CENTRE FOR CHILD LAW

SUBMISSIONS ON

THE CHILD JUSTICE AMENDMENT BILL B32 - 2018

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About the Centre

1. The Centre for Child Law (the Centre) is registered as a Law Clinic and through strategic impact litigation aims to set legal precedent to improve and strengthen laws pertaining to children. The Centre contributes towards the establishment and promotion of the best interests of children in South African law, policy and practice through litigation, advocacy, research and education.

2. The Centre welcomes the proposed amendments to the Child Justice Act particularly in as far as they relate to the review and amendment of the minimum age of criminal capacity. The Centre believes that these amendments bring South Africa closer to international standards. In 2016, the United Nations Committee on the Rights of the Child, in its concluding observations to South Africa, expressed the concern that a legal minimum age of criminal capacity of 10 years was low. The Committee called on South Africa to expedite the review of the minimum age of criminal responsibility with a view to raising it to an internationally acceptable level.

Centre for Child Law's position on the desirable minimum age of criminal capacity

3. The Centre appreciates the effort made to raise the minimum age of criminal capacity from the current level of 10 years old. The Centre notes that the proposed minimum age of criminal capacity in the Bill is 12 years old. We also notes the proposal to retain rebuttable presumption (*doli incapax*) that children 12 years or older but under the age of 14 years lack criminal capacity unless the State proves otherwise (clauses 2, 3 & 4 of the Bill).

4. The Centre however takes the view that the minimum age of criminal capacity should be raised to 14 years old, as this is where the upper limit of the current legal presumption that children lack criminal capacity is placed, and is therefore the upper age of protection in relation to the age of criminal capacity. The United Nations Committee on the Rights of the Child, in its General Comment number 10, commended States for setting high level ages of 14 or 16 years; even though it gave the recommendation that States with low ages of criminal capacity should increase the minimum age to 12 years as the absolute minimum and continue increasing it.[1] The Committee notes that a minimum age of 14 years, will contribute "to a … system which

[1] United Nations Committee on the Rights of the Child, General Comment No. 10 Children's rights in juvenile justice, CRC/C/GC/10 (25 April 2007) at paras 30 and 33.

… deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected."[2]

5. Setting the minimum of criminal capacity at 14 years would make the use of the presumption that children lack criminal capacity (*doli incapax* presumption) unnecessary. The United Nations Committee on the Rights of the Child frowns on the use of two ages "such as occurs in the application of rebuttable presumptions."[3] The Committee takes the view that making use of two ages is often confusing, leaves much to the discretion of the court/judge and could cause discriminatory practices.[4]

6. In addition, the retention of the presumption, although it is only limited by this Bill to children facing trial, means that psychiatrists and psychologist have to be involved in assessments. This is an expensive and time consuming process, and a use of scarce skills for purposes of 'checking' if a child is of normal development for a 12 or 13 year old.

The Centre for Child Law's submissions on the proposed ages of criminal capacity in the Bill

7. Taking the above submissions into consideration, the Centre nevertheless supports the proposals in the Bill. The Bill ensures that South Africa is on its way to complying with concluding recommendations from the United Nations Committee on the Rights of the Child as well as General Comment No. 10 which urges States to increase the minimum age to at least 12 years and continue increasing the age from thereon.

8. The Centre supports clause 1 of the Bill which, as noted in the memorandum to the Bill, caters for children in conflict with the law being taken care of by or living with other children.

9. The Centre supports clauses 2 to 4 of the Bill, they ensure that the minimum age of criminal capacity is increased from 10 years to 12 years, and children between 12 and 14 years are presumed not to have criminal capacity. They ensure that this reviewed age of criminal capacity is reflected is necessary provisions.

[2] General Comment 10 at para 33.
[3] Skelton, A 2013, 'Proposals for the review of the minimum age of criminal responsibility' *South African Journal of Criminal Justice*, vol. 3, p. 3.
[4] General comment at para 30.

10. The Centre supports clause 5 of the Bill. This clause ensures that there is a further review of the age of criminal capacity 5 years after the commencement of the Amendment Bill, or relevant provision. Indeed this is very important if the Committee decides to stick with the minimum age of 12 years. That age should then be reconsidered, in line with the General Comment of the CRC.

11. The Centre supports clause 6 of the Bill, it reflects consequential amendments required as a result of the amended age of criminal capacity and changing "appropriate adult" to "appropriate person" in the proposed amendment in clause 1.

12. The Centre supports clauses 7 and 8 of the Bill. They reflect consequential amendments required as a result of the amended age of criminal capacity. It acknowledges the fact that prosecutors are not in the position to determine the cognitive ability of children in conflict with the law. The clause also refers the issue of determining criminal capacity to plea and trial in order to unclog the child justice system and prevent children being pathologised during pre-plea and trial processes.

13. The Centre supports clause 9 to 14 of the Bill. They reflect consequential amendments required as a result of the amended age of criminal capacity.

14. The Centre supports clause 15 of the Bill. It reflects consequential amendments required as a result of the amended age of criminal capacity. It also removes the requirement that "criminal capacity is likely to be proved in terms of section 11" for a prosecutor to divert a child 12 years or older but under 14 years; and instead states that the prosecutor must consider whether the "child will benefit from diversion." This places less restrictions on the prosecutor's exercise of discretion as they do not have to determine whether criminal capacity will be proved; something that prosecutors may not have the capability to do. We propose an additional subsection here, which will allow more protection for the child. This may also require a consequential amendment to clause 20 of this Bill, which amends section 67 of the Act.

(2) Where the prosecutor is of the view that the child is unlikely to benefit from diversion, or if diversion is for any other reason not appropriate, he or she may refer to 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.

15. The Centre supports clause 16 of the Bill. It reflects consequential amendments required as a result of the amended age of criminal capacity. It also reflects the fact that the probation officer is not ideally placed to determine criminal capacity.

16. The Centre supports clause 17 of the Bill. It reflects consequential amendments required as a result of the amended age of criminal capacity and ensures that issues of criminal capacity are dealt with at plea and trial stage.

17. The Centre supports clause 18 of the Bill.

18. The Centre supports clause 19 of the Bill. The clause has the effect that if a child does not comply with a diversion order and the prosecutor decides to proceed with prosecution, then criminal capacity of the child must be proved if they are 12 years or older but under 14 years.

19. The Centre supports clause 20 of the Bill as it inserts an additional order that can be made by the child justice court; which is an order of diversion. Consideration should be given to inserting a provision in section 67:

(3) Where the child justice court is of the view that the child is unlikely to benefit from diversion, or if diversion is for any other reason not appropriate, the court may refer to 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.

20. The Centre supports clause 21 of the Bill as it revises circumstances under which a child justice court may not dispense with a pre-sentence report. The circumstances include detention in a child and youth care centre and placement on the national register for sex offenders; sentence which have a long term impact on the child involved. Therefore, the decision to impose such a sentence should be informed by an investigation and report by a probation officer.

21. The Centre supports clause 22 of the Bill as it is consequential to the amendment of "appropriate person" in the definitions section.

22. The Centre supports clause 23 of the Bill as the amendment facilitate the next review of the minimum age of criminal capacity and it reflects consequential amendments required as a result of the amended age of criminal capacity.

23. The Centre supports clauses 24 to 28. They reflect consequential amendments required as a result of the amended age of criminal capacity and amendments to the definition “appropriate person.

Oral submissions

24. The Centre for Child Law requests the opportunity to make oral submissions if called up to do so by the Committee.