

Proposals for the review of the minimum age of criminal responsibility

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ABSTRACT

The minimum age of criminal capacity in South Africa used to be seven years of age, one of the lowest in the world. The Child Justice Act raised that age from seven to 10 years, and retained the rebuttable presumption of criminal incapacity for those children aged 10 years or older but under the age of 14. The Act also provided for a review of the minimum age, with a view to raising it, within five years of the Act's commencement. This article explores the current international debates about setting a minimum age of criminal responsibility, to garner ideas for the upcoming review. The relevant provisions of the Child Justice Act and their practical implementation are interrogated. The conclusion is that the current provisions fall short of international standards in a number of ways, and that children's rights are at risk in the current system. The setting of a new, single minimum age of criminal responsibility is proposed, together with the abolition of the *doli incapax* presumption which will obviate the need for the assessment of criminal capacity. The author prefers 14 as the new minimum age, but considers 12 the more likely age to be accepted by the legislature.

1. Introduction

South Africa's Child Justice Act 75 of 2008 (hereafter referred to as 'the Act') raised the minimum age of criminal capacity from seven to ten years of age. It also retained a presumption that children who are 10 years or older but under the age of 14 years (hereafter referred to as 'children between the ages of 10 and 14') at the time of the commission of the alleged offence are presumed to lack criminal capacity. The presumption is rebuttable, and there is an onus on the state to prove that the child had criminal capacity at the time of the offence. Although these amendments moved South Africa from the invidious prior position of having one of the lowest minimum ages of criminal capacity in the world, the current minimum age of criminal capacity provisions still fall short of internationally accepted standards. In 2009 the United Nations Committee on the Rights of the Child issued a General Comment on Juvenile Justice,¹ in which they urged states

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¹ United Nations Committee on the Rights of the Child *General Comment no. 10* (2007): *Children's Rights in Juvenile Justice* (2007).

parties to raise the minimum age of criminal responsibility to at least the age of 12 years, and to abandon 'dual' minimum age thresholds like the *doli incapax* presumption. This General Comment had already been issued when the Child Justice Bill was debated in Parliament. Civil society organisations made much of this in their submissions to Parliament, and almost persuaded the Justice Portfolio Committee to raise the minimum age to 12 years.² It is for this reason that the Act contains an unusual clause requiring Parliament to review the minimum age, with a view to increasing it, within five years of the Act coming into operation.³ The date of commencement was 1 April 2010, thus the end of March 2015 is the deadline for the review. The time is ripe to consider the new provisions on criminal capacity, how they have worked in practice, and to make recommendations for the review.

The latest debates about the minimum age of criminal capacity are diverse. A recent special edition of the UK-based international journal *Youth Justice* sets out a rich dialogue on the subject, including clinical, criminological, sociological and legal perspectives.⁴ All are deeply concerned about the minimum age of 10 years (without any *doli incapax* presumption) which prevails in England and Wales. Some say that new understandings and research about child development and neuroscience suggest that an individualised approach is to be preferred. Delmage argues, from a medico-legal perspective, for a 'developmental continuum' rather than the setting of an arbitrary age.⁵ Developmental psychologists Lamb and Sim suggest that children aged between 10 and 15 should be treated within an educational/welfare system rather than within the criminal justice system.⁶ Another view is that the issue of capacity is so complex that it would be better to simply say that a state should set a minimum age below which children should not be prosecuted, for reasons of not doing harm and promoting safety, as well as compliance with international standards.⁷

² A Skelton & J Gallinetti 'A long and winding road: The Child Justice Bill and civil society advocacy' (2008) 25 *SA Crime Q* 1 at 8.

³ Section 8.

⁴ R Church, B Goldson & N Hindley 'The minimum age of criminal responsibility: Clinical, criminological/sociological, developmental and legal perspectives' (2013) 13 *Youth Justice* 99.

⁵ E Delmage 'The minimum age of criminal responsibility: A medico-legal perspective' (2013) 13 *Youth Justice* 102. See also N Newton and K Bussey 'The age of reason: An examination of psychosocial factors involved in delinquent behaviour' (2012) 17 *Legal & Crim Psychology* 75 at 88.

⁶ M Lamb & M Sim 'Developmental factors affecting children in legal contexts' (2013) 13 *Youth Justice* 131.

⁷ B Goldson "'Unsafe, unjust and harmful to wider society": Grounds for raising the minimum age of criminal responsibility in England and Wales' (2013) 13 *Youth Justice* 111.

A further strand of the discussion is promoted by the Child Rights International Network (CRIN), calling for a debate that 'gets beyond pragmatism and compromise'.⁸ They urge a way forward that separates the concept of responsibility from that of criminalisation. The gravamen of their concern is that the UN Committee's call for a minimum age of criminal responsibility of not less than 12 years has been misused by some states, which previously had a minimum age of older than 12 years, to support law reform to reduce the age.⁹ CRIN proposes that one should stop focusing on *criminal* responsibility. Children should be held responsible, and this is in line with trends in restorative justice, which is widely promoted in child justice. But should this 'responsibility' be *criminal*? Council of Europe Commissioner, Thomas Hammarberg, has called for a complete shift in the minimum age of criminal responsibility debate to one in which children below eighteen should be held responsible, but not criminally responsible.¹⁰

However there remains a need, in the interim, to continue to raise the minimum age of criminal responsibility as far as possible. In 2011 the Inter-American Commission on Human Rights issued a report entitled 'Juvenile justice and human rights in the Americas'.¹¹ The report reiterates Hammarberg's call for a new debate separating the concepts of 'responsibility' and 'criminalisation', but recognises that excluding children totally from the criminal justice system (whilst holding them accountable and guaranteeing due process) is a complex matter that may take some time to implement. Thus continued pragmatism is required, and the Commission 'urges states to progressively raise the minimum age under which children can be held responsible in the juvenile justice system towards 18 years of age'.¹²

In South Africa we clearly have an opportunity – and an obligation – to reconsider this issue. This article examines the relevant provisions in the Child Justice Act pertaining to criminal capacity, interrogates the challenges that have been experienced in practice, and makes proposals for the review of the minimum age of criminal capacity.

⁸ CRIN 'Making children criminals' (2012), available at <http://crin.org/en/library/publications/stop-making-children-criminals>, accessed on 8 December 2013.

⁹ For example, Georgia and Panama have lowered their minimum age of criminal responsibility, and Argentina, Brazil, Philippines, Hungary, Peru, Republic of Korea and the Russian Federation are planning to do so: see CRIN op cit (n8) 2.

¹⁰ Hammarberg's position is cited in CRIN op cit (n8).

¹¹ The report was written by the Inter-American Commission's rapporteur on children's rights, Paulo Pinheiro, formerly the UN special rapporteur on violence against children, 2012.

¹² Inter-American Commission on Human Rights 'Juvenile Justice and Human Rights in the Americas' (2011), available at www.cidh.org/countryrep/JusticiaJuvenileng/jjtoc.eng.htm, accessed on 10 December 2013.

2. The Child Justice Act provisions on criminal capacity

2.1 The statutory presumptions of criminal incapacity

Section 7(1) states that a child who commits an offence while under the age of 10 years does not have criminal capacity, and cannot be prosecuted for that offence. In terms of section 7(2), a child who commits an offence while he or she is between the ages of 10 and 14 is presumed to lack criminal capacity, unless the state proves, beyond a reasonable doubt, that he or she has criminal capacity in accordance with section 11. That section sets out what must be proved: 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 to act in accordance with that appreciation’.

According to Le Roux-Bouwer, the only material change to the common law rules of criminal capacity that the Act brought about is the shift in the lower age from seven to ten.¹³ Walker takes a different view, criticising the Act because it has not merely codified the common law, but diminished it.¹⁴ Her objection centres around the fact that the requirement to prove that the child had ‘the capacity to appreciate the difference between right and wrong at the time of the commission of an alleged offence’ does not pay sufficient attention to the requirement under the common law that the child must appreciate the wrongfulness of his or her own conduct.¹⁵ Walker reads section 11(1) as requiring only a generalised or abstract understanding of right and wrong, rather than whether he or she was capable of appreciating the wrongfulness of his or her unlawful conduct. She urges a constitutionally compliant interpretation that would re-incorporate what she calls a ‘conduct-specific’ wrongfulness requirement. Section 11(1) does link the understanding of right and wrong to ‘the time of the commission of an alleged offence’ so it is not an entirely abstract appreciation that is required, but unlawfulness is not mentioned. Walker is correct that being capable of appreciating the wrongfulness of an act or omission is a crucial element of criminal capacity,¹⁶ and that the language in section 11(1) should convey this more clearly.

¹³ J Le Roux-Bouwer ‘Juvenile offenders in South African law’ in C Bezuidenhout (ed) *Child and Youth Misbehaviour in South Africa: A Holistic Approach* 3ed (2013) 212.

¹⁴ S Walker ‘The requirements for criminal capacity in section 11(1) of the new Child Justice Act, 2008: A step in the wrong direction?’ (2011) 24 *SACJ* 33.

¹⁵ Walker op cit (n14) 35.

¹⁶ The test applies to adults too, in terms of s 78(1) of the Criminal Procedure Act 51 of 1977.

2.2 What happens to children who lack criminal capacity?

The Act provides that where a police officer has reason to believe that a child suspected of committing an offence is under the age of 10 years, he or she may not arrest the child and must refer the matter to a probation officer.¹⁷ Section 9(2) requires the probation officer to assess the child as soon as possible but not later than seven days after the referral. After completing the assessment, the probation officer may refer the child to a children's court (which is part of the child protection system), refer the child for counselling or therapy or to a programme especially designed for children under the age of 10 years, or arrange for any support services. The probation officer may arrange a meeting attended by the child, family members and any other person who can provide relevant information. The purpose of the meeting is to understand more fully the circumstances surrounding the allegations against the child, and to formulate an appropriate plan relevant to the circumstances. Alternatively, the probation officer may decide to take no action. The section is clear that the taking of any action does not imply that the child is criminally liable. Any child who is 10 years or older but who is found to lack criminal capacity may also be referred to the probation officer for the same process to be followed.

These provisions regarding what happens to children who lack criminal capacity are important. Some experts take the view that where the chronological minimum age of criminal responsibility is set is not as important as what happens to children below that age.¹⁸ The concern arises from the fact that in some systems, such children are swept into welfare systems with heavy reliance on detention, accompanied by a lack of due process.¹⁹ South Africa's Act is innovative in this regard, providing a mostly non-custodial alternative process, although referral to the care and protection system could result in a child being placed in alternative care.²⁰ However, such decisions are made by the children's court, with appropriate procedural safeguards.²¹

¹⁷ In terms of the Probation Services Act 116 of 1991, a probation officer is a qualified social worker, registered with the social work council.

¹⁸ N Cantwell and J Doek: foreword to D Cipriani *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009).

¹⁹ See generally C Hamilton *et al Administrative Detention of Children: A Global Report: Discussion Paper* (2011), published under the auspices of the Children's Legal Centre and UNICEF.

²⁰ This includes foster care or placement in a child and youth care centre.

²¹ Chapters 4, 7, 9, 11, 12 and 13 of the Children's Act 38 of 2005 are applicable.

2.3 The role of the police

It is important to make a determination regarding the age of the child at the point of first contact with the system, because the way in which a police official must deal with the child depends on whether the child is above or below the age of 10 years. As explained above,²² if the police believe a child may be below the age of 10 years, they may not arrest or issue with a written notice, and must take the child to a parent, guardian or appropriate adult or, where that is inadvisable or impossible, to a temporary safe care facility in the care and protection system. If the child is between 10 and 14, then the police may issue a written notice to appear at a preliminary inquiry, issue a summons or, in limited circumstances, conduct an arrest.²³ The assessment or establishment of criminal responsibility is undertaken by other role players after that point.

2.4 Assessment by probation officer

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 between the ages of 10 and 14, is to express a view on whether expert evidence on the criminal capacity of such a child is required. After completion of the assessment, the probation officer must compile the assessment report including, where applicable, the 'possible criminal capacity' of the child, if the child is between the ages of 10 and 14, 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.

2.5 The role of the prosecutor

The prosecutor who is required to decide whether or not to prosecute the child must, in the case where the child is between the ages of 10 and 14, take the following factors into account:²⁴

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

²² See 2.2.

²³ If such a child is arrested, he or she should be released into the care of a parent, guardian or suitable adult, or if that is not possible, consideration must be given to placing him or her in a child and youth care centre pending first appearance.

²⁴ Section 10(1).

- 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, in terms of 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 1.²⁵ Alternatively, the matter proceeds to a preliminary inquiry.

2.6 The preliminary inquiry

One of the objectives of the preliminary inquiry is to consider the assessment report, which includes the view of the probation officer regarding the criminal capacity of the child, if he or she is between the ages of 10 and 14, 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.²⁶ The Act states further 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 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

²⁵ The Child Justice Act has several schedules. Schedule 1 sets out relatively minor offences (for example theft of small amounts of money, common assault), and Schedule 3 the most serious offences (for example, murder, rape and armed robbery). Schedule 2 lists offences that are of medium seriousness (for example, assault to do grievous bodily harm, housebreaking).

²⁶ Section 49(1)(b).

qualified person.²⁷ 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.²⁸ In instances where the prosecutor decided to prosecute the child (between the ages of 10 and 14) 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.

2.7 Trial in the child justice court

During the trial in the child justice court, the State must prove, beyond reasonable doubt, the capacity of a child, who is between the ages of 10 and 14. It must be shown that the child could appreciate the difference between right and wrong at the time of the commission of the alleged offence and was able 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. This means that a child might have to go through the entire process of a trial before a decision about whether a child has or does not have criminal capacity is made. This considerably diminishes the protection that the presumption of a lack of criminal capacity appears, on face value, to offer. Where the State fails to prove criminal capacity the child might be saved a conviction and sentence, but will nevertheless have been exposed to trial, albeit in the child justice court.

According to section 11(2)(b) of the Act, the child justice court must also, when making a decision on the criminal capacity of a child 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 finds that the child's criminal capacity has not been proved beyond a

²⁷ A suitably qualified person is a medical practitioner who is registered as such under the Health Professions 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: GG 33092, GN 273, 2010/04/01.

²⁸ Section 9.

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.

This section has traversed the legal provisions of the Child Justice Act, with the aim of sketching how the rules pertaining to criminal capacity work in the law. How they work in practice is a different issue, and it is to that subject this article now turns.

3. Problems in practice

A seminar convened by the Child Justice Alliance in 2011 brought together child law specialists, psychologists, psychiatrists and social workers to discuss the process of the evaluation of children aged between the ages of 10 and 14, to determine whether they have criminal capacity. This important dialogue revealed a number of problems that are being experienced in practice, which will now be discussed.

3.1 Resource constraints in conducting criminal capacity evaluations

The seminar established that there is no uniform model for evaluation in place, and that there is widespread uncertainty in the mental health profession regarding the new assessment role. 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 and the Department of Health has been requested to assist with these assessments. However, the Department of Health has indicated that it has a limited number 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. The shortfall in both human resources and budgets result in undue delays in the finalisation of cases involving children whose criminal capacity is uncertain.²⁹

3.2 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

²⁹ C Badenhorst *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* (2011) 30.

health assessment. The answer to the question as to whether or not a child between the ages of 10 and 14 had the required criminal capacity at the time of the offence 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.³⁰ Furthermore, it is placing an additional burden on the already stressed child mental health sector, leading to delays which are detrimental to children.³¹

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, between the ages of 10 and 14, does not have the necessary criminal capacity to be held liable for the commission of an offence. 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 (average or normal) children between the ages of 10 and 14 who come in conflict with the law should be regarded as *doli incapax*. This will result 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 result is that children who are mentally normal, are pathologised and unnecessarily brought into contact with the mental

³⁰ AL Pillay 'Criminal capacity in children accused of murder: challenges in the forensic mental health assessment' (2006) 18 *J Child and Adolescent Mental Health* 17-22.

³¹ A Skelton and C Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 28.

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.³²

3.3 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.³³

The Act does not mention section 77 or section 78 of the Criminal Procedure Act in relation to the trial in the child justice court. Skelton and Badenhorst assert that these sections still apply to children, but concede that the procedures to be followed or the period of postponement in the case of a referral for such an evaluation have not been addressed in the Act.³⁴ 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.³⁵

3.4 Prosecutors' consideration of criminal capacity

The prosecutor is required, when deciding whether or not to prosecute a child between the ages of 10 and 14, to consider the prospects of establishing criminal capacity if the matter were to be referred to a preliminary inquiry.³⁶ If the prosecutor is of the opinion that criminal

³² Skelton and Badenhorst op cit (n31) 47-49.

³³ 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.

³⁴ Skelton and Badenhorst op cit (n31) 23.

³⁵ Ibid.

³⁶ Section 10 of the Act.

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.³⁷ 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' call for speculation 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 aged between 10 and 14. This also raises questions as to the effectiveness of the 'protective mantle' provided by the *doli incapax* presumption and intended by the legislation.

3.5 Criminal capacity and guilty pleas

Prior to the Child Justice Act coming into operation, there was already a problem with criminal capacity in the context of guilty pleas.³⁸ Several such cases, reached the superior courts after magistrates had omitted to consider the criminal capacity of the children in question.³⁹

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.⁴⁰

In *S v Mshengu*⁴¹ a 13-year-old boy, who was legally represented, pleaded guilty on a charge of murder and handed in a statement in terms of section 112(2), setting out the basis of his plea. He was convicted on his guilty plea and sentenced to eight years' imprisonment. The Supreme Court of Appeal set aside the conviction and sentence because the presumption that the accused lacked criminal capacity

³⁷ Section 9 of the Act.

³⁸ In terms of s 112 of the Criminal Procedure Act 51 of 1977.

³⁹ See the cases discussed in E Du Toit et al *Commentary on the Criminal Procedure Act* (RS 34: 2005) 17-1 – 17-12C and *S v Moya* 2004 (2) SACR 257 (W).

⁴⁰ J Kriegler & A Kruger *Hiemstra: Suid-Afrikaanse Strafproses* 6ed (2002) 302-319.

⁴¹ 2009 (2) SACR 316 (SCA).

at the time of the commission of the offence had not been rebutted by the State. Unfortunately, the Court passed over the opportunity to formulate guidelines as to how an inquiry into the rebuttal of the presumption of criminal capacity of a child should be conducted.

Although this case was heard before the implementation of the Act, the provisions in the Act do not take the matter any further. There are no provisions or guidelines in the Act dealing with the determination of criminal capacity in cases of guilty pleas by children between the ages of 10 and 14.

3.6 Criminal capacity and diversion

Diversion is considered to be a benign process, but it is based on an acknowledgment of responsibility, and it does have consequences for a child. It is therefore important to be sure that children who are being considered for diversion have criminal capacity.⁴²

Firstly, a matter may only be diverted if there is a *prima facie* case against the 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 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 against the principle of legality to expect a child, who does not have the necessary criminal capacity to comply with an order for such a long period of time – especially as non-compliance may result in being referred back to the child justice court.

3.7 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. Magistrates are uncertain whether they have sufficient knowledge to determine

⁴² Badenhorst op cit (n29) 28-29.

the criminal capacity of children.⁴³ This results in an increase in the number of orders for the evaluation of the criminal capacity of children.

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, requires further consideration. Certainty about a child's criminal capacity before diversion or guilty plea is required, but is 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 Child Justice Act simply fails to give adequate guidance.

4. Review of the minimum age of criminal capacity by Parliament

4.1 The concern about the lack of information

One of the main reasons why the Parliamentary 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 from 10 to 13 years old who have been accused of committing offences or the type of crimes that they have allegedly committed.⁴⁴ That is why section 8 provides for a review of the minimum age of criminal capacity and directs the Minister responsible for Justice to submit a report to Parliament.

This report, as provided for in section 96(4), must provide statistics on the number of 10-year-old to 13-year-old children who are alleged to have committed offences and 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 capacity would not be proved and the reasons for that decision in each case. Information on the number of

⁴³ Ibid.

⁴⁴ 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 8 December 2013.

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 should be included. 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.

At the time of writing, the Act has been in operation for almost four years – in April 2014 there will be only one year left before the minimum age of criminal capacity must be reviewed, as required by section 8. The Intersectoral Committee on Child Justice has issued two reports since the Act came into operation, and neither of them have included any information about offences being committed by children between 10 and 14 years, as required by section 96(4).

The gathering of reliable data on the number of children aged 12 to 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 important for the review of the minimum age of criminal capacity. At the time of writing (almost four years after the Act came into operation), no such data has been produced by the Minister for Justice and Constitutional Development, nor by the National Prosecuting Authority. The rights violations that will occur if the review is delayed due to lack of evidence can be squarely laid at the door of the executive government. Notwithstanding government's failure to produce the required statistics, it is argued that the legislature should, before the end of March 2015, set a new age below which children may not be prosecuted and abolish the *doli incapax* presumption. There are adequate reasons to do so, which will be enumerated in the concluding parts of this article.

4.2 International law reasons for raising the minimum age of criminal responsibility

Article 40(3) of the Convention on the Rights of the Child and article 17(4) of the African Charter on the Rights and Welfare of the Child require states parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. The Beijing Rules⁴⁵ use the term criminal 'responsibility' rather than 'capacity', but the official commentary still focuses, in essence, on capacity, as it refers to whether a child, by virtue of her or his

⁴⁵ United Nations General Assembly *Standard Minimum Rules for the Administration of Juvenile Justice* (1985). The official commentary forms part of the Rules.

individual discernment and understanding, can be held responsible for behaviour deemed by the law to be criminal.

In 2007 the UN Committee on the Rights of the Child (hereafter 'the Committee') issued General Comment No 10,⁴⁶ in which it declared that a minimum age of criminal responsibility below 12 years is unacceptably low. The Committee recommended a fixed minimum age of criminal responsibility of not lower than 12 years, and that states parties should progressively raise the minimum age of criminal responsibility. The Committee frowned on the use of two ages – such as occurs in the application of rebuttable presumptions.⁴⁷ It observed that such rebuttable presumptions are not only confusing but also lead to children of the same ages being treated differently due to their maturity. Their treatment also depends on the quality of the rebuttal evidence presented by the prosecution, which also concerned the Committee.

It is thus clear that the Child Justice Act provisions are in conflict with General Comment No 10. While the General Comment 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.⁴⁸

The Beijing Rules official commentary also points out there is a close relationship between the notion of responsibility for criminal behaviour and other social rights and responsibilities. Therefore another international law imperative that urges an adjustment to the minimum age of criminal responsibility is the need to reduce inequality between ages that apply to different kinds of responsibility.⁴⁹ It is impossible and probably undesirable to attempt to set uniform age thresholds across all areas of the law. Nevertheless, it is interesting to note that the Children's Act 38 of 2005, which came into operation

⁴⁶ Op cit (n1).

⁴⁷ Although not directly relevant to the discussion at hand, the Committee also roundly criticised the use of different age limits for different crimes, e g a minimum age of criminal responsibility of 12 for all offences, except for murder, for which it is set at 10 years.

⁴⁸ J Sloth-Nielsen & H Kruuse 'A maturing manifesto: The constitutionalisation of children's rights in South African jurisprudence 2007-2012' (2013 forthcoming) *Int J of Children's Rights*. The South African Constitutional Court has taken cognisance of these General Comments: see, e g, *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) paras 29-31, where the Court took note of General Comments issued by the United Nations Committee on Economic, Social and Cultural Rights.

⁴⁹ B Lyons 'Dying to be responsible: Adolescence, autonomy and responsibility' (2010) 30 *Legal Studies* 257; N Ferreira 'Putting the age of criminal and tort liability into context: A dialogue between law and psychology' (2008) 16 *Int J Children's Rights* 29; C J Davel 'The delictual accountability and criminal capacity of a child: How big can the gap be?' (2001) 34 *De Jure* 604.

on the same date as the Child Justice Act, set the age of 12 years as the median age at which children can consent to medical treatment and access contraceptives.⁵⁰ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 set the age below which a child is incapable of appreciating the nature of a sexual act at 12 years. Nevertheless, as the law stands, a child of 10 or eleven can be charged with a sexual offence. It is thus apparent that the minimum age of criminal capacity being set at 10 years is out of kilter with other domestic legislation passed around the same time.

From the preceding paragraphs it is apparent that a minimum age of criminal responsibility of 12 years is the age up to which the parliamentary portfolio committee is most likely to raise the current minimum age of criminal responsibility. If parliament heeds the UN Committee, the shift upwards in chronological age should coincide with the abolition of the *doli incapax* presumption, which currently operates for children between the ages of 10 and 14 years.

5. Conclusion

This article has traversed some of the risks to children's rights that are occurring within the current system. The first set of concerns relate to the assessment of children's criminal capacity. The uncertainty of the medical profession about how to undertake an assessment of criminal capacity may lead to very diverse outcomes, raising the spectre of unequal treatment. It is also a concern that the process of assessment has the unintended consequence of pathologising 'normal' children, bringing them into contact with psychologists and psychiatrists and even residential psychiatric care. The process of assessment also takes time, and causes delays in the child justice system, which is otherwise designed to deal as speedily as possible with children's cases. The need for criminal capacity assessments places stress on an already over-burdened child and adolescent mental health system.

Assessing children to determine criminal capacity leaves less capacity to work effectively with children who have mental health illnesses or problems. An individual assessment of every child is an expensive and human resource-intensive endeavour, and one which South Africa's mental health system is struggling to fulfill. Furthermore, there is uncertainty about how sections 77 and 78 of the Criminal Procedure Act interact with the Child Justice Act rules on criminal capacity – some children may in fact be unable to follow proceedings or may lack criminal capacity due to 'a mental illness or mental defect', but this

⁵⁰ Sections 129 and 134: to consent to medical treatment children must be 'over the age of 12 years' and have 'sufficient maturity' and 'the mental capacity to understand the benefits, risks, social and other implication of treatment'.

may be overlooked in the confusion about testing for criminal capacity as required under the Child Justice Act.

A second group of concerns link to the assessment of criminal capacity in cases where children are pleading guilty or when they are to be referred for diversion. The law is unclear on precisely how criminal capacity is to be assessed in such circumstances. Where a child is being diverted on a minor charge, a full assessment on criminal capacity is arguably a waste of resources and an unnecessary act of net-widening. However, diversion under the Child Justice Act is predicated on an acknowledgement of responsibility, and thus the fact that the child has criminal capacity may be understood to be an important element. The Act is currently inconsistent, in that prosecutors can make a decision to divert a child on a schedule 1 offence without considering the issue of criminal capacity. Inquiry magistrates, on the other hand, should be satisfied at the preliminary inquiry stage that a child has criminal capacity before making an order for diversion.

The third set of concerns is that children who are charged and tried in the child justice court must undergo the trial before that court decides whether or not the child has criminal capacity or not. This exposes a child as young as 10 years to the full process of a trial – and thus dilutes the promise of protection that the *doli incapax* presumption appears to offer.

It is argued that the review of the minimum age of criminal capacity should be undertaken before the end of March 2015, in accordance with section 8 of the Child Justice Act. That review will be assisted if the information required in section 96(4) is made available to Parliament, but the rights of children should not be compromised by allowing the review to be delayed to the government's failure to deliver such statistical information, if that is the case. There are sufficient legal and practical reasons to make the decision to review the minimum age of criminal capacity.

The wording in the legislation should move away from the term 'criminal capacity', and set an age below which children will not be held criminally responsible.⁵¹ A single age should be set, and the *doli incapax* presumption should be abolished. Assessment of criminal capacity will no longer be necessary in the ordinary course, and such assessments should be limited to situations where sections 77 or 78 of the Criminal Procedure Act apply, or where developmental problems indicate that a child is significantly behind the usual developmental milestones. It should be kept in mind that the Child Justice Act has adequate measures for children below the age of criminal responsibility,

⁵¹ Goldson op cit (n7) 117, making a similar argument for England and Wales, has called for 'immunity from prosecution' for children below a certain age.

and that these services should be strengthened to support the raising of the age of criminal capacity.

It only remains to determine the age to which the minimum age of criminal responsibility should be raised. An obvious option would be to raise it to 14 years of age, as that is where the upper limit of the current *doli incapax* presumption is placed. Setting the age lower than 14 years will diminish the rights of 12- and 13-year-olds. In particular, the rule that children under the age of 14 years may not be held in a prison offers vitally important protection that must not be lost.⁵² It is possible to separate this rule from the minimum age of criminal responsibility, however, particularly due to the constitutional principle of detention as a measure of last resort, and the fact that the child must be treated in a manner and kept in conditions that take account of the child's age.⁵³

A realistic consideration of the political and legal landscape suggests it more likely that 12 years will be the age selected. Aside from the reasons mentioned above pertaining to international standards and the need to better align children's responsibility in domestic law, a further reason is that it will be easier to persuade the legislature and the public that 12 years is the appropriate age. Setting the new minimum age will both raise and lower the age, if one considers that within the *doli incapax* presumption the lower age is 10 years and the upper age is 14 years. The age of 12 years falls half way between the two. If the age is set at 12 years, the law could again contain a provision for a further review with a view to increasing the age again, within a further five years.

Child rights experts calling for a departure from the pragmatic approach which sees the minimum age of criminal responsibility being shifted from one arbitrary age to another may be disappointed in the conclusion of this article. The endeavour to change the debate to one which separates the concept of responsibility from the concept of criminalisation, is one that South Africa should aspire to. The upcoming review presents an opportunity for a further step in that progressive journey.

⁵² Sections 30(1)(b) & 77(1)(a).

⁵³ Section 28(1)(g) of the Constitution of the Republic of South Africa, 1996.