



30 November 2018

**PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES
AMENDMENTS TO THE CHILD JUSTICE AMENDMENT BILL [B32B – 2018]**

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1. INTRODUCTION

In terms of Section 8 of the Child Justice Act 75 of 2008 (CJA), the Minister responsible for the administration of justice had to submit a report to Parliament by 1 April 2015, i.e. within five years after the commencement of the CJA, in order to review the current minimum age of criminal capacity. The Report on the Review of the Minimum Age of Criminal Capacity, which was tabled in Parliament on 2 March 2016, recommended raising the minimum age of criminal capacity from 10 years to 12 years.

In terms of the Report, Parliament had to obtain public comment during the review process, which took the form of a joint meeting of the Portfolio Committee on Justice and Correctional Services and the Select Committee on Security and Justice on 7 September 2016. During this meeting, concerns were raised over children increasingly being used by adults to commit crime and insufficient data in this regard and in general to make accurate predictions about the age of criminal capacity, especially considering differences in European and African culture and customs in respect of children.

The Department eventually introduced the Child Justice Amendment Bill [B32 – 2018] in Parliament in 2018 in response to the recommendations of the Report on the Review of the Minimum Age of Criminal Capacity. The Child Justice Amendment Bill [B32B – 2018] as amended by the Portfolio Committee, was passed by the National Assembly on 27 November 2018, and has been transmitted to the NCOP for processing by the Select Committee on Security and Justice.

2. AGE OF CRIMINAL CAPACITY¹

The minimum age of criminal capacity (or criminal responsibility) sets the age by which children are not criminally liable in terms of the law. In South Africa, children below the age of 10 years are not

¹ Parliament of South Africa Research Unit (2015)



criminally liable and cannot be prosecuted. *Doli Incapax* is the legal presumption that a child between certain ages is not criminally liable unless the prosecutor can prove otherwise. In South Africa, children between the ages of 10 and 14 years are presumed not to have criminal capacity unless the prosecutor can prove otherwise.

2.1 CRIMINAL CAPACITY IN SOUTH AFRICA

When the CJA came into effect it raised the age of criminal capacity from 7 to 10 years and provides for a rebuttable presumption of criminal incapacity between the ages of 10-14. Currently, children:

- **Under 10** may not be arrested or prosecuted.
- **Aged 10-14** may be arrested and prosecuted if proved by the prosecutor that the child had criminal capacity when he or she committed the crime.
- **Under 14** may not be imprisoned.
- **14 years and older** may only be imprisoned for serious offences.
- **14 years and older may** not be imprisoned for more than 25 years.

3. REPORT ON THE REVIEW OF THE MINIMUM AGE OF CRIMINAL CAPACITY

- In terms of Section 96(4) of the Child Justice Act 75 of 2008, the Report also had to include statistics, that *inter alia* (a) differentiated between the capacity of children aged between 10 and 13, respectively, at the time of commission of the alleged offences and the types of alleged offences; (b) sentences imposed on such children; (c) the number of children that did not proceed to trial because criminal capacity could not be proved and (d) the reasons why.
- While the Department presented statistics to Parliament in September 2016, it was well-documented by Parliament and role-players in the child justice sector that the Department's own reports contained very little information that could be used to assist in the review of the age of criminal capacity. In addition, the statistics contained within the Reports were flawed.²
- **In terms of section 7(1) of the Child Justice Act 75 of 2008 (CJA), children who are 10 old and younger lack criminal capacity.**
- **Section 7(2) provides that a child between the ages of 10 and 14 years who commits an offence lacks criminal capacity, *unless the state proves that he or she had criminal capacity*, i.e. that the State can prove beyond reasonable doubt that *child had the capacity to "appreciate the difference between right and wrong at the time of the commission of the offence* and acted in accordance with that appreciation".³**

² Parliament of South Africa Research Unit (2015)

³ In terms of section 11 of CJA.



3.1 MAIN RECOMMENDATIONS ON MINIMUM AGE OF CRIMINAL CAPACITY

The Report made three main recommendations, namely that Parliament should:

- (i) **Raise the minimum age of criminal capacity to 12 years, but 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.
- (ii) **Amend sections 7, 10, 11, 41, 49, 52, 58 and 67 of the CJA 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 must consider and be satisfied that the child's educational and maturity levels will allow him or her to understand and benefit from diversion before the child is diverted.
- (iii) **Amend Section 8 of the CJA but retain the requirement in the CJA for another review of the minimum age of criminal capacity within 10 years.**

4. OBJECTIVES OF CHILD JUSTICE AMENDMENT BILL

The Bill mainly seeks to:

- (1) Amend certain (a) definitions and (b) wording in the CJA in order to facilitate the interpretation of a phrase; and
- (2) Further regulate the (a) minimum age of criminal capacity; (b) provisions relating to the decision to prosecute a child who is 12 years or older but under the age of 14 years; (c) proof of criminal capacity; (d) assessment report by the probation officer; (e) factors to be considered by (i) a prosecutor when diverting a matter before a preliminary inquiry; (ii) an inquiry magistrate when diverting a matter at a preliminary inquiry and (iii) a judicial officer when diverting a matter in a child justice court and (f) orders that may be made at the preliminary inquiry.

5. PUBLIC COMMENTS RECEIVED ON THE BILL

- The Portfolio Committee received only two written submissions on the Bill, from the South African National Institute for Crime Prevention and the Reintegration of Offenders (Nicro) and the Centre for Child Law of the University of Pretoria, respectively.
- Commentators supported the amendment in the Bill to **replace the reference to an appropriate "adult" with an appropriate "person"** to make provision for the many child-headed homes where the appropriate person responsible for a child in conflict with the law may be an older sibling.
- In order to avoid a situation where children would be required to take responsibility for other children who have committed an offence, the Bill requires such **appropriate person to be at least 16 years old.**
- The Centre for Child Law **recommended raising the minimum age of criminal responsibility to 14 years which would also remove the need for a rebuttable presumption that the child lacks criminal capacity.**
- Nicro (a) supported the provision for **another review of the age of criminal responsibility in five years**, (b) recommended **raising the minimum age of criminal responsibility to 15 years** in line with the African Commission on Human and People's Rights and Guidelines on the Rights to fair trial and legal assistance; (c) was of the



view that **Probation Officers are not qualified to express views on a child’s criminal capacity** and (d) recommended that **evaluation of criminal capacity should only be done by certain categories of persons with Masters Degrees in clinical social work, criminology and child psychologically and a minimum of five years’ experience.**

6. MAIN AMENDMENTS TO THE CJA

- **Clause 1: Appropriate “adult” replaced with appropriate “person” of 16 years or older under definitions**

Clause 1 amends Section 1 of the CJA by replacing the word “adult” with “appropriate person”. Thus, section 1 will now define an “appropriate person” to mean “any member of a child’s family, including a sibling who is 16 years or older”.

- **Clauses 2, 3 and 4: Amendment of minimum age of criminal capacity**

Clauses 2 to 4 amend sections 4, 5 and 7 of the CJA to give effect to the recommendation of the Report on the review of the age of criminal capacity and raises the current age of criminal capacity of 10 years to 12 years old.

Other clauses containing consequential amendments in this regard are clauses 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 23 and 24.

- **Clause 5: Review of minimum age of criminal capacity within five years after the commencement of section 5 of the CJA**

This provision requires the Minister to submit a report to Parliament for a review of the age of criminal capacity within five years after the new age of 12 years becomes effective. Some commentators are of the view that the age should be raised higher than 12, but government has opted to first test the impact that the amendments in the Bill will have on the child justice system. The next review will thus determine whether the age of criminal capacity should be raised to above 12 years old.

- **Clause 6: A child offender can be placed in the care of an “appropriate person” of 16 years pending assessment of criminal capacity (raised from 10 to 12)**

Clause 6 amends section 9 of the CJA by replacing the word “adult” with “appropriate person” in line with the amended definition. It provides that a police official may not arrest a child under 12 years, but must hand the child over to his or her parents or an appropriate person or a guardian, pending the assessment of the child’s criminal capacity. This would happen in instances where the child’s age has not been established. Additionally, while the Act clearly intends for children under 12 to not be criminally responsible, it nevertheless retains the rebuttable presumption that the child lacks criminal capacity.



- **Clause 7: Prosecutor no longer considers cognitive ability when deciding whether or not to prosecute and delinks criminal capacity from diversion**

Clause 7 amends section 10 of the CJA by raising the age of criminal capacity to 12 and by removing the reference to the “cognitive ability” of a child as one of the factors to be considered by a prosecutor when deciding whether or not to prosecute. A suitably qualified person should evaluate a child’s cognitive ability and a prosecutor is not equipped in this respect. Clause 7 further amends section 10(1)(f) by replacing a “preliminary inquiry” for purposes of establishing criminal capacity with a “child justice court”.

A new section 10(3) is proposed which allows a prosecutor to divert a matter in terms of Chapter 6 of the CJA if the matter is suitable for diversion, irrespective of whether or not criminal capacity has been assessed. Hopefully, the proposed amendments will address the current situation where dealing with criminal capacity both at the preliminary inquiry and before diversion has resulted in all children in conflict with the law between the ages of 10 and 14 being referred for psychiatric evaluation, thus clogging the system due to the large numbers of children being referred. Thus, some of the unintended consequences in the implementation of the rebuttable presumption requiring the assessment of the criminal capacity of affected children is that they are unnecessarily “pathologised” and brought into contact with the mental health system, an “undesirable outcome which is not in the best interests of children”.⁴

- **Clause 8: Child Justice Court decides criminal capacity of a child**

Clause 8 amends section 11 of the CJA by removing all references to the inquiry magistrate and probation officer for purposes of deciding the criminal capacity of a child. Probation officers and inquiry magistrates are also not suitably qualified to comment on the cognitive abilities of a child, which should be assessed by professionals with suitable qualifications in e.g. clinical social work and child psychology. The reports in this regard form part of all the evidence about the child’s cognitive, moral, emotional, psychological and social development that must be placed before the child justice court in terms of Clause 8 in order to make a decision about the child’s criminal capacity for purposes of plea and trial.

- **Clauses 9, 10, 11 and 12: Consequential amendments increasing age of criminal capacity**

Amendments are made to sections 12, 24, 27 and 34 of the CJA to increase the minimum age of criminal capacity.

- **Clauses 13, 14 and 16: Address the concern that probation officers are not qualified to express views on the criminal capacity of a child**

- **Clause 13** amends section 35 of the CJA by substituting the reference to 10 years with 12 years and by deleting section 35(g) which requires probation officers to express a view on whether expert evidence is required relating to the criminal capacity of a child.

⁴ Memorandum on the Objects of the Bill



- **Clause 14** amends section 40 of the CJA by deleting section 40(1)(f) which requires a probation officer to include in the assessment report a recommendation on the possible criminal capacity of a child and measures to be taken to prove criminal capacity.
- **Clause 16** amends section 43 of the CJA to substitute the reference to 10 years with 12 years and by deleting section 43(2)(a) which provides that one of the objectives of a preliminary inquiry is to consider the assessment report, including the view of the probation officer regarding the criminal capacity of a child.
- **Clause 18: Prima facie evidence that the child committed the offence**

Clause 18 amends section 52 of the CJA by substituting the reference to a case against a child with a reference to prima facie evidence that the child committed the offence.

- **Clause 19: Requirement to prove criminal capacity when deciding to prosecute**

Clause 19 amends section 58 of the CJA by the addition of a new subsection:

“(5) If the prosecutor decides to proceed with the prosecution in terms of subsection (4)(a) in the case of a child who is 12 years old but under the age of 14 years, criminal capacity of that child must be proved in terms of section 11.”.

- **Clause 21: Consideration of pre-sentence report in sexual offence matters**

Clause 21 amends section 71 of the CJA, which regulates pre-sentence reports in order to bring it in line with the Criminal Law (Sexual Offences and Related Matters Act 32 of 2007). Currently, a court may dispense with a pre-sentence report in certain cases. Clause 21 now amends section 71 by providing that the child justice court must consider the report by the probation officer where the court may order that the particulars of the child be included in the National Register for Sex Offenders. This will ensure that the child justice court does not dispense with a pre-sentence report where the court may impose a sentence involving compulsory residence in a child and youth care centre or imprisonment, or where the court makes an order that the particulars of the child be included in the National Register for Sex Offenders.

- **Clause 22: Children used by adults and older children to commit crimes**

Clause 22 of amends section 92 of the CJA which deals with children used by adults to commit crimes by amending the heading and by substituting the word “adult” with “persons” in order to cater for instances where children are used by adults as well as older children to commit crimes.



- **Clause 23: Statistics to be submitted to Parliament for purpose of reviewing the minimum age of criminal capacity**

Clause 23 is a consequential amendment to section 96(4) of the CJA which deals with statistics to be submitted to Parliament for purposes of reviewing the minimum age of criminal capacity. The amendment removes the requirement to submit statistics in respect of children younger than 12 years as the Bill raises the minimum age of criminal capacity to 12.

- **Clause 24: Technical amendment**

Clause 24 is a technical amendment amending the table of contents of the CJA due to the amendments to the headings to sections 9, 10 and 92 of the Act.

- **Clause 25: Consequential amendment**

Clause 25 of is a consequential amendment, namely to substitute the phrase “appropriate adult” with “appropriate person” wherever it appears in the CJA.

- **Clause 26: Consequential amendment to substitute “appropriate adult” with “appropriate person” in the Criminal Procedure Act**

Clause 26 is a consequential amendment to substitute the phrase “appropriate adult” with “appropriate person” in sections 73, 77 and 78 of the Criminal Procedure Act, 1977, as a result of the amendment of the definition of “appropriate adult” in section 1 of the CJA.

- **Clause 27: Transitional arrangement**

Clause 27 provides that any criminal proceedings in which the age of criminal capacity of a child is applicable which were instituted before the commencement of section 4 of the CJA, must be continued and concluded as if the CJA had not been passed.

7. PORTFOLIO COMMITTEE AMENDMENTS

- **Clause 15: Diversion before a preliminary inquiry**

Clause 15 amends section 41 of the CJA, which deals with diversion before a preliminary inquiry. The amendment inserts an additional requirement for the prosecutor to consider when diverting a matter involving a child who is 12 years or older but under the age of 14 years, namely whether the child will benefit from diversion. The Portfolio Committee added another provision to cater for instances where such a child lacks criminal capacity and might not benefit from diversion or diversion might be inappropriate, by the insertion of the following subsection:

“(1A) If the prosecutor is of the view that the child is unlikely to benefit from diversion, or if diversion is for any reason not appropriate, the prosecutor may refer the child to a probation officer to be dealt with as a child who lacks criminal capacity, in terms of section 9 of the Act.”.



- **Clause 17: Diversion at preliminary inquiry**

Clause 17 amends section 49 of CJA which deals with orders that may be made at a preliminary inquiry. This is a consequential amendment to remove the requirement to prove criminal capacity at a preliminary inquiry and to insert an additional requirement that an inquiry magistrate may only divert a matter involving a child who is 12 years or older but under the age of 14 years, if the magistrate is satisfied that the child will benefit from diversion. The Portfolio Committee added another provision to cater for instances where such a child lacks criminal capacity and might not benefit from diversion or diversion might be inappropriate, by the insertion of the following subsection:

“(c) If the inquiry magistrate is of the view that the child is unlikely to benefit from diversion, or if diversion is for any reason not appropriate, the inquiry magistrate may refer the child to a probation officer to be dealt with as a child who lacks criminal capacity, in terms of section 9 of the Act.”.

- **Clause 20: Diversion at child justice court**

Clause 20 amends section 67 of CJA, which deals with orders that may be made by the child justice court. This a consequential amendment to insert an additional requirement that the child justice court may only order diversion of a matter involving a child who is 12 years or older but under the age of 14 years if the child will benefit from diversion. The Portfolio Committee added another provision to cater for instances where such a child lacks criminal capacity and might not benefit from diversion or diversion might be inappropriate, by the insertion of the following subsection:

“(aB) If the child justice court is of the view that the child is unlikely to benefit from diversion, or if diversion is for any reason not appropriate, the court may refer the child to a probation officer to be dealt with as a child who lacks criminal capacity, in terms of section 9 of the Act.”.

8. CONCLUSION

During the National Assembly Debate ahead of the Bill being passed on 28 November 2018, Deputy Justice Minister John Jeffery said that the CJA has been successful in reducing the prison population of children by providing alternative sentences and diversion.⁵ One of the key issues during consideration of the Act has been the question at what age children have the mental ability to distinguish right from wrong and understand the consequences of their actions and accept responsibility.

Before the CJA came into operation, the criminal capacity age in South Africa was seven years, meaning that a child over seven could be criminally liable. The CJA raised the age of criminal capacity to 10 years old, and the Child Justice Amendment Bill of 2018 raises it further to 12 years, subject to a review in five years' time. While not as high as many child rights activists

⁵ SA News (2018)



would have liked, the age of 12 years is in line with the recommendations of the United Nations Committee on the Rights of the Child.⁶

According to the Deputy Minister, government decided against raising the age of criminal capacity too fast in order to avoid unintended consequences. For e.g. the CJA provides that a child who lacks criminal capacity may be reported to a probation officer or social worker and could thus be referred to the Children's Court (if the child is neglected) or to counselling. Government would thus, "need to see what the impact of this is before we move forward. We don't want to move too fast and find that things don't work and people get left behind."

While the Bill still requires the State to prove the criminal capacity of children between the ages of 12 to 14, this does not stop the State from diverting them away from the formal criminal justice system. In the past, children could only be diverted once criminal capacity was established. They can now be diverted if the magistrate believes that he or she can benefit from a diversion programme.

9. SOURCES

Child Justice Act 75 of 2008

Child Justice Amendment Bill [B32 – 2018]

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⁶ The minimum age for criminal capacity in Swaziland and Zimbabwe is seven years, in Kenya eight years, Ethiopia nine years, Cameroon and Côte d'Ivoire 10 years, Uganda 12 years, Egypt 12 years, Ghana 12 years, Angola 14 years and Cape Verde 16 years.