065.pdf). Accessed on 12 August 2011.

102 Badenhorst C (2011) *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intention, Questionable Outcomes*. Open Society Foundation for South Africa, Criminal Justice Initiative. Occasional Paper 10.

Thirdly, the diversion of a child who did not have the necessary criminal capacity to begin with, may also reduce the chances that the child would comply with the diversion order and may result in a perception by the prosecution and magistrates that diversion is not effective. Such a perception will have a serious impact on the successful implementation and application of the Act since it could result in prosecutors and magistrates becoming wary of diverting matters and decide to rather opt for the prosecution of these matters. It will also expose the child, who should not be in a diversion programme in the first place, to children who did commit crimes and this may have a negative influence on the child.

## 7.8 Decisions on criminal capacity by magistrates

Since the implementation of the Act, it has emerged that some magistrates are uncertain whether or not they may still decide on the criminal capacity of children without necessarily referring the child for an evaluation to a psychiatrist or psychologist. One of the reasons for this uncertainty is that these magistrates are of the opinion that they are not trained to determine the criminal capacity of these children.<sup>103</sup> This results in an increase in the number of orders for the evaluation of the criminal capacity of children.

Inclusion of criminal capacity in the Act did not change the nature of the underlying concept. The principles, guidelines and factors to be taken into account emanating from case law still apply in the establishment of criminal capacity. Some magistrates are therefore uncertain about whether it is still possible for child justice court magistrates to decide on the criminal capacity of a child based on the evidence led during the trial, the facts of a case and the circumstances surrounding the commission of an offence. The Act is unclear about this.

Uncertainties as to magistrates' ability to decide on the criminal capacity of a child offender, in cases where the matter is considered for diversion or where the child pleads guilty (especially unrepresented children who are accused of the commission of serious offences), need further consideration. Certainty about a child's criminal capacity before diversion and guilty pleas (as discussed in paragraphs 7.6 and 7.7 above) is required, but is very difficult to acquire. Very little information is available to inquiry magistrates when considering diversion during preliminary inquiries, especially where the child has been arrested and detained. The assessment of a child must be conducted before the preliminary inquiry, and the preliminary inquiry of an arrested and detained child has to be conducted within 48 hours after the arrest. Magistrates are uncertain as to how they can be satisfied about the child's criminal capacity. It is difficult to do so without evidence, but referral for a psychologist's or psychiatrist's report is an expensive, time consuming exercise in a case where the child is to be diverted for a relatively minor offence. The Act simply fails to give adequate guidance.

In cases where an unrepresented child (and from the case law referred to, also children who are represented) pleads guilty, the child justice court magistrates are uncertain as whether they can be 'satisfied' on the basis of asking the child questions, or whether they will have to obtain evidence. The Act is silent on the issue of guilty pleas and criminal capacity.

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<sup>103</sup> Ibid.

## 8

## Considerations in Support of Raising the Minimum Age of Criminal Capacity and Abandoning the *Doli Incapax* Presumption

- South Africa ratified the CRC and thereby incurred various obligations regarding the treatment of children, including children in conflict with the law. A minimum age of criminal capacity below the age of 12 years is considered by the United Nations Committee on the Rights of the Child not to be internationally acceptable.<sup>104</sup> States Parties (such as South Africa) are encouraged to increase their minimum age of criminal capacity to 12 years as an absolute minimum and to continue to increase it to a higher age level. In 2000 South Africa was urged by the United Nations Committee on the Rights of the Child to reassess the draft legislation (Child Justice Bill) on criminal responsibility with a view to increasing the proposed minimum age of 10 years.<sup>105</sup>

The UN Committee also expressed concern about the practise of some States Parties using two minimum ages of criminal responsibility. Children in conflict with the law who at the time of the commission of the offence are above or at the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard (*doli incapax* presumption). The assessment of maturity is left to the court, often without the requirement of involving a psychological expert. The system of two minimum ages is, according to the UN Committee not only confusing, but leaves much to the discretion of the court and may lead to discriminatory practices.

Raising the minimum age of criminal capacity and abandoning the *doli incapax* presumption will therefore be in line with international law, practice and standards.

- During the initial deliberations on the Bill (as drafted by the SALRC) in Parliament in 2003, the majority of the submissions supported the raise in the minimum age of criminal capacity to 10 years and the retention of the *doli incapax* presumption. One of the main reasons for supporting this was the fact that the 2002 version of the Bill which provided for more emphasis on the rebuttal of the presumption. These included expert evaluation of the criminal capacity of each child, 10 years or older but under the age of 14 years, and the issuing of a certificate by the Director of Public Prosecutions confirming an intention to prosecute such child. These provisions were removed from the 2007 version of the Bill and resulted in a withdrawal of the support for the retention of the *doli incapax* presumption. The fact that these protective measures or safeguards in the establishment of criminal capacity were removed created the situation where the practice of calling a parent to rebut the presumption (which has been widely criticised) would continue.<sup>106</sup>
- From recent case law it appears that the more serious the offence, the less likely it is that the child's criminal capacity will be considered, despite the fact that the child may be of a very young age. This appears to be the case specifically in instances where the child pleads guilty and is legally represented.<sup>107</sup> Although the cases referred to were decided before the implementation of the Act, there is no provision in the Act to reduce the risk of a continuation of this practice. Many of the reported cases on criminal capacity involved 10 and 11 year

<sup>104</sup> United Nations Committee on the Rights of the Child, Forty-fourth session, Geneva, 15 January - 2 February 2007. *General Comment No.10 (2007)*. CRC/C/GC/10. 25 April 2007. Available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>. Accessed on 11 August 2011.

<sup>105</sup> United Nations Committee on the Rights of the Child (2000). *Concluding Observations of the Committee on the Rights of the Child, South Africa*. UN Doc. CRC/C/15/Add.122 (2000). Available at <http://www1.umn.edu/humanrts/crc/southafrica2000.html>. Accessed on 10 August 2011.

<sup>106</sup> Sloth-Nielsen J (2008) *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill, 2007 version*. Available at <http://www.childjustice.org.za/submissions/2008Submissions/Julia%20Sloth-Nielsen.pdf>. Accessed on 10 August 2011.

<sup>107</sup> *Obakeng v S* case number CA11/2009 North West High Court. Unreported and *Mshengu v S* 2009(2) SACR 316 SCA. Available at [http://www.justice.gov.za/sca/judgments/sca\\_2009/sca09-065.pdf](http://www.justice.gov.za/sca/judgments/sca_2009/sca09-065.pdf). Accessed on 12 August 2011.

old children and the *doli incapax* presumption did not offer them the intended protection.<sup>108</sup> In these cases it was only during the review that the children's criminal capacity or the lack of proof of it was considered.

- There is also a concern that the criminal capacity test, as provided for in section 11(1) of the Act is very vague, and provides for a generalised knowledge about right and wrong. The amendment of the common law to a less stringent test results in a failure to consider the child's ability to appreciate the wrongfulness of his or her act or omission with reference to the specific conduct of the child in the context and circumstances of the particular case.<sup>109</sup> Removal of the *doli incapax* presumption will cure this anomaly.
- In addition to the above legal considerations, there are also various practical problems and challenges being experienced in the application and operation of the *doli incapax* presumption. Some of these challenges have been discussed in section 7. Other challenges in this regard include:
  - There is no uniform model for the assessment and evaluation of the criminal capacity of children so the outcomes are not standardised.
  - Uncertainties about the competency of presiding officers in the establishment of criminal capacity, even in minor offences before diversion results in increased numbers of referral for the evaluation of criminal capacity. There are insufficient resources, both financial and human, to deal with the increased numbers of referrals. There is also a lack of psychiatric facilities where evaluations can be conducted. Cases are therefore unnecessarily delayed to the prejudice of children.<sup>110</sup>
  - Mental health professionals are not adequately trained to conduct the evaluations of the criminal capacity of children and are uncertain how to report on this issue in cases where the referrals were done in terms of section 77 or 78 of the Criminal Procedure Act.<sup>111</sup>
- Raising the minimum age of criminal capacity to the internationally acceptable level and abolishing the *doli incapax* presumption will simplify the issue and will contribute to more predictable outcomes. It will also eliminate the challenges experienced in the application of the *doli incapax* presumption, contribute to legal certainty on the issue and reduce the risk of discriminatory and arbitrary practices in the decision on whether or not to prosecute a child, 10 years or older but under the age of 14 years. It will also increase accessibility of the limited resources for children who do suffer from mental illnesses or mental defects.
- Raising the minimum age of criminal capacity to 12 years and abolishing the *doli incapax* presumption will also balance the accountability of children in this age group. Children below 12 years will no longer be held accountable for the commission of criminal offences, but it will create the possibility for all children between the ages of 12 and under 14 years (who meet all the requirements for accountability) to be held criminally liable and accountable for their criminal acts. Children between the ages of 12 and under 14 years will therefore be dealt with in the same way as children between the ages of 14 and under 17 years. It will therefore result in both raising the minimum age of criminal capacity, while at the same time lowering it. This is likely to give the proposal political purchase.

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108 *S v Kholli* 1914 CDP 840; *S v Van Dyk and Others* 1969 (1) SA 601(CPD); *S v Mbanda and others* 1986 (2) PHH 108 (T); *S v Khubeka and others* 1980 (4) SA 221 (OPD).

109 Walker S 'The requirements of criminal capacity in section 11(1) of the new Child Justice Act, 2008: A step in the wrong direction' (2011) 24(1) SACJ 33 - 41.

110 Child Justice Alliance (2011) *Workshop Report on Criminal Capacity of Children*. See Annexure A of this report.

111 *Ibid*.

## 9

## Considerations against raising the Minimum Age of Criminal Capacity and Abandoning the *Doli Incapax* Presumption

- One of the strongest arguments supporting the retention of the presumption of incapacity for younger children is that, because of the cloak of protection offered by the presumption, one can relatively safely retain a comparatively low minimum age of criminal capacity, knowing full well that only the most developed and mature children will, following the screening process, be found to have criminal capacity.<sup>112</sup>
- Another advantage of retention of the *doli incapax* presumption is that the protection it offers comes into operation automatically. It is activated by the simple fact of a child being a specified age. This is important from a practical point of view, as the moment a child is alleged to be between the relevant ages, the “protective mantle” (namely, the presumption that the child lacks capacity) is immediately thrown over such child. Another central feature is that once the presumption is triggered, the onus shifts to the State to present evidence to overturn the “protective mantle”.<sup>113</sup>
- The *doli incapax* presumption offers a flexible approach to dealing with children 10 years or older but under the age of 14 years. While the actual age of the child is an important factor to be taken into consideration, this alone is not conclusive. Equally important are the facts and circumstances of the specific case and the individual child’s background. This flexibility is especially beneficial in a country such as South Africa with its culturally and ethnically diverse population. Implicit in this approach are two forms of flexibility: flexibility between children of different ages (10 versus 13 years), and flexibility between children with differing levels of maturity where they are the same age (between one 11-year-old and another).<sup>114</sup>
- Another argument that is often raised in support of not raising the minimum age of criminal capacity is the fear that it would result in an increase in cases where children are used by adults to commit crime. To keep the minimum age of criminal capacity as low as possible is therefore seen as a way of protecting children falling prey to adults using them to commit crime. This concern has been dealt with in the Act in section 92, which provides for the reporting of such an adult to the South African Police Service and the prosecution of the adult in terms of section 141(1)(d) read with section 305(1)(c) of the Children’s Act 38 of 2005. The fact that the child has been used by an adult to commit the crime must also be taken into account when determining the child’s treatment in the child justice system.
- One of the risks in removing the *doli incapax* presumption is that upon removal of the presumption the minimum age of criminal capacity may be set too low and this would result in indiscriminate prosecution of very young children without any form of screening linked to proof of maturity.<sup>115</sup>

This fear becomes more reality if the position in the United Kingdom of Great Britain (UK Government) is considered. Following the brutal murder of 2 year old James Bulger in 1995, by two 10-year-old boys, there was a public outcry for a review of the *doli incapax* presumption, applicable to children 10 years or older but under the age of 14 years. In the final report of the Youth Justice Task Force the majority of the members of the Task

112 South African Law Commission (2000) *Juvenile Justice Report* Project 106 at 29. Available at [http://salawreform.justice.gov.za/reports/rprj63\\_insolv\\_2000apr.pdf](http://salawreform.justice.gov.za/reports/rprj63_insolv_2000apr.pdf). Accessed on 10 August 2011.

113 Ibid.

114 Ibid.

115 Ibid.

Force favoured abolishing the presumption of *doli incapax* in England and Wales on the grounds that it leaves the youth justice system unable to deal with some young people who regularly offend. The UK Government stated that it believed that there was no case for the retaining of the presumption of *doli incapax* in England and Wales. In 1995 the House of Lords recommended that Parliament should review this presumption, which had been inconsistently applied and was capable of producing inconsistent results. The rebuttable *doli incapax* presumption was repealed by section 34 of the Crime and Disorder Act, 1998.<sup>116</sup>

The minimum age of criminal capacity was not raised with this abolishment of the *doli incapax* presumption and this resulted in children as young as 10 years being regarded as and being subject to the same treatment as 17 year old children, without any additional protection.

Despite expressions of concerns on the low minimum age of criminal capacity and the abolishment of the *doli incapax* presumption by the United Nations Committee on the Rights of the Child in 2002, the position has remained unchanged.<sup>117</sup>

In 2010 there were calls for a review of the minimum age of criminal capacity in England and Wales and suggestions were made to raise this age to 12 years for all offences but murder, attempted murder, manslaughter, rape and aggravated sexual assault.<sup>118</sup> This approach also does not accord with international law.

Any consideration of or attempt to abolish the *doli incapax* presumption should therefore be coupled with a guarantee of a higher minimum age of criminal capacity to prevent a repeat of the regrettable situation in England and Wales.



## Workshop on Criminal Capacity of Children <sup>119</sup>

As part of the research project the Child Justice Alliance conducted a consultative workshop on the criminal capacity of children on 4 May 2011 at the University of Pretoria. Twenty seven people attended and the participants were drawn from different sectors including government, academics and civil society. The professions represented were law, psychology and social work.

The workshop provided an opportunity to look at the different debates around the minimum age of criminal responsibility, to consider some of the stumbling blocks experienced in the assessment of criminal capacity, to debate some of the solutions, and to debate which professionals should be undertaking the assessments of the criminal capacity of children in the cases where the rebuttable presumption is an issue.

Some of the recommendations following the workshop focused on the need for detailed information about children, 10 years or older but under the age of 14 years, who are in conflict with the law. The need to train

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116 Badenhorst C (2006) *Criminal Capacity of Children*. Thesis submitted in fulfilment of requirements towards the degree of D.Lit et Phil, University of South Africa. Available at <http://uir.unisa.ac.za/bitstream/handle/10500/897/thesis.pdf;jsessionid=525FAEA4D46960B12F6C464CC2885DC0?sequence=1>. Accessed on 1 September 2011.

117 United Nations Committee on the Rights of the Child (2002) Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188, 9 October 2002. Available at [http://www.unhcr.ch/tbs/doc.nsf/0/2f2744b7e0d015d6c1256c76004b3ab7/\\$FILE/G0245381.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/2f2744b7e0d015d6c1256c76004b3ab7/$FILE/G0245381.pdf). Accessed on 31 August 2011.

118 Barnardo's (2010) *From Playground to Prison: the case for reviewing the age of criminal responsibility*. Available at [http://www.barnardos.org.uk/120910\\_from\\_playground\\_to\\_prison-2.pdf](http://www.barnardos.org.uk/120910_from_playground_to_prison-2.pdf). Accessed on 1 September 2011.

119 The Workshop Report is attached hereto as Annexure A.

mental health professionals in the assessment of criminal capacity of children as well as the need to revise the way that assessments are conducted and the tools used during the assessments. Qualitative and quantitative research needs to be conducted with a view to make concrete and substantive submissions to Parliament during the review of the minimum age of criminal capacity.

# 11

## Conclusion

The establishment of a minimum age below which children shall be presumed not to have the necessary capacity to infringe the penal law, is one of the cornerstone principles in the development of a separate child justice system. Although a very important principle, there has been a lot of uncertainty in fixing an acceptable minimum age of criminal capacity, since the CRC and the Beijing Rules only provided for general guidelines in this regard. It was left up to States Parties to decide on a minimum age of criminal capacity taking into account a child's level of emotional, mental and intellectual maturity.

In 2007 the United Nations Committee on the Rights of the Child issued General Comment No. 10 that fixed an internationally acceptable minimum age of criminal capacity to 12 years in an attempt to lessen the disparities that existed amongst States Parties in this regard.

States Parties were encouraged to raise their minimum ages of criminal capacity to this level and to progressively raise it further. States Parties with higher minimum ages of criminal capacity were warned not to lower theirs to this level. The United Nations Committee also criticised the use of two minimum ages of criminal capacity occasioned by the rebuttable presumption of *doli incapax*.

The adoption of the CRC and its ratification by various States Parties has resulted in many of them amending their domestic legislation or enacting new legislation to comply with the standards set by the CRC. These amendments included reviewing the minimum age of criminal capacity and reconsidering the continued applicability of the *doli incapax* presumption.

In 2000 (thus before the issuing of General Comment No. 10), Australia raised its minimum age of criminal capacity from 7 years to 10 years and retained the *doli incapax* presumption, applicable to children 10 years or older but under the age of 14 years.

In Ireland the minimum age of criminal capacity was raised from 7 to 12 years in 2006. Children below the age of 12 years may not be charged with a criminal offence. An exception was been made in cases of 10 and 11 year old children accused of committing serious offences such as murder, rape or aggravated sexual assault. The rebuttable *doli incapax* presumption was abolished. The fact that the minimum age of criminal capacity has been raised to 12 years, however does not mean that all 12 year old children, accused of committing a criminal offence will be charged, since the Director of Public Prosecution have to give consent for the prosecution.

The adoption and ratification of the CRC also had many positive effects on the protection of the rights of children in Africa. Various countries have drafted new children's rights based legislation, including Uganda, Ghana, Kenya, Rwanda, Nigeria and South Africa. Other countries such as Mozambique, Namibia and Lesotho are in the process of passing new laws to protect the rights of children.

Uganda raised the minimum age of criminal capacity from 7 to 12 years and abolished the *doli incapax* presumption. In Sierra Leone the minimum age of criminal capacity was raised to 14 years. The *doli incapax* presumption never applied in Sierra Leone.

South Africa ratified the CRC on 16 June 1995 and the process of establishing a separate child justice system started in 1997 with an investigation on the feasibility of such a system by the SALRC.

The SALRC's Report on Juvenile Justice, published in 2000, included a draft Bill on Child Justice which was first introduced in Parliament in August 2002. The minimum age of criminal capacity, as stated in the Bill, was fixed at 10 years and the *doli incapax* presumption was retained for children 10 years or older but under the age of 14 years. During the submissions and deliberations following the introduction of the Bill in Parliament in 2003, the majority of the submissions supported the raise of the minimum age of criminal capacity to 10 years. The Bill provided for additional protective measures in the application of the *doli incapax* presumption, such as the requirement of expert testimony to prove criminal capacity and the issuing of a certificate by the Director of Public Prosecutions before the prosecution of any child below the age of 14 years.

The Bill disappeared from the Parliamentary Agenda until 2008 when a new version of the Bill, published in 2007, was introduced into Parliament. Public hearings and submissions on the new version of the Bill started early in 2008. In this version of the Bill the minimum age of criminal capacity remained at 10 years with the retention of the *doli incapax* presumption. However, the additional protective measures regulating the application of the *doli incapax* presumption were removed. In addition to this change, the United Nations Committee on the Rights of the Child issued General Comment No. 10 fixing the internationally acceptable age for the minimum age of criminal capacity at 12 years. During 2008 the majority of the submissions to Parliament supported 12 years as the minimum age of criminal capacity.

The arguments in favour of fixing the minimum age of criminal capacity at 12 years were very convincing and the Portfolio Committee was amenable to raising the minimum age of criminal capacity to the suggested age. However, a lack of accurate and detailed statistics of children between the ages of 10 to under 12 years in conflict with the law proved to be a huge problem in raising the minimum age of criminal capacity to 12 years and the Portfolio Committee decided to fix it at 10 years, as suggested in the Bill. The rebuttable *doli incapax* presumption for children 10 years or older but under the age of 14 years was retained without the additional protective measures. These provisions were included in the Act.

By fixing the minimum age of criminal capacity on 10 years, South Africa fails to comply with its obligations incurred through ratification of the CRC. Even before enactment of the Act, the United Nations Committee on the Rights of the Child, in 2000, noted the intention to raise the age to 10 years and retain the *doli incapax* presumption, and the Committee expressed its concern in this regard and urged South Africa to raise the minimum age of criminal capacity to the internationally acceptable level.

The Act was implemented on 1 April 2010 and the common law presumptions that regulated the minimum age of criminal capacity and the *doli incapax* presumption were amended by the provisions of the Act. The Act explains the processes to be followed and considerations to be taken into account by the various role players in the child justice system when deciding on the criminal capacity of children, 10 years or older but under the age of 14 years.

The Act also provides for a review of the minimum age of criminal capacity, no later than 5 years after the implementation of the Act.

During an Annual Report on the first year of the implementation of the Act, presented to the Portfolio Committee for Justice and Constitutional Development in June 2011, it emerged that there are still no statistics or information available on children, 10 years or older but under the age of 14 years, who are in conflict with the law.

Other challenges in the application of the *doli incapax* presumption since the implementation of the Act have also been identified and include, amongst others, shortages of resources to conduct criminal capacity evaluations, lack of training of mental health professionals and no consensus on the tests to be applied, the consideration of criminal capacity during guilty pleas and diversion, uncertainties amongst magistrates about their competencies to decide on criminal capacity.

There are many convincing arguments in support of raising the minimum age of criminal capacity to an internationally acceptable level and abolishing the *doli incapax* presumption. There are also as many convincing arguments against raising the minimum age of criminal capacity and abolishing the *doli incapax* presumption. It is therefore important to start a debate on these issues and to look at the merit of each of these arguments before the review of the minimum age of criminal capacity is undertaken by Parliament to be able to assist Parliament to make an informed decision in the best interests of the children who will be affected by it.

## 12

## Recommendations

- The minimum age of criminal capacity must be reviewed by Parliament within the next three and a half years. To be able to conduct such a review and to make informed decisions during the review, there need to be accurate, reliable and available statistics and detailed information on children 10 years or older, but under the age of 14 years. This information should also include the way that courts and other role players deal with the issue of determining criminal capacity and the rebuttal of the presumption in courts. Efforts to gather these statistics should be a priority.
- A debate should be commenced with all the role players in the child justice system. All the arguments in favour or against the raising of the minimum age of criminal capacity should be investigated with a view of making submissions to Parliament during the course of the review of the minimum age of criminal capacity.
- Research to support and facilitate an informed review and the possible raising of the minimum age of criminal capacity to 12 years and the rationale behind it should be conducted. The fact that the internationally acceptable minimum age of criminal capacity has been set at 12 years should be a persuasive consideration in this regard.

# ANNEXURE A

## Report of the Workshop on Criminal Capacity of Children

Held on Wednesday, 4 May 2011 (University of Pretoria)

### Introduction

The workshop on criminal capacity of children, organised by the Child Justice Alliance, was held on Wednesday, 4 May 2011 at the Centre for Continuing Education at the University of Pretoria. Twenty seven people attended and the participants were drawn from different sectors including government, academics and civil society. The professions represented were law, psychology/psychiatry and social work.



08:45 - 09:50

Chair: Dr. Ann Skelton

### Welcome Remarks and Introduction of Workshop Objectives

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#### **Dr. Ann Skelton: Director, Centre for Child Law, University of Pretoria**

Dr. Ann Skelton welcomed the participants on behalf of the Child Justice Alliance. She explained that the Child Justice Alliance (the Alliance) was originally formed to support the passage of the Child Justice Bill through Parliament. It is composed of non-governmental organisations (NGOs) and Friends of the Alliance which include government officials and persons from the corporate sector. The Bill was passed into law in 2009 becoming the Child Justice Act (CJA) and the Alliance has since shifted its attention to implementation issues, monitoring and evaluation. The Alliance has a Driver Group which meets three to four times a year and takes care of operational issues and monitors the implementation of the CJA. The CJA provides that within 5 years of implementation, the criminal capacity of children should be reviewed. It is one year since implementation, hence the need to start examining the issue of criminal capacity.

Dr. Skelton gave the legislative history of criminal capacity, stating that when the South African Law Reform Commission (SALRC) drafted the Child Justice Bill various options and aspects of criminal capacity were considered. In 1990 an inter-sectoral workshop was held at the University of Pretoria (UP) where there was strong support to increase the minimum age of criminal capacity from 7 years, and also to retain the rebuttable presumption of the criminal capacity of children below the age of 14, where the State can prove that a child indeed had the necessary criminal capacity.

The SALRC therefore proposed that the minimum age of criminal capacity be raised from 7 to 10 years, and that the rebuttable presumption be retained between the ages of 10 years or older but under 14 years. This was not particularly controversial, although there were a few 'die-hards' who felt that the minimum age should remain at 7 years. The Child Justice Bill was introduced into Parliament in 2002. Meanwhile, in the international

arena, events began to overtake the Child Justice Bill. The 1989 United Nations (UN) Convention on the Rights of the Child (CRC), does not set a minimum age for criminal capacity, and only encourages States Parties to have a specified minimum age.<sup>120</sup> In 2007, the United Nations Committee on the Rights of the Child, in the UN General Comment No. 10, stated that a minimum age of criminal capacity younger than 12 years is considered by the Committee not to be internationally acceptable.<sup>121</sup> Furthermore, the approach of a 'presumption' was not favoured, and the General Comment provided that the Committee 'strongly recommends that States Parties set a minimum age that does not allow, by way of exception, the use of a lower age.'<sup>122</sup> This means that the Committee prefers a clear 'cut off' age below which a child may not be prosecuted.

The rebuttable presumption of criminal capacity has existed for decades but it does not work very well for children. For example, it was common practice in the past that the prosecution called the parent of the child offender and asked such questions such as 'does the child know the difference between right and wrong?' or 'Have you taught the child the difference between right and wrong?' If the response was in the affirmative, it was regarded as evidence for rebutting the presumption of criminal capacity. Thus the courts have previously relied on the evidence of the parent against the child to ascertain whether or not the child had the necessary criminal capacity at the time of the commission of the offence. The position of the Child Justice Alliance was that if the rebuttable presumption was to be retained, the law must ensure that sufficient evidence is presented and should not rely on the evidence of a parent when making a decision on the criminal capacity of the child.

A Child Justice Alliance conference was held in 2006, where Professor Jaap Doek (Chairperson of the Committee on the Rights of the Child at that time) denounced the Child Justice Bill's approach to criminal capacity and tried to persuade South Africans to opt for a higher cut off age, not younger than 12 years. The Bill came back onto the parliamentary agenda in 2008 and the Child Justice Alliance decided to support the Bill's proposal for retaining the rebuttable presumption of criminal capacity between the ages of 10 years or older but under 14 years, but encouraged Alliance members to make written and oral presentations setting out their different views. Several submissions by members recommended 12 (or even 14 years) as a minimum age, some suggested retaining the presumption, others suggested abolishing the presumption and rather opting for a clear 'cut-off' age of 12 or 14 years.

The Portfolio Committee on Justice and Constitutional Development held open and participative discussions on this issue. The Committee was willing to consider the various possibilities and warmed to the idea of flexibility and individuality provided by the presumption, but did consider the simplicity of the 'cut off' approach to also be an attractive option.

In the end, Parliament decided that it did not have enough information about how many and what kind of crimes are committed by 10, 11, 12 and 13 year old children. A compromise was therefore reached, that within 5 years from the implementation of the CJA, Parliament will again consider raising the minimum age of criminal capacity - this time with more information at its disposal.

To this effect, section 8 of the CJA provides that:

"In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the administration of justice must, not later than five years after the commencement of this section, submit a report to Parliament, as provided for in sections 96(4) and (5)."

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120 Article 40 (3)(A) UNCRC.

121 General Comment No. 10 'Children's Rights In Juvenile Justice' Un Doc. Crc/C/Gc/10 (2007), Para 32.

122 Ibid, Para 34.

With that sections 96(4) and (5) of the CJA direct the Inter-sectoral Committee for Child Justice to collect the following data on 10, 11, 12 and 13 year old children: The number that have committed crimes and what crimes were committed, the number that went to trial, what sentences were given, the number of cases in which expert evidence was led and what the outcomes were.

Since the Act came into operation in April 2010, there are now less than four years remaining to gather the necessary information for the review of the minimum age of criminal capacity.

This workshop on criminal capacity of children, was therefore considered to be a good opportunity to look at different debates on the minimum age of criminal responsibility, to consider some of the stumbling blocks experienced in the assessment of criminal capacity, to debate some of the solutions, and to debate which professionals should be undertaking the assessments of the criminal capacity of children in the cases where the rebuttable presumption is an issue.

The agenda for the workshop was to discuss criminal capacity of children in relation to the

- Legal perspective
- Probation/social work perspective
- Psychological perspective - including special issues such as children with developmental delays or other mental health problems.

Some of the questions considered were whether or not South Africa has the capacity to undertake the required number of assessments, evaluations and expert reports regarding criminal capacity of children, especially as persons suitable to carry out evaluations include psychologists and psychiatrists only. The workshop also considered that there are some children with specific mental health issues, the borderline cases, e.g. where a child may be chronologically over 14 years but developmentally younger - should the energies of psychologists and psychiatrists rather be focused on these?

## Criminal Capacity of Children: The Legal Perspective

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**Dr. Charmain Badenhorst: Senior Researcher, Council for Security and Industrial Research (CSIR)**

Dr. Badenhorst's presentation on the legal perspective of criminal capacity of children focused on case law and how the issue of the rebuttable presumption of criminal capacity has been dealt with in South African courts. This was considered in terms of three themes: common law presumptions, guidelines and factors from case law, and the Child Justice Act.

### ***Common law presumptions***

Under the common law, children under the age of 7 years were irrebuttably presumed to lack the necessary criminal capacity and could thus never be prosecuted. Children 7 years or older but under 14 years of age were rebuttably presumed to lack the necessary criminal capacity and in order to prosecute such children the State had to present evidence to rebut this presumption. The prosecution had to prove that the child, at the time of the commission of the offence, had the ability:

- to appreciate the wrongfulness of his or her act ;and
- to conduct himself or herself in accordance with his or her appreciation of the wrongfulness of his or her act at the time of the commission of the offence.

### **Guidelines and factors from case law**

Under case law, several factors and guidelines have been developed as indicators that a child has criminal capacity. A false account as to where the child had obtained stolen goods,<sup>123</sup> and proof of a 'malicious mind' on the part of the child,<sup>124</sup> have been used to rebut the presumption of criminal incapacity.

The courts have held that where a child offender has been accused of committing a statutory offence, the evidence to rebut the presumption of criminal capacity should be stronger as it is not about the general ability of the child to differentiate between right and wrong, but rather whether he or she knew in the specific instance that he or she acted wrongly.<sup>125</sup> The State must show that the child knew what the reasonable and probable consequences of his or her act would be. The fact that a child ran away after committing a crime may be understandable on the ground that he or she was too frightened to return home.<sup>126</sup>

In cases where a child offender is charged with an adult offender or a child that is appreciably older than him or her, the court must consider the fact that the child might have acted under the coercion or influence of the adult or older child.<sup>127</sup> Also, when a child commits a crime with a person whom he or she can be expected to obey, it leads to the presumption that the child acted as a result of compulsion.<sup>128</sup>

If there is evidence that the child planned the offence and hid the fact that he or she committed the offence because he or she was afraid of punishment, the presumption could be successfully rebutted.<sup>129</sup> Where the prosecution does not set out deliberately to prove criminal capacity, the court is nevertheless entitled to look at the evidence in general in order to determine whether the accused has the required criminal capacity.<sup>130</sup> In *S v Ngobese and others*,<sup>131</sup> the court suggested four factors that the State should take into account when discharging the onus of proving that the child offender has the required criminal capacity:

- The precise age of the child, as the presumption weakens with the advance of years towards 14 years of age;
- The nature of the crime, as the presumption weakens when the offence is inherently bad;
- The advancement of evidence that the particular accused appreciated the distinction between right and wrong; and
- Proof that he or she knew the act which had been committed by him or her was wrong within the content of the particular case.

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123 *S v Kholi* 1914 CDP 840.

124 *Attorney-General, Transvaal v Additional Magistrate Of Johannesburg* 1924 AD 421.

125 *R v Mahwahwa And Another* 1956 (1) SA 250 (SR) .

126 *R v K* 1956 (3) SA 353 (A) and *R v Tsutso* 1962 (2) SA 666 (SR).

127 *S v Pietersen and Others* 1983 (4) 904 (ECD).

128 *S v Khubeka and Others* 1980 (4) SA 221 (ODP) and *S v M* 1978 (3) SA 557 (TKSC).

129 *S v S* 1977( 3) SA 305 (OPA).

130 *S v M* 1979(4) SA 564 (BSC).

131 *S v Ngobese and others* 2002 (1) SACR 562.

Where a child pleads guilty to a charge and hands in a statement in terms of section 112(2) of the Criminal Procedure Act, the statement must set out the facts which the accused admits; and on which he or she has pleaded guilty and the presiding officer must be satisfied that the accused is indeed guilty of the offence. This should include a reference to the child's criminal capacity at the time of the commission of the offence. A deficiency in a section 112(2) statement cannot be cured by the fact that the child had been legally represented.<sup>132</sup>

### ***The Child Justice Act 75 of 2008***

The CJA amends the common law principle by raising the minimum age of criminal capacity from 7 years to 10 years. In terms of section 7(2) of the Act a child, who is 10 years or older but under the age of 14 years and who commits a criminal offence is presumed to lack criminal capacity. The State must prove, beyond reasonable doubt, the capacity to appreciate the difference between right and wrong at the time of the commission of an alleged offence, and the capacity to act in accordance with that appreciation.

Every child who is alleged to have committed an offence must be assessed by a probation officer. One of the purposes of the assessment, in the case of a child who is 10 years or older but under the age of 14 years, is to express a view on whether expert evidence on the criminal capacity of such child would be required. The probation officer makes recommendations on various issues, including the possible criminal capacity of the child, if the child is 10 years or older but under the age of 14 years, as well as measures to be taken in order to prove criminal capacity.

When deciding to prosecute a child between the ages of 10 years or older but under the age of 14 years, the prosecutor must consider factors such, as the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child, the nature and seriousness of the alleged offence, the impact of the alleged offence on any victim, the interests of the community, the probation officer's assessment report, the prospects of establishing criminal capacity if the matter were to be referred to a preliminary inquiry, the appropriateness of diversion, and any other relevant factor.

If the matter has not been withdrawn or diverted by the prosecutor before the preliminary inquiry, the matter must be referred to a preliminary inquiry. The preliminary inquiry is in essence the first appearance of the child in a criminal court. Diversion is one of the objectives of the preliminary inquiry, but the inquiry magistrate may only consider diverting the matter if he or she is satisfied that the child had the necessary criminal capacity at the time of the commission of the offence. The inquiry magistrate must consider the assessment report of the probation officer when making a decision regarding the criminal capacity of the child. The inquiry magistrate or child justice court may, of its own accord, or on the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child by a suitably qualified person. The evaluation must include assessment of cognitive, emotional, moral, psychological and social development. Section 11(5) provides that, where the inquiry magistrate has found that the child's criminal capacity has not been proved beyond a reasonable doubt he or she may, if it is in the best interest of the child, cause the child to be taken to a probation officer for any further action. The preliminary inquiry is an informal pre-trial procedure that is inquisitorial in nature and there is no requirement for a legal representative acting on behalf of the child, although nothing in the CJA precludes a child from being legally represented.

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<sup>132</sup> *Obakeng v S* Case Number CA11/2009 North West High Court; *Mshengu v S* 2009(2) SACR 316 (SCA) and *S v Skade and Another* Case Number 49/10 Unreported Eastern Cape Division.



09:50 - 11:30

Chair: Mr. Lorenzo Wakefield

Mr. Wakefield introduced the speakers, Dr. Leon Holtzhausen and Mr. Mthetho Mqonci. He then opened the session by offering a look at inter-sectoral government collaboration and asked the question 'Which profession is key to child justice?' In his view, it is the probation officers because they are the first to assess a child in conflict with the law and they stay involved in the process until the matter has been diverted and the child successfully complied with the diversion order, or until the trial has been concluded and compliance of the sentencing order has been achieved, where applicable. In this regard probation officers have to provide various reports, including assessment reports, pre-sentencing reports and sentence monitoring reports. They further make a recommendation about the possible criminal capacity of a child and whether further evidence will be needed to prove the criminal capacity of a child.

## Criminal Justice Social Work and the Assessment of Criminal Capacity

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**Dr. Leon Holtzhausen: Assistant Professor, Department of Social Development, University of Cape Town**

Dr. Holtzhausen presented a criminal justice social work perspective on criminal capacity issues. He explained that forensic social workers, probation officers, and private social workers all deliver services to the same system and client, therefore there is need for a unified way of approaching the criminal justice system in South Africa.

Dr. Holtzhausen defined criminal justice social work as a specialised practice which aims to identify and address offending behaviour, reduce the risk of re-offending, and restore those that have been injured by crime.

Within the criminal justice practice framework, irrespective of the unit of intervention chosen to change criminal behaviour and reduce risk of re-offending, the criminal justice social worker (CJSW) must be able to provide a coherent rationale for action taken and decisions made during intervention - a correctional specific practice approach serves as a point of departure for addressing offending behaviour. Furthermore, irrespective of the 'method of intervention' chosen to work with offenders and others, a CJSW specific practice approach provides a systematic, orderly, predictable and measureable way of working within the criminal justice sector.

The nature of the child was historically seen as evil or innocent. The way we define children incorporates assumptions about how we ought to treat them (the child is a criminal and the criminal is a child). Historically, children were believed to be naturally evil, born in original sin and susceptible to influence and vulnerable to corruption therefore one had to beat the devil out of them. The juvenile justice system was developed because of a recognition of the need for protection of children. Later, the belief was that children are moral. A child was believed to be sacred, morally pure, to be nurtured and protected. The juvenile justice system was therefore for control, discipline and restraint or public accountability.

Is the child a victim or a threat? Children are perceived as both.<sup>133</sup> In criminal law, "whether a child is a child or not a child depends on what he or she has done." In social work, a child and what he or she is, goes way beyond what they are doing.

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133 Titus J.J. 'Juvenile Transfers As Ritual Sacrifice: Legally Constructing The Child Scapegoat' *Youth Violence And Juvenile Justice* (2005) 3 at 116.

At the heart of the debate over the age of criminal capacity is its relationship to moral judgment, competence and accountability. The criminal capacity debate is an attempt to establish something very important based on a biological indicator, namely, age. Thus, proportionality in sentencing regards the child as having reduced culpability. The dilemmas of this include; the judging level of culpability of adolescents for criminal offences, and allowing youth second chances while punishing offenders for crimes.

Violent behaviour (e.g. fighting & aggression) is relatively common in childhood or early adulthood because of the developmental stages that children go through. It is natural for them to take risks.

Various theories seek to understand violent behaviour, namely:

- Differential Association Theory
- Social Learning Theory
- Social Control Theory
- General Strain Theory

These theories only partially account for key etiological processes. A number of theories propose multiple pathways to antisocial behaviour.<sup>134</sup> The challenge is between typing and process. The focus is primarily on typing individuals according to patterns of involvement in problem behaviour. If you just say he has criminal capacity, that is typing, but social workers are interested in the process by which individuals enter those pathways and the individual changes within that happen over time. Moral development is not a once off but a lifelong process. Children learn patterns of behaviour from the socialising institutions of the community. Therefore, it is not enough to assess the child only but also the community.

### ***A developmental perspective of violence***

The Social Development Model (SDM) is a synthesis of control theory, social learning theory & differential association theory. It acknowledges multiple biological, psychological and social factors at multiple levels in different social domains that lead to the development of problems e.g. drug use, delinquency and violence.

There are four constructs of socialisation which make up the identity of self:

- Opportunities for involvement with others
- Degree of involvement and interaction
- Skills to participate in interactions
- Reinforcement from performance in activities & interaction

Children learn patterns of behaviour (pro-social or antisocial) from the socialising agents of family, school, religious & other community institutions and peers.

Risk and need assessment in an individual's behaviour may happen at four levels, namely:

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<sup>134</sup> Huang et al, 'Modeling Mediation in the Etiology of Violent Behavior in Adolescence: A Test of the Social Development Mode' *Criminology* (2001) 39(1) at 80.

- 1st Generation - clinical judgement / interview
- 2nd Generation - static risk factors
- 3rd Generation - criminogenic need (dynamic) factors
- 4th Generation - combine clinical judgment with actuarial risk assessment (RNR)

These are based upon the social developmental perspective of criminal conduct and also on three core principles of risk, need and responsivity or readiness to change.

The important dimensions measured are moral concern and moral development. Moral concern is a subset of our concerns orientated toward justice, rights and welfare (well-being of others), namely, concern, activities, awareness of standards, rules and goals (SRGs). Moral development concerns with well-being of others and the ability to act on those concerns i.e. empathy. Empathy can either be cognitive or affective and it means 'feelings that are more congruent with another's situation than with own situation'<sup>135</sup> It has to do with performance rather than competence (not experience only but also capability). Empathic experience need not involve the same feeling as that of the target person. There is empathic concern where the aggressor takes the perspective of victim sympathy and emphatic mimicry, where the aggressor observes sadness, fear and distress and copies the victim thereby increasing aggression.

Emotional empathy involves experiencing an appropriate and concordant change in mood in response to another's circumstances - specifically, sharing the emotional experience of another person (for example feeling distressed by another's unhappiness).<sup>136</sup> Cognitive empathy involves understanding another person's feelings on a cognitive level - grasping intellectually or conceptually how another person is feeling.<sup>137</sup>

### ***Measuring moral development***

Moral development can be measured by way of clinical interview (Bio-psychosocial Perspective & DAC); assessment tools, such as defining the issues test (DIT 2), victim empathy response assessment (VERA) and socio-moral reflection measurement-short form (SRM-SF); and assessment principles such as standardised interview schedules, frameworks, tools and indigenisation of actuarial tools.

There are three levels for dealing with a client in social work namely, description, assessment and contract levels. Description involves such factors as client identification; person, family, household and community systems; person system; family and household system; community system; presenting the problem and issues of concern; assets, resources and processes; social history (developmental, personal, familial, cultural, critical events, moral development, SUD, medical, physical, biological, legal, educational, recreational, religious or spiritual, prior services).

Secondly, a tentative assessment of the person in the environment is undertaken. Here, the problem or issues are looked at in terms of the nature, duration, frequency, severity, and urgency, and also risk and protective factors. Then, assess the person and situation by looking at personal factors, situational or systemic factors. Also look at the motivation or readiness to change and the stages of change, as well as the risk and needs assessment. This then leads to the formulation of the case.

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<sup>135</sup> Hoffman M.L., *Empathy and Moral Development: Implications for Caring and Justice* New York: Cambridge University Press (2000) at 30.

<sup>136</sup> Marshall W.L., Hudson S.M., Jones R., & Fernandez,Y.M., 'Empathy in sex offenders,' *Clinical Psychology Review*, (1995) 15 at 99-113.

<sup>137</sup> Ibid.

Thirdly, a service contract is created where the problem or issues are; client-identified, worker-identified and also agreed upon problems or issues. Also consider service goals and plans (who will do what, by when and how?).

## Probation Perspectives to Criminal Capacity of Children

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**Mr. Mthetho Mqonci: Deputy Director, Social Crime Prevention, Department of Social Development**

Mr. Mqonci explained that probation officers are qualified social workers, trained in theories and can identify where there is need for intervention.

Sections 34-40 of the CJA provide that probation officers must conduct an assessment of a child alleged to have committed an offence. In terms of section 35(g) for 10 to under 14 year olds, probation officers may express a view on whether further evidence should be adduced regarding criminal capacity. Section 40 provides for all recommendations that probation officers can put in the assessment report. In terms of section 40(1)(f), a probation officer's report may contain a recommendation on criminal capacity of a child and measures that may be taken to prove such criminal capacity.



11:20 - 12:30

Chair: Joe Ngelanga

Joe Ngelanga introduced the speakers and made a brief comment on section 11(3) of the CJA - that the determination of criminal capacity can take place either at the preliminary inquiry or at the Child Justice Court.

## General Approach and Challenges in the Forensic Mental Health Assessment of Criminal Capacity in Children

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**Professor Anthony Pillay: Principal Clinical Psychologist, Department of Behavioural Medicine, Nelson R Mandela School of Medicine, UKZN & Fort Napier Hospital**

Professor Pillay, looked at several provisions in the CJA. Section 7(2) of the Act provides that a child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the Prosecution proves that he or she has criminal capacity in accordance with section 11.

In terms of section 11(1), the Prosecution must prove beyond reasonable doubt the capacity of a child who is 10 years or older but under the age of 14 years. Section 11(3) states that a child justice court may order an evaluation of the criminal capacity of the child by a suitably qualified person, which must include an assessment of the cognitive, moral, emotional, psychological and social development of a child. In terms of section 97(3) of the CJA the Minister of Justice and Constitutional Development must determine the category or class of persons who are competent to conduct the evaluation of criminal capacity.<sup>138</sup>

Section 8 provides for a review of the minimum age of criminal capacity, to be done by Parliament within 5 years after implementation of this section in the CJA, to determine whether the current minimum age should be raised.

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<sup>138</sup> Government Gazette, 31 March 2010.

With reference to the minimum age of criminal capacity, the CRC in article 40 requires 'the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.' The CRC does not stipulate a minimum age. The United Nations' Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules") state that the minimum age of criminal responsibility differs widely owing to history and culture, by setting the minimum age too low or if there is no age limit at all, the notion of responsibility would become meaningless.

### ***Practical challenges in executing section 11(3)***

There are a number of practical challenges in executing section 11(3) of the CJA. The first is that of facilities, as proper facilities need to be established in all provinces to conduct such evaluations. The facility must be considered as a specialised area of service and the question is whether it will be an in- or out-patient service, whether the children need admission to hospital, what kind of documentation they will have and whether or not they will be required to pay. The second challenge is insufficient capacity (the availability of psychologists and psychiatrists) nationally, as this is a specialised area of practice that requires scarce professionals. Thirdly, there is need for understanding what the examination entails. Lastly, there is need for training.

### ***Time***

Section 11(4) states that '...the person identified to conduct an evaluation of the child must furnish the inquiry magistrate or child justice court with a written report of the evaluation within 30 days of the date of the order', but there is a long waiting list. As such, as much as there is need for the time period there is also a need for capacity to do that.

### ***Clinical Practice Challenges***

The challenges related to clinical practice according to the current state of research are that there is not much available on forensic mental health examination and the issue of children's culpability.

The type of examination required for children between 10 and under 14 year olds to determine criminal responsibility is also problematic and one needs to ask and answer questions such as: Does the child have an understanding of right and wrong? Does the child have an understanding of right and wrong in relation to the crime? Does the child have the capacity to act in accordance with that appreciation?

But what is the law really asking of child development specialists? By requiring proof that the child accused between 10 and under 14 years knows right from wrong and can act accordingly, is the court asking for proof that the child is 'normal'? If so, then it means that the law presumes that children are fundamentally 'not normal', unless proven otherwise. If not, is the law asking for proof that the child is functioning 'above normal'?

In 1995, the House of Lords in the United Kingdom expressed sympathy for a lower court's argument that the presumption of *doli incapax* was outdated, illogical and produced inconsistent results. The rule is said to be illogical because the presumption can be rebutted by proof that the child was of normal mental capacity for his age, and, as noted by Urbas, this means every child is initially presumed not to be of normal mental capacity for his age, which is absurd.<sup>139</sup> The House of Lords deferred to Parliament to determine whether the common law

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139 Urbas, G (2000). *The Age Of Criminal Responsibility: Trends And Issues In Crime And Criminal Justice* (Australian Institute Of Criminology), at 1-6.

presumption should remain part of English law and after much parliamentary debate it was abolished by statute some three years later in section 34 of the Crime and Disorder Act 1998 (England and Wales), but this has led to some confusion in judicial circles.

In *R v JTB*<sup>140</sup> the critical question before the court was whether section 34 of the Crime and Disorder Act 1998 abolished the defense of *doli incapax* altogether, in the case of a child aged between 10 and under 14 years, or merely abolished the presumption that the child has that defense.

**Table 1 - Minimum age of criminal responsibility in selected countries**

COUNTRY	AGE
Singapore, India, Nigeria, Thailand, USA (some States)	7
Kenya	8
Ethiopia, Bangladesh	9
Australia, Switzerland, South Africa, Malawi, UK (England, Wales and Northern Ireland)	10
UK (Scotland), Canada, Ireland, Japan, South Korea, Netherlands, Uganda	12
France, Algeria	13
China, Italy, Germany, New Zealand, Russia, Ukraine, Slovenia, Estonia, Denmark	14
Finland, Norway, Sweden, Egypt	15
Portugal	16
Poland	17
Brazil, Argentina, Colombia, DRC, Belgium	18

In Australia, the Criminal Code Act of 1995 provides in section 7(2)(1) that a child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. Evidence must show the accused to have appreciated that the act in question was “seriously wrong, as opposed to something merely naughty or mischievous”.

Age is not always synchronised with development; hence, chronological age does not necessarily indicate criminal capacity. In ‘normal’ functioning children, higher age correlated with greater responsibility.

Current approaches in criminal responsibility examinations suggest that there is no standard ‘checklist’ approach and it is an under-studied field as not much research work has been done in this area, both internationally and nationally. It is therefore virgin territory that requires research and clinical development. The approaches include intelligence, social competence, cognitive development and moral development.

Mostly, the tests were borrowed from the West. Therefore, there is a lot of criticism against simply applying them in our context. The definition of intelligence depends on what intelligence tests measure, the questions asked that portray what intelligence is, for example if you know what a thermometer is. However, can this assess the intelligence of rural children who have a very little likelihood of encountering a thermometer?

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140 *R v JTB* (2009) UKHL 20.

## ***Social competence***

Social Competence refers to the child's ability to solve problems posed by the social context. It is the ability to deal with day-to-day challenges and it is about contextually relevant social maturity. Social competence is not necessarily correlated with IQ, but relevant to criminal capacity. For example, ask if a child can carry water on her head or know what firewood to select? This is important because that is very much related to context. The child's ability to solve certain problems and deal with issues in their social cultural milieu is important.

## ***Thinking processes***

Cognitive Development refers to children's development in thinking patterns and understanding of the world. Piaget's stages of cognitive development are: - Sensorimotor period (birth - 2 years), pre-operational period (+2 - 7 years), and the concrete operational period (+7 - 12 years) and formal operations period (+12 years - adulthood). The formal operations stage is characterized by reasoning that is hypothetic-deductive. The reasoning process develops into the ability to contemplate consequences. This is of relevance in the determination of children's criminal capacity

Moral development refers to ways of thinking and behaving in differentiating what is right and wrong. In children's early years the distinction is made on the basis of consequences. Development progresses to the stage where actions are deemed right or wrong based on (i) social conventions and (ii) the impact on others. The major theorists are Kohlberg and Piaget.

## ***Kohlberg's stages of moral development***

The pre-conventional stage (up to + age 9 years) and moral judgments based on consequences (don't do wrong, because you don't want to be punished).

The conventional stage (+ 9 - 15 years), where right/wrong based on social convention. The post-conventional stage, where own (internal) moral standards develop.

However, Kohlberg says the best stage of development, most of us as adults do not reach, therefore it is important to take that into account when examining children.

Helwig, Zelazo & Wilson state that 'young children are capable of taking into account other people's perspectives when making moral judgments of psychological harm.'<sup>141</sup> According to Scott & Steinberg, 'developmental research clarifies that adolescents, because of their immaturity, should not be deemed as culpable as adults ... but they also are not innocent children whose crimes should be excused.'<sup>142</sup> The distinction between excuse and mitigation seems straightforward, but it is often misunderstood. As such, take that into consideration other than just having one cut off age like in the U.K. There is a degree of responsibility that all individuals will have, but to what extent that responsibility is in place should be related to mitigating factors.

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141 Helwig, C.C., Zelazo, P.D. & Wilson, M. (2001). "Children's Judgements Of Psychological Harm In Normal And Noncanonical Situations" *Child Development* (2001) 72(1) at 66-81.

142 Scott, E. S. & Steinberg, L (2008) *Adolescent Development And The Regulation Of Youth Crime: The Future Of Children*, at 15-33.

Intervening time is the time between alleged offence and examination. The child is learning from experiences in the intervening period. For example, a 12 year old boy, had committed an offence a year earlier and by the time he was seen for assessment, he had had sessions of psychological therapy for one year (on account of his parents), so that obviously affected the way he responded during the examination.

### ***Behaviour surrounding the alleged offence***

Flight on its own may not be sufficient. Flight in combination with other factors may be used to rebut *doli incapax*. Other factors include attempts to hide evidence and past criminality. Evidence of previous criminality is, of course, rarely admissible to prove an issue in a criminal trial. However, in relation to *doli incapax* such evidence is regularly admitted.

After Professor Pillay's presentation, Mr. Clive Willows came in as a discussant and he spoke about the issues relating to assessment of criminal capacity in terms of the CJA.

## The Child Justice Act 75 of 2008: Issues in Assessment

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### **Mr. Clive Willows: Clinical Psychologist, Pietermaritzburg**

Mr. Willows started his presentation by explaining that in the beginning religious and philosophical beliefs created an understanding of the 'Natural state of Humankind' and we cannot deny that, to some extent, personal beliefs continue to inform the principles applied in law and in psychology. He went on to say that science is the modern 'religion' in which there is a reliance on research and 'proof'. Psychology is the science of human behaviour whose purpose is to explain, predict and change human behaviour.

The interface between psychology and law is that law determines the rules of discourse, the concepts and the language while psychology tries to adjust and adapt science into principles and precedents. The two operate differently and it will never be a comfortable marriage. Law determines the discourse. For example, lawyers come up with terms like 'capacity'.

Psychologists are aware of the variables of human nature and the underlying presumptions, for example, 'the reasonable man' is a measure against which other tests must be measured yet, there is no psychological test for a reasonable man. Law and psychology are two disciplines from fundamentally different origins.

Now looking at the laws relating to children, can psychology explain, predict and change the thoughts, feelings and behaviour of children to assist in the implementation of these laws?

Criminal capacity is the ability to know the difference between right and wrong and to act in accordance with that knowledge. Research shows that the capacity to deceive develops at about the age of 3 years. There is therefore a difference between cognitive development of children as per Piaget, and moral development as per Kohlberg. Kohlberg's research was conducted on 10-16 year old boys to see what reasoning process is used and how it is used at that age. It is linked to Piaget's cognitive theory. For example, a poor man's wife is seriously ill, the medication is expensive, he breaks in and steals it. The question is, is he right, and not, is it illegal? The question is different to that of capacity. There are three stages of Kohlberg's moral development.

**Level 1:** The pre-conventional stage, where there are hedonistic consequences of reward and punishment, or expedient co-operation.

**Level 2:** The conventional stage where one seeks approval through social acceptance and judgment, and cooperates with established norms.

**Level 3:** The post-conventional stage where there is acceptance of universal principles, beyond group conformity, toward autonomy.

### ***Practicalities of assessment of criminal capacity***

There is a dearth of appropriate measuring instruments that meet the scientific criteria of validity and reliability. Thus, an assessment of personal and social competency is probably more helpful than an IQ test. Vineland's Social Maturity Scale asks the question, how does the community assess the child, normal or not?

As a matter of opinion, misdemeanors of children should be decriminalised, but children have a right to learn via consequences in order to benefit from socialisation. It would be rare to find a child over 10 years lacking in capacity to tell right from wrong. The two pillars of the capacity argument are problematic in psychology. It is difficult to find a time when a person knew what they were doing is wrong but nonetheless acted against it. In law, if on the day before you turn 10 years you kill you will not be charged, and if you kill 3 days after you turn 10 years, in law there has been a fundamental developmental difference which could have devastating consequences. There is nothing like that in psychology where development is regarded as a process which differs from individual to individual.



12:30 - 13:30

Chair: Prof Pieter Carstens

Professor Carstens introduced the speakers for this session, namely, Professor Denis Viljoen and Dr. Lynda Albertyn.

### **Foetal Alcohol Syndrome (FAS) and Criminal Capacity**

**Professor Denis Viljoen: Chairperson and Chief Executive Officer, Foundation for Alcohol Related Research (FARR), Rondebosch, Cape Town**

Professor Viljoen explained that foetal alcohol syndrome (FAS) is the most common form of mental retardation in the world. It is preventable but there is no biological test that can determine or detect it during pregnancy. FAS is a condition where the child suffers mental and physical deficiencies as a result of the mother drinking heavily during pregnancy.

The clinical characteristics of FAS are as follows:

- growth retardation
- characteristic face
- nervous system problems such as small head, behavioural problems like hyperactivity, poor concentration, inappropriate social behaviour, average IQ of 65
- behavioural and interpersonal problems such as mental health problems, disrupted school experience, trouble with the law, confinement, inappropriate sexual behaviour and alcohol and other substance abuse problems
- organ system involvement

The discriminating features of FAS are; the middle part of the face does not develop well in the child, such that it is flat, short palpebral fissures (the separation between the upper and lower eyelids), short nose, indistinct philtrum (an underdeveloped groove between the nose and the upper lip), thin upper lip and the head circumference is very small and that is related to the functioning of the brain. Associated features are low nasal bridge, minor ear anomalies and undersized jaw (micrognathia).

Prof Viljoen stated the care should be exercised when measuring mental retardation as sometimes it depends on other factors other than FAS. Therefore, he suggested that professionals look at other factors affecting the behaviour of individuals such as nutrition.

Abnormal behaviour in society is very much a part of FAS. In South Africa, the figures of FAS represent 10 times that of all other developmental problems combined. Most excessive drinking takes place in shebeens and there are about 250,000 shebeens in RSA. In pregnancy, 1.2 beers per day or 5-6 beers per occasion, per week is enough to cause FAS. The genetic element to FAS is that in cases of identical twins, they all get affected with full blown FAS but non-identical twins may not both be affected.

## Conduct Disorder and the Criminal Justice System

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**Dr Lynda Albertyn: Principal Specialist Psychiatrist, Area 248 Charlotte Maxeke Johannesburg Academic Hospital**

Dr. Albertyn defined conduct disorder as a psychiatric condition defined largely by "rule breaking and destructive and aggressive behaviour". In slight tautology, this would mean that if you break rules and enter the criminal justice system this defines you as having a conduct disorder.

Characteristics of rule breaking:

- Bullies, threatens
- Fights
- Uses weapon
- Cruel to people and animals
- Steals
- Forced sexual activity
- Destroyed property
- Fire setting
- Theft
- Lies
- Stays out at night
- Runs away from home
- Truant from school

Older diagnoses may be more helpful and these include psychopathy and bad prognostic indications. Psychopath may be diagnosed by such factors as, lack of empathy, being cold emotionally and calculating, manipulative, callous with little or no guilt or remorse, inform on others and try to blame others for their own misdeeds, superficially charming and often are assessed as more intelligent than they actually are. Bad prognostic indications include early onset (before 10 years), severity, psychopathic characteristics, low IQ, co-morbid ADHD, low anxiety.

The prevalence of conduct disorder is 4-7% and rising, and it is suffered more by males than females. Conduct disorders are made largely by social and psychological factors, including:

- Antisocial parents
- Mentally ill mother especially antisocial, but also depressed
- Punitive, physically aggressive punishment
- Parents being cold emotionally
- Chaotic homes
- Multiple early caretakers and lack of attachment in early years
- Poverty and crowding
- Single mothers
- Teenage pregnancies
- Smoking in pregnancy
- Deviant peers
- School dropout

Children with conduct disorder are troublesome, dangerous, costly to manage, do not get better, are unsuitable for most forms of therapy, and medication is unhelpful in most instances. Parents are not capable of containing them.

Children with conduct disorder lack empathy. There is a distinction between sympathy and empathy. Sympathy is manipulative as it allows no real remorse although one may regret. There is no evidence that there is genetic predisposition to conduct disorder. Depression and antisocial parents contribute to the development of conduct disorder. The single most important thing that happens to a child is attachment to the mother in the first years and that is what creates empathy. The brain formation in the first two years is set and it is not always possible to change later. Where there is detachment or poor boundaries, there is no empathy.

A question therefore arises that whether persons with conduct disorder can be held criminally responsible. Here, one has to ask if they know the difference between right and wrong, whether or not they are capable of making decisions and whether or not the diagnosis mitigates against the crime committed. If one has conduct disorder, they do know the difference between right and wrong, but their capacity to feel for others and make decisions has been impaired. As such, to say that it is a mental problem, hospitals will be flooded and conduct disorder children will be held responsible for the actions they take. Conduct disorder costs society a lot through accidents and crime. Parents often create the problem but are not able to contain it. Also, you have to be able to attach to some extent if you are to be able to get therapy e.g. attach to a therapist. To simply say the children need therapy will not make much difference if they are unable to attach.

Research findings about rehabilitation and treatment suggest that there is need for long term management programmes that are consistent, kind, established and teaching social behaviour (for example boys/girls' towns, industrial schools or children's homes). There is also need for containment and structure in terms of consequences, fairness yet firmness and rule following. Also, family therapy with committed parents can show some benefit. Furthermore, DBT has also shown some benefit. However, even with best systems in place, there are poor results.

Overall, prevention for example preventing mothers from drinking, encouraging mothers to be with children in the first two years of the child's life, and investing in specialised programmes for these children is the only key to preventing and managing conduct disorder.

## Discussions

Following the presentations, a number of questions and comments were raised. The discussions centered around the following main issues, namely: the question of victim empathy, the training of probation officers, health professionals and other role players in the assessment of criminal capacity, challenges faced when dealing with children diagnosed with conduct disorder and the minimum age of criminal capacity.

The importance of empathy was highlighted since it links with moral development, which is one of the aspects that needs to be assessed during the evaluation of the criminal capacity of children. The distinction between cognitive and emotional empathy is important when dealing with child offenders.

Regarding the training of probation officers, health professionals and other role players in the assessment of criminal capacity, the need to keep on building capacity in the field was highlighted, as well as the need to keep everyone updated on developments in the field.

Diagnosing children with conduct disorder presents various challenges. The fact that a child suffers from conduct disorder does not necessarily mean that he or she does not have the required criminal capacity to be held liable for the commissioning of an offence. However, capacity of such children is diminished as they often cannot act in accordance with the knowledge that they have. There is a lack of specialised institutions that offer treatment and rehabilitation to children suffering from conduct disorder since long term management programmes that are structured, consistent and that focuses on teaching social behaviour are needed.

On the minimum age of criminal capacity, the arbitrariness of the differences in minimum age of criminal responsibility in different countries was discussed. It was suggested that South Africa should possibly consider raising the minimum age of criminal capacity to 12 years because that is the internationally acceptable minimum. The CJA does provide for a review and this opportunity should be utilised.

## Challenges

The following challenges have been identified in the assessment of criminal capacity of children:

- Certainty about a child's criminal capacity prior to diversion is very important. If the child does not take responsibility for the criminal offence, the matter may not be diverted and the child who did not have criminal capacity at the time of the commission of the offence may not want to take such responsibility. In these cases the prosecutor must proceed with a trial in the child justice court if the matter is not withdrawn. Even if the child takes responsibility for the offence and the matter is diverted, the child still needs to successfully comply with the diversion order before the matter can be finalised. If the child does not comply, the prosecutor may decide to proceed with the trial and the child's acknowledgment of responsibility will be noted on the record as an admission. It will then be too late to consider the criminal capacity of the child at the time of the commission of the offence, at this stage of the proceedings.
- There is a lack of psychiatric facilities and professionals to conduct the assessment of criminal capacity of children. Routine assessments of these children place an increased burden on already stressed resources.
- The status of assessment reports is a concern. There are concerns about the quality and accuracy of assessment reports because probation officers are still using old and outdated theories and not modern theories of criminal behaviour. Therefore, the way that information is gathered and the tools used needs to be updated in line with international best practice. Assessment reports do not meet the needs and requirements of the court, the child offender and the community.

## Recommendations

The following recommendations were made:

- There is need to be able to access the information and make recommendations for research regarding how many children have been held to have criminal capacity, for what crimes and what ages specifically, and how the system deals with them.
- Submissions should be made to Parliament during the course of the review of the minimum age of criminal capacity. Consideration should be given to changing the law to remove the rebuttable presumption of criminal capacity, and to opt instead for a cut-off age below which a child cannot be prosecuted. Therefore, research to support the review and possible raising of the age to 12 years and the rationale behind it ought to be done. The fact that the international acceptable minimum age of criminal capacity has been set at 12 years should be a consideration in this regard.
- There is a need to revisit the way that assessments are conducted and the tools and tests currently used. It appears that those conducting the assessments are currently poorly equipped and there is no national standardised approach. Psychologists and psychiatrists are expected to use their own methods as there is no guidance.
- In matters where preliminary inquiries are conducted these inquiries should be more inquisitorial in nature to allow for all the relevant information to be placed before the inquiry magistrate. This would give a clearer picture of the child's circumstances, the circumstances surrounding the commission of the offence and may also give an indication on the possible criminal capacity (or lack thereof) of the child.
- There is a need to focus on bridging the gap in cases where a child has been referred for an assessment in terms of section 77 or 78 of the Criminal Procedure Act (his or her ability to understand the proceeding and to stand trial or referral for an evaluation of his or her criminal capacity or lack thereof due to a mental illness or mental defect) and assessment of the criminal capacity of children 10 years or older but under the age of 14 years. Health professionals should also consider the child's criminal capacity (where it is not due to a mental illness or mental defect and the child is 10 years or older but under the age of 14 years) even if the child has been referred in terms of section 77 or 78 of the Criminal Procedure Act and should include a finding in this regard in their report.

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