**NICRO Submission on the Child Justice Amendment Bill of 2018**

*By Venessa Padayachee, National Advocacy & Lobbying Manager, 2 November 2018*



**Introduction**

1. The Constitution of South Africa (Act 108 of 1996) clearly stipulates that the best interest of the child is of paramount importance in all decisions pertaining to a child. The CJA (Act 75 of 2008) echoes this, and advocates that the best interest of the child must be considered in all matters pertaining to children[[1]](#endnote-1). The intention of the Child Justice Act was to minimize the traumatic effect on children if and when they come into contact with the criminal justice system.
2. In 2009 when the Child Justice Act was signed into law, the act made provision for the review of the age of criminal capacity within 5 years. It is now 9 years later, and NICRO therefore welcomes the investment by the State and civil society in the review of the issue of criminal capacity for children and the subsequent amendments.
3. NICRO supports the increase in the minimum age for criminal capacity.
4. Section 10-NICRO is very supportive of the removal of the requirement to prove criminal capacity for the purposes of diversion and preliminary enquiries. We also are pleased that diversion for children has been ‘de-linked” from the issue of criminal capacity. As a result of not having this provision, many children who are in conflict with the law are falling through the cracks that could benefit from interventions.
5. NICRO also made a submission in 2014 on the call for proposals on *Categories of persons competent to conduct evaluations of the criminal capacity of children in terms of the Child Justice Act 2008*, Government Gazette Notice 583 of 2014, which in particular motivated for the use of clinical social workers in conducting criminal capacity assessments, which we will re-emphasise in this submission.
6. Further, 2013 NICRO ran a research project with the University of Pretoria to look at the issue of Criminal capacity, some of the results of which would be presented in this submission.

**NICRO’S work with children in conflict with the law, and criminal capacity assessments**

1. NICRO, a national NGO has been working with people in prison and persons, including children in conflict with the law, and their families since 1910. NICRO has a long, proud and significant history in working within the criminal justice system, including acting as expert witnesses, providing client specific information and reports for sentencing purposes, we have also been concerned with changing offending behaviour, attitudes and cognitions and helping offenders, take responsibility for their lives and pursuing a crime free life. NICRO has been one of the key campaigners for an alternative system of justice for children, and in creating alternatives such as diversion and non-custodial sentencing options, and in lobbying for the Child Justice Act. We have also decades of experience on child development and offending behaviour. NICRO clinical social workers have also to date conducted a number of criminal capacity assessments.

**Age of Criminal Capacity**

1. The Report on the Review of the Minimum Age of Criminal Capacity concluded that the minimum age of criminal capacity should be increased from 10 to 12 years of age, and that the rebuttable presumption be retained for children who are 12 years and older but under the age of 14 years. This is now in keeping with, the United Nations Committee on the Rights of the Child, in the UN General Comment No. 10 provision, who in 2007 stated that that a minimum age of criminal capacity younger than 12 is considered by the Committee not to be internationally acceptable[[2]](#endnote-2). However, the African Commission on Human and People’s Right Principles and Guidelines on the Right to a Fair trial and Legal Assistance in Africa, states that the age of criminal responsibility should not be fixed below 15 years of age. We therefore support section 8 being amended to make provision for another review after 5 years from the commencement of the Child Justice Amendment Act, 2018, if the Bill is enacted.

**Findings of Research study-NICRO & UNISA research partnership**

1. In 2013 NICRO embarked on a partnership with the University of Pretoria to critically analyse the methods and process of determining criminal capacity currently in use in order to determine if this is in the best interest of children in conflict with the law. The sample was children in conflict with the law between the ages of 10-14 years in the Western Cape. Some of the key findings included:
   1. *Criminal capacity assessment should be conducted within a multi-professional context* **-**the majority of the participants in this study believe that a multi-disciplinary approach during assessment is in the best interest of the child. The recommendation was that the criminal capacity assessment process is revised and that a multi-professional team consisting of various professionals is used to evaluate child offenders.
   2. *Recruit dedicated role players who can specialise in Child Justice & develop a multi-professional specialised training course.* Child Justice should be considered a specialist field where various professionals such as criminologists, psychologists, psychiatrists, social workers are trained and schooled proficiently to deal exclusively with matters pertaining to children and criminal capacity.
   3. *The current assessment tools utilised in the criminal capacity process needs to be reviewed.* The current assessment tools utilised in South Africa by psychologists and/or psychiatrists need urgent attention and revision. Concerns were raised unanimously regarding the current instruments, and the affect this can have on the results of assessments. It is not conducive to try and modify the current instruments in an effort to accommodate a multi-cultural South African society
   4. *The current assessment tools used by professionals in criminal capacity need to be reviewed.* In the research concerns were raised regarding certain instruments used and the effects this had on the results of the assessment. All children should be assessed in a manner that acknowledges their individuality and upholds their best interests. Assessing children in a one dimensional approach may not be in their best interests.It was recommended that further research be done into developing a comprehensive tool for assessing criminal capacity.

**The competency of trained clinical social workers in conducting criminal capacity assessments[[3]](#endnote-3)**

1. Section 11 of the Child Justice Act, 75 of 2008, refers to categories of persons regarded as being competent to conduct evaluations of the criminal capacity of children. According to the present Act, the following categories or classes of persons are competent to conduct the evaluation of the criminal capacity of a child referred to in section 11 (3) of the **Act:**(a) A medical practitioner who is registered as such under the Health Professions Act, 1974 (Act No. 56 of 1974), and against whose name the speciality psychiatry is also registered; and (b) a psychologist who is registered as a clinical psychologist under the Health Professions Act, 1974.Currently the Act prescribes that such assessments should be undertaken by either a clinical psychologist or a psychiatrist but a case can be made that in order for this to be in the best interest of the child that it should be undertaken by a multi-disciplinary team inclusive of a clinical social worker and psychologist as well as other professionals, such as occupational therapists and criminologists[[4]](#endnote-4).
2. Currently criminal capacity assessments are not being performed as a result of operational challenges and uncertainty about the correct and most effective implementation processes to follow. This places many children currently in the criminal justice system at risk.
3. As much as NICRO is pleased that the checklist pro-forma approach to expressing a view on criminal capacity by probation officers has been challenged, NICRO is concerned with the implication of the statement that Probation officers, who are actually all social workers, are not qualified to express a view on criminal capacity. NICRO would like to recommend that there may be suitably qualified social workers, that may have a clinical degree, or years of experience that may in fact be suitable.
4. At NICRO, we have clinical social workers who have been doing criminal capacity assessments for a number of years now. In 2013, NICRO assisted the Western Cape Director of Public Prosecutions office with URGENT cases needing criminal capacity assessments. NICRO’s Clinical Unit, together with a team of clinical social workers and clinical psychologists, conducted 5-7 criminal assessments. Advocate De Kock (Director of the NPA in the Western Cape) in writing to the Regional Head of Justice, Mr Mohammed, in April 2013, to request to approve funding for NICRO to conduct these criminal capacity assessments, had this to say about NICRO,
   1. *“NICRO has conducted a few evaluations terms of the section 11 prescripts and they have been found to be of the highest standard;*
   2. *NICRO has an excellent track record DOJ&CD providing services to the NPA and the courts.*
   3. *Given the challenges facing the DOJ & CD, we propose, pending discussions and decisions with the Department of Health, that NICRO be recognized as the service provider of all current and future evaluations.*
5. This works ideal when there is a multi-disciplinary team of social workers, psychologists and psychiatrists. However practically in SA we have to also consider the costs of psychologists and psychiatrists, and consider clinical social workers. Clinical social workers are those who have a Masters in clinical practice in social work.
6. In Skelton & Badenhorst, 2011, the authors refer to the shortage of resources to conduct the criminal capacity evaluations. The report states that, “the Department of Health has indicated that there is a shortage of psychologists and psychiatrists and it is not in a position to assist with the evaluation of the criminal capacity of children.” The report goes on to say, “private psychologists and psychiatrists can be used...” but that “these shortages in both human resources and budgets are placing a further burden on an already stressed child mental health sector. Further these resource shortages result in undue delays in the finalization of cases involving children 10 years or older but under the age of 14 whose criminal capacity is uncertain.
7. On the 25 March 2013, the DoJ&CD was also requested by DPP, Western Cape to secure funds and payment of evaluations as the Dept. of Health (DoH) indicated that it does not have the human or financial capacity to continue with evaluations. They argued that courts are increasingly ordering evaluations in terms of section 11(3). As a Result – Cases postponed, withdrawn or struck off the roll.
8. It is NICRO's recommendation that clinical social workers should be added as a group of professionals suitable to undertake such assessments.  The involvement of suitably qualified social workers is not only needed to address the shortages of clinical psychologists and psychiatrists, but that they are in fact suitably qualified and trained to conduct these types of assessments.
9. A clinical social worker in South Africa for instance must qualify with a minimum Master’s Degree in Clinical Social work. A typical Masters in Clinical Social Work programme aims to develop well-rounded professionals who can work holistically using an ecological systems perspective with a developmental, strengths and preventative focus. Candidates are equipped with advanced in-depth knowledge and skills to enable them to work effectively with individuals, couples, families and small groups as clinical practitioners. Qualified clinical social workers should be able to provide a full range of mental health services, including assessment, diagnosis and treatment. Provide services to individuals, couples, families and groups. Utilize a variety of psychotherapeutic theories and tools to guide treatment. Provide referrals to appropriate agencies; assist clients in adjusting to major life style changes due to death of a loved one, disability, divorce, or loss of a job.
10. It is necessary however that these suitable social workers should be defined in terms of their experience in working with children in the criminal justice system as well as their expertise - as would be expected of psychologists and psychiatrists undertaking such assessments.  We propose the following qualification and experience/training of relevant social workers:
    1. Social Workers with at least a master’s degree in clinical social work, play therapy, forensic social work, probation work and minimum 5 years’ experience in specialized work with children inclusive of assessment and therapeutic intervention. These clinical social workers should have a least done an elective module on Psychopathology of Childhood and Adolescents
    2. Social workers without a masters who have minimum 10 years’ experience in specialized work with children inclusive of assessment and therapeutic intervention or a Honours Degree in Clinical social work.
    3. In the case of social workers employed by private practice(difficult behaviours)
11. This proposal was supported in a statement by the Child Justice Alliance in February 2010, in their submission on the category or class of persons competent to conduct the evaluation of criminal capacity of a child and the allowances and remuneration, and argued that,

*“If clinical social workers have a sufficient amount of experience in working with children, then they could be seen as competent persons to do an evaluation on the criminal capacity of children.”*

1. Other categories of persons could also be Criminologists (MA Degree) with a social work or child psychology background and a minimum of 5 years’ experience in working with children.
2. And of course to retain as well, as is in the present legislation -Clinical psychologists and psychiatrists
3. NICRO would want to caution against fragmenting the assessment process -limiting various categories of persons to assessing the different aspects of development - for example social workers assessing moral development and psychologist assessing the other aspects, as this will create a fragmented assessment that will not see the holistic development of the child.  It is a professional accepted practice and code that social workers cannot use psychological instruments when undertaking such assessments and in such cases it is best interest of the child to work in a multi-disciplinary fashion with a psychologist. A collaborative multi-professional approach works best, as the research shows.[[5]](#endnote-5)
4. It is unclear how psychologists and psychiatrists are unable to assess moral development as cognitive and moral development is intrinsically connected.  In fact cognitive developmental levels or stages will provide an indication of the level of moral development, reasoning or motivation of the child to act in a right or wrong way.  This considered together with the social circumstances of the child, and the family background of the child will provide a more comprehensive picture of the capacities (values attitudes, motivations and abilities (intellectually and cognitively) to consider actions and consequences of such actions. Hence the more comprehensive such an assessment can be, the more this will be in the best interest of the child.
5. NICRO strongly believes that in the best interest of the child, this assessment must be a holistic one and must be assessed by a multi-disciplinary team (which is what we want to promote in the NICRO clinical unit) with a core group of social workers, clinical psychologists, psychiatrist and criminologists. Occupational therapists, psychological counselors, and psychometrists are additional members of the team that will be used as and when necessary. NICRO proposes that one of the individuals preferably the social worker, should act as the case manager and coordinator which then can also manage child protection issues.  Also an integrated report to be provided with input of all professionals as addendums.
6. It also should be noted that children should not unnecessarily be exposed to the mental health system - which is what happens when children have to attend state institutions for purposes of criminal capacity assessments. NICRO has undertaken a number of these assessments in collaboration with psychologists and this has proven to work very well - not just for the children but also for the courts that receive detailed reports that not only inform them about the criminal capacity of the child but also provide potential ways forward to assist these children with their behaviours.  One of the concerns in practice is that if children are found to be without capacity they fall through the cracks and will not receive much needed intervention or assistance with their behaviour for which they cannot be held criminally accountable.  Yet these behaviours will not just miraculously disappear, and therefore these children need further intervention although it will not necessarily be within the criminal justice context.
7. For those categories of profession found competent to conduct criminal capacity evaluation/assessments, NICRO would also like to propose continued professional development in the criminal capacity evaluations for children.

**CHILD HEADED HOUSEHOLDS AND APPROPRIATENESS OF CHILDREN TO BE RELEASED INTO THE CARE OF OTHER CHILDREN**

1. Clause 1 of the Bill was a technical amendment that amended the definition of “appropriate adult” in Section 1 of the Act to “appropriate person”. “Appropriate adult’ in the principle act, now changed to “appropriate persons” also referred to a sibling or family member who is 16 years or older. The inclusion of a family member or sibling that is 16 years old was said to be informed by the reality that there are many children living in their own and in child-headed households. As much as NICRO acknowledges that this is a reality in South Africa, we do not support the principle that children should be taking responsibility for other children on this level that is required by adults. The fact that the child is in conflict with the law, indicates that the behavior of the child requires serious attention. Further we have to consider the responsibility of burden placed on children in these circumstances. In a study of Child Headed households in Zimbabwe, by the Southern African Regional Poverty Network, they stated,

“Child headed households are much more vulnerable and at risk because they do not have the material and personal resources to cope with the problems that they encounter on a daily basis”[[6]](#endnote-6).

**CONCLUSION & RECOMMENDATIONS**

1. Charmaine Badenhorst in her research on “criminal capacity of children,” in November 2006 stated that,

“The Courts are the upper guardian of the children in our country and a child’s best interest is of paramount importance in every matter concerning the child. This is applicable whether the child is the victim or the perpetrator. The determination of the criminal capacity of children and the decision regarding it is one of the life altering decisions our Courts have to make on a daily basis. It is therefore of the utmost importance that all the professionals involved with children in conflict with the law, in the criminal justice process, work together as a team, to place the Court in the best position it can be, to make this important decision in the best interest of the child.

1. Criminal capacity of children recognized as specialized field and the consideration of the development of a comprehensive tool for criminal capacity assessment.
2. We understand the devastating impact of violence on our society. It is not surprising that children are affected and in turn become violent. Evidence shows that harsh punitive measures do not necessarily rehabilitate individuals, but interventions that addressed cognition and behaviour. Focusing on the hurt and social alienation that are at the heart of youth violence, requires insight, compassion and steps that will lead to appropriate strategies for prevention and intervention.

1. Human, M. 2015. *‘An exploration of the criminologist’s role in establishing the criminal capacity of children in conflict with the law”.* University of South Africa. [↑](#endnote-ref-1)
2. Dr Ann Skelton, Welcome Remarks and Introduction of Workshop Objectives, Director, Centre for Child Law, University of Pretoria, Report on the Workshop of Criminal Capacity, 4 May 2011, pg 1-3). [↑](#endnote-ref-2)
3. Padayachee, V. 2014. NICRO Submission to the Department of Justice & Constitutional Development, Criminal capacity of children - Proposals on categories of persons competent to conduct EVALUATION/ASSESSMENTS. [↑](#endnote-ref-3)
4. Human, M. 2015. *‘An exploration of the criminologist’s role in establishing the criminal capacity of children in conflict with the law”.* University of South Africa. [↑](#endnote-ref-4)
5. Human, M. 2015. *‘An exploration of the criminologist’s role in establishing the criminal capacity of children in conflict with the law”.* University of South Africa. [↑](#endnote-ref-5)
6. <https://sarpn.org/documents/d0000070/page8.php> [↑](#endnote-ref-6)