

**BRIEFING BY THE DEPARTMENT OF JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT ON THE REVIEW OF THE AGE OF  
CRIMINAL CAPACITY (SECTION 8 READ WITH SECTION 96(4) AND  
(5) OF THE CHILD JUSTICE ACT, 2008 (ACT 75 OF 2008)**

**Joint Meeting of the Select Committee on Security and Justice with  
the Portfolio Committee on Justice**

**7 September 2016**

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Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA



## THE PURPOSE OF THE REPORT

The report was compiled in compliance with sections 8, 96(4) and 96 (5) of the Child Justice Act, 2008 (Act 75 of 2008) (hereinafter referred to as “the Act”) which requires that the Minister of Justice and Constitutional Development (now referred to as the Minister of Justice and Correctional Services) to submit this Report to Cabinet for consideration and approval, and thereafter to Parliament for consideration, in order to assist with the decision on whether or not the minimum age of criminal capacity as set out in section 7(1) of the Act should be raised.



# CRIMINAL CAPACITY ITO THE CHILD JUSTICE ACT, 2008 (ACT 75 OF 2008)

- Criminal capacity has since the implementation of the Act been regulated by the Act.
- Section 11(1) of the Act provides that the State must prove beyond reasonable doubt that a child who is 10 years or older but under the age of 14 years, had the capacity to appreciate the difference between right and wrong at the time of the commissioning of the alleged offence and that the child had the capacity to act in accordance with that appreciation.
- The Act raises the minimum age of criminal capacity from 7 years to the age of 10 years, and provides, to a limited extent, for a framework for the consideration and evaluation of criminal capacity during different phases in the child justice process.



## CHILDREN UNDER THE MINIMUM AGE OF CRIMINAL CAPACITY (AND CHILDREN 10 YEARS OR OLDER BUT UNDER 14 YEARS WHO DO NOT HAVE CRIMINAL CAPACITY)

- A child who commits an offence while under the age of 10 years does not have criminal capacity and therefore cannot be prosecuted (Irrebuttable presumption).
- A police official may not arrest a child under the age of 10 years and must hand such child over to his or her parent, appropriate adult or guardian. If the latter is not available or if it is not in the best interest of the child to be handed over to his or her parent, appropriate adult or guardian, the child must be handed over to a suitable child & youth care centres (CYCC)
- The police official must inform a probation officer about the handing over, and the latter must assess the child as soon as possible, but not later than five (5) days after being notified.



## THE SA CONSTITUTION AND INTERNATIONAL INSTRUMENTS ON CRIMINAL CAPACITY

The investigation first considered the Constitution and the international protocols that bind SA:

- **Section 28 (2) of the Constitution** states that the child's best interests must be of paramount importance in every matter concerning the child.
- **Article 3(1) of the UN Convention on the Rights of the Child (CRC)** provides for the best interest of the child principle as the primary consideration in all actions concerning children.
- **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.



# INTERNATIONAL INSTRUMENTS ON CRIMINAL CAPACITY

- The UN Standard Minimum Rules on the Administration of Juvenile Justice, 1985 (the Beijing Rules) further state 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.
- The UN Committee on the Rights of the Child has continuously expressed its concern with regard to the vast international differences in setting a minimum age of criminal capacity.
- A definitive guide to implementing effective child justice was released by the Committee through General Comment No. 10 of 2007: Children's Rights in Juvenile Justice.
- 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.
- 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.



## REGIONAL INSTRUMENTS ON CRIMINAL CAPACITY

- The African Commission on Human and Peoples' Rights developed Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which on criminal capacity provides that:

*“States shall establish laws and procedures which set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law. The age of criminal responsibility should not be fixed below **15 years** of age. No child below the age of 15 shall be arrested or detained on allegations of having committed a crime”*

- In the Concluding Recommendations by the African Union Committee of Experts on the Rights and Welfare of the Child in paragraph 17 of the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child circulated in January 2015, the Committee raised a concern about South Africa's minimum age of criminal responsibility which is at the age of 10 and the retention of the *doli incapax* presumption for children between the ages of 10 to under 14 years.



## MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN SELECTED AFRICAN COUNTRIES

AFRICAN COUNTRY	Minimum Age of Criminal Capacity
Nigeria, Mali, Guinea	18
Liberia, Sao Tome and Principe, Angola, Cape Verde, Democratic Republic of Congo, Equatorial Guinea, Guinea-Bissau, Mauritania, Morocco and Mozambique	16
Comoros, Sudan and Egypt	15
Benin, Botswana, Ghana, Libya, Mauritius, Togo and Rwanda	14
Algeria, Burkina Faso, Burundi, Chad, Congo, Djibouti, Gabon, Madagascar, Niger, Senegal and Tunisia	13
Gambia, Eriteria, Zanzibar, Tanzania and Uganda	12
Cameroon, Central African Republic, Cote d'Ivoire, Sierra Leone, Lesotho and South Africa	10
Ethiopia	9
Kenya and Zambia	8
Malawi, Namibia, Seychelles, Swaziland and Zimbabwe	7



# MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN SELECTED AFRICAN COUNTRIES

COUNTRY	MINIMUM AGE OF CRIMINAL RESPONSIBILITY	<i>Doli Incapax</i>	LEGISLATION
Malawi	10	Applies	Penal Code (Amendment) Act, 2011
Uganda	12	Abolished	Children Act, 1997
Ghana	14	Abolished	Criminal Code (Amendment) Act, 1998



## DOMESTIC LEGISLATION ON CRIMINAL CAPACITY

The minimum age of criminal capacity being set at 10 years is out of kilter with other domestic legislation passed around the same time:

- **Children's Act, 2005 (Act 38 of 2005)** sets 12 year median age to consent to medical treatment and to access contraceptives;
- **Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007)** sets the age below which a child is incapable of appreciating the nature of a sexual act at 12 years but as the law stands, a child of 10 or 11 can be charged with a sexual offence.



# NATIONAL CONSULTATIVE WORKSHOP ON THE REVIEW OF THE MINIMUM AGE OF CRIMINAL CAPACITY

- In February 2015, DoJ&CD conducted a 2-day National Experts Workshop on the Review of the Minimum Age of Criminal Capacity with the children's rights sector experts.
- The purpose of this workshop was to review and evaluate the minimum age of criminal capacity of children from the perspective of the academia, psychologists, psychiatrists, the judiciary, the NPA, DSD, DCS, SAPS, DoH, Legal Aid SA, and the civil society organisations- specializing in children's issues.

The recommendation from the Workshop was that the minimum age of criminal capacity should be raised to 14 years. However, some participants proposed that:

- The minimum age of criminal capacity be raised to 12 years and that the *doli incapax* presumption be abandoned, but were of the opinion that a provision should be made for a mandatory evaluation of 12 and 13 years olds.



# COLLECTION OF STATISTICS IN TERMS OF SECTION 96(4) OF THE ACT

Section 96(4) of the Act requires the Directors-General Intersectoral Committee on Child Justice (DG ISCCJ) to submit to the Minister a report setting out the following the statistics of the following categories of children who are alleged to have committed an offence and the offences they are alleged to have committed:

- i.children who are 10 years at the time of the commission of the alleged offence;
- ii.children who are 11 years at the time of the commission of the alleged offence;
- iii.children who are 12 years at the time of the commission of the alleged offence;
- iv.children who are 13 years at the time of the commission of the alleged offence;



## NATIONAL MANUAL DATA COLLECTION PROJECT

- None of the Departments was able to provide the required data as their data systems were not historically designed to collect this data; hence DoJ&CD had to commence with the Manual Data Collection Project in 2014;
- The Project focused on a sample of 20% of the total courts in each Province that have recorded the highest number of preliminary inquiries since the implementation of the Act on 1st April 2010;
- The data was therefore gathered from 92 courts for the period 1 April 2010 to 31 August 2014.



# DATA COLLECTION PROJECT

The achieved sample:

Province	Reported Number of child counts (2010-2014)	ACTUAL number of children	Targeted sample (10%)	ACTUAL (10-13yrs)	ACTUAL 10-13yrs			
					10	11	12	13
Western Cape	14 565	18 090	1 457	731	24	50	177	480
Northern Cape	840	1 394	84	145	6	31	31	77
Gauteng	4 380	9 507	436	134	2	5	25	102
Eastern Cape	5 067	4 802	508	166	8	15	37	106
Free State	4 450	1 459	445	175	7	36	45	87
KwaZulu-Natal	10 534	11 429	1 161	390	7	21	83	279
Mpumalanga	1 764	1 697	178	58	1	6	15	36
Limpopo	1 799	2 020	179	98	2	10	28	58
North West	2 684	3 347	266	50	-	7	11	32
<b>TOTAL</b>	<b>46 083</b>	<b>53 745</b>	<b>4 714</b>	<b>1 947</b>	<b>57</b>	<b>181</b>	<b>452</b>	<b>1 257</b>



# SUMMARY TABLE – DATA COLLECTION

Category	13 year Olds	12 Year Olds	11 Year olds	10 Year olds	Totals
No. of Child Offenders	n=1 257	n=452	n=181	n=57	n=1 947
% of total 10-13 year olds	65%	23%	9%	3%	100%
% of Total Children	2.3%	0.8%	0.3%	0.1%	3.5%
Contact Crimes	65% (n=648)	24% (n=237)	9% (n=91)	2% (n=25)	100% (n=1 001)
Contact Related Crimes	57% (n=46)	26% (n=21)	10% (n=8)	7% (n=6)	100% (n=81)
Property Related Crimes	62% (n=452)	24% (n=172)	11% (n=75)	3% (n=25)	100% (n=724)
Other Serious Crimes	80% (n=116)	14.4% (n=21)	5% (n=7)	0.6% (n=1)	100% (n=145)



# SUMMARY TABLE – DATA COLLECTION

Informal Criminal Capacity Evaluations at PI	65% (n=1 247)	23% (n=441)	9% (n=173)	3% (n=58)	100% (n=1 919)
Outcomes at PI stage – Diverted	64% (n=643)	23% (n=229)	10% (n=95)	3% (n=31)	100% (n=998)
Outcomes at PI stage – Referred to Children's Court	62% (n=24)	33% (n=13)	5% (n=2)	0	100% (n=39)
Outcomes at PI stage – proceeded to CJC	67% (n=324)	22% (n=106)	8% (n=38)	3% (n=17)	100% (n=485)
Outcomes at PI stage – Withdrawn	62% (n=220)	24% (n=85)	11% (n=40)	3% (n=8)	100% (n=353)
Outcomes at PI stage – Struck Off the Roll	65% (n=46)	26% (n=19)	8% (n=6)	1% (n=1)	100% (n=72)
Children who proceeded to Trial	67% (n=324)	22% (n=106)	8% (n=38)	3% (n=17)	100% (n=485)



# SUMMARY TABLE – DATA COLLECTION

Expert Evidence Evaluations	13% (n=65)	6% (n=28)	2% (n=9)	1% (n=4)	22% (n=106)
Criminal Capacity Proved - Yes	13% (n=42)	12% (n=13)	13% (n=5)	18% (n=3)	13% (n=63)
Trial Outcome – Guilty	13% (n=42)	12% (n=13)	13% (n=5)	18% (n=3)	13% (n=63)
Trial Outcome – Diverted	27% (n=87)	39% (n=41)	39% (n=15)	53% (n=9)	31% (n=152)
Trial Outcome – Withdrawn	57% (n=185)	45% (n=48)	47% (n=18)	24% (n=4)	52% (n=255)
Trial Outcome – Referred to Regional Court	2% (n=5)	3% (n=3)	0	0	2% (n=8)
Trial Outcome – Struck Off the Roll	2% (n=5)	1% (n=1)	0	6% (n=1)	1% (n=7)



# SUMMARY TABLE – DATA COLLECTION

Sentencing – Correctional supervision	64% (n=16)	16% (n=4)	8% (n=2)	12% (n=3)	40% (n=25)
Sentencing – Community Based Sentence	64% (n=7)	36% (n=4)	0	0	17% (n=11)
Sentencing – Fine	86% (n=6)	14% (n=1)	0	0	11% (n=7)
Sentencing – Residential Care	62% (n=8)	23% (n=3)	15% (n=2)	0	21% (n=13)
Sentencing – Postponement or Suspension	72% (n=5)	14% (n=1)	14% (n=1)	0	11% (n=7)



# Types of Crimes where Children were Represented by Legal Aid SA on the types of crimes committed by children

Charge	Age of the child					Total
	10	11	12	13	14	
Rape/attempted rape/Intercourse with minor	8	14	32	72	153	279
Housebreaking with intent to.../attempted housebreaking with intent to...	4	4	12	24	114	156
Assault with intent to do grievous bodily harm	2	4	9	22	75	111
Theft/attempted theft	5	5	9	16	51	84
Assault common	2	2	5	15	34	57
Possession of drugs			2	9	47	58
Murder/attempted murder	1	2	6	7	30	46
Robbery/attempted robbery		1	0	4	36	41
Malicious injury to property		1	1	8	15	25
Public violence/Family violence	1			14	5	20
Shoplifting				6	9	15
Other Offences	6	1	13	15	62	95
<b>Total</b>	<b>29</b>	<b>34</b>	<b>89</b>	<b>212</b>	<b>631</b>	<b>987</b>





## Statistics from Legal Aid SA on the outcome of cases represented during 2014/2015

OUTCOME	10	11	12	13	14	TOTAL
Withdrawn - Other reasons	5	9	34	67	195	310
Diversion	2	2	7	11	60	82
Warrant of arrest	3	2	7	19	47	78
Suspended sentence				1	2	3
Finalised - Guilty Plea	1	1	3	7	36	48
Withdrawn – Diversion	3	9	9	30	99	150
Withdrawn by state				3	11	14
Struck off roll (SOR)	2	6	12	23	65	108
Not guilty					3	3
Withdrawn - Informal Mediation			2	8	24	34
Sentence postponed					2	2
Finalised – Trial		1	1	1	13	16
-						
Withdrawn by Legal Aid SA Practitioner		2			2	4
Imprisonment 3 m - 1 Year						
Finalised – Withdrawn		1	1		2	4
Finalised – Appeal						
Finalised - Admission of guilt fine				1	1	2
<u>Trial de novo</u>						
House arrest						
<b>Total</b>	<b>16</b>	<b>33</b>	<b>76</b>	<b>171</b>	<b>562</b>	<b>858</b>



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# Statistics from the South African Police Service

The number of children, between the ages of 10 to 13 years, apprehended by SAPS during the period 1 April 2010 to 31 December 2014 can be tabularized as follows:

Period	AGES OF CHILREN			
	10 years	11 years	12 years	13 years
1 April 2010 to 31 March 2011	169	515	762	1270
1 April 2011 to 31 March 2012	80	223	716	1346
1 April 2012 to 31 March 2013	64	153	498	1247
1 April 2013 to 31 March 2014	66	149	294	975
1 April 2014 to 31 December 2014	54	97	217	564
<b>TOTAL</b>	<b>433</b>	<b>1137</b>	<b>2487</b>	<b>5402</b>



## Data from the South African Police Service

- The Act differentiates between the seriousness of the various offences with Schedule 1 representing the least serious offences, Schedule 2 more serious offences and Schedule 3 representing the most serious offences.
- The table below reflects the number of children 10 year or older but under 14 years that were charged during the period 1 April 2010 to 31 December 2014 for the commissioning of Schedule 1 offences:

<b>Ages</b>	<b>10 Years</b>	<b>11 Years</b>	<b>12 Years</b>	<b>13 Years</b>
<b>All</b>	113	331	766	1723
<b>Male</b>	106	285	648	1411
<b>Female</b>	7	46	118	312



## Data from the South African Police Service

- The table below reflects the number of children 10 year or older but under 14 years that were charged during the period 1 April 2010 to 31 December 2014 for the commissioning of Schedule 2 offences:

Ages	10 Years	11 Years	12 Years	13 Years
All	210	518	1143	2531
Male	194	472	1013	2223
Female	16	46	130	308

- It is clear that 10 year old children commit the lowest number of Schedule 2 offences followed by the 11 year old children. The number of children committing Schedule 2 offences increases with 12 and 13 year old children.



## Data from the South African Police Service

- The table below reflects the number of children 10 year or older but under 14 years that were charged during the period 1 April 2010 to 31 December 2014 for committing Schedule 3 offences:

Ages	10 Years	11 Years	12 Years	13 Years
All	110	288	578	1148
Male	107	280	563	1097
Female	3	8	15	51

- It is clear that 10 year old children commit the lowest number of Schedule 3 offences followed by the 11 year old children. The number of children committing Schedule 3 offences increases with 12 and 13 year old children.



## CHALLENGES IN THE APPLICATION OF THE PROVISIONS OF THE ACT RELATING TO CRIMINAL CAPACITY

- A lack of accurate, reliable and detailed statistics
- Shortage of resources to conduct the criminal capacity evaluations
- Challenges in the forensic mental health assessment of criminal capacity in children
- Prosecutors' consideration of criminal capacity
- Decisions on criminal capacity by magistrates



# POSSIBLE OUTCOMES OF THE REVIEW OF THE MINIMUM AGE OF CRIMINAL CAPACITY

- **The first option** is to retain the *status quo* - current minimum age of criminal capacity at 10 years and the rebuttable presumption of *doli incapax* operational between the ages of 10 years or older but under 14 years.
- **The second option** is to raise the minimum age of criminal capacity from 10 years to 12 years and to retain the rebuttable presumption for children 12 years or older but under the age of 14 years, applicable to children referred to the child justice court for plea and trial. The option of diversion can be left open to 12 and 13 year old children without the need for a criminal capacity evaluation through amendments to the Act(sections 7, 10, 11, 41, 49, 52, 58 and 67).
- The provision to review the minimum age of criminal capacity could remain in the Act to provide for reconsideration of a further raise in the minimum age of criminal capacity in 10 years' time.
- **The third option** is to raise the minimum age of criminal capacity to 12 years and to abolish the rebuttable presumption of *doli incapax*.
- **The fourth option** is to raise the minimum age of criminal capacity to 14 years and to do away with the rebuttable presumption of *doli incapax*.



# RECOMMENDATIONS

- It is recommended that the minimum age of criminal capacity be raised to 12 years with the retention the rebuttable presumption for children 12 years or older but under the age of 14 years, applicable to children referred to the child justice court for plea and trial.
- It is further recommended that the Act (sections 7, 10, 11, 41, 49, 52, 58 and 67) be amended to remove the requirement of establishing the criminal capacity of children 12 years or older but under 14 years for purposes of diversion. The prosecutor and magistrate will consider and be satisfied that the child's educational and maturity levels are such that he or she will understand and benefit from diversion before the child is diverted.



# RECOMMENDATIONS

- It is further recommended that section 8 of the Act be amended and retained in the Act to provide for another review of the minimum age of criminal capacity within ten years.
- It is also recommended that Parliament endorses the recommendations in principle subject to public participation; and
- that Parliament allows the Department to proceed with the drafting of the necessary Bill that will reflect the proposed recommendations.



**Thank you.**



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