



Submission to the Portfolio Committee on Justice on the Child Justice Bill

January 2007

1 Introduction

This submission is made on behalf of the **South African Society for the Prevention of Child Abuse and Neglect (SASPCAN)**, by Carol Bower an Independent Consultant and member of the **SASPCAN** National Executive Committee.

SASPCAN is an umbrella organisation, with membership of individuals and organisations stretching across the field and across the country. Membership is not limited by professional qualifications; thus **SASPCAN** members represent a wide range of grassroots organisations and activities regarding the protection of children, and the prevention of abuse and neglect.

As an integral part of its activities, **SASPCAN** advocates for the rights of children. This advocacy is conducted at all levels of society, and includes work with legislation and policy development.

We take this opportunity of respectfully requesting permission to make an oral submission when the parliamentary hearings on this Bill are held on 5th February 2008.

2 The Child Justice Bill¹

We are aware that a number of other submissions dealing with a diverse range of issues within this Bill are being prepared by several civil society organisations which deal directly with children in trouble with the law. These submissions are addressing a number of our concerns, including

- Diversion
- Incarceration of children under 18
- Restorative justice
- Assessment
- Probation officers

¹ B 49 of 2002

SASPCAN is aware that this Bill has been in development for a number of years, and commends the Portfolio Committee on the fact that it is again receiving attention. Given the high levels of violence in our country, and the many challenges faced by our children, we welcome this initiative to create a rights-focused and appropriate child justice environment.

3 SASPCAN's concerns regarding the age of criminal capacity

We are concerned that the age of criminal capacity has been set too low. The Bill currently sets the minimum age of criminal capacity at 10 years, with this being rebuttable between the ages of 10 and 12. **SASPCAN** proposes that these limits be raised so that children under the age of 12 are assumed to lack criminal capacity, and this assumption is rebuttable for children aged 12 to 16 years.

In examining our concern and developing these proposals, we have looked at a range of international and domestic statutes, conventions and charters, and related documentation. These are:

- the UN Convention on the Rights of the Child (UNCRC)²;
- the UN Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules")³;
- the African Charter on the Rights and Welfare of the Child (ACRWC)⁴;
- General Comment 10 from the UN Committee on the Rights of the Child: Children's rights in juvenile justice⁵; and
- the Concluding Observations of the UN Committee on the Rights of the Child to South Africa's Initial State Party Report⁶.

3.1 International instruments

UNCRC

Article 40 of the UNCRC provides that State Parties shall ensure :

40 (3) (a): The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Beijing Rules

The Beijing Rules, although written before the Convention, are expressly referred to within it⁷. Rule 4 (1) of the Beijing Rules states that, where the concept of the age of criminal responsibility for juveniles is recognised, "the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity".

The ACRWC

Article 17 (4) of the ACRWC provides that there "shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law".

² Available online at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

³ Available online at http://www.unhchr.ch/html/menu3/b/h_comp48.htm

⁴ Available online at <http://www.africa-union.org/root/au/Documents/Treaties/Text/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf>

⁵ Available online at http://www.crin.org/docs/CRC_GeneralComment10.pdf

⁶ Available online at <http://daccess-ods.un.org/TMP/600375.8.html>

⁷ Skelton, A

General Comment 10

The UN Committee on the Rights of the Child considers several issues in coming to the decision that the lowest possible age for criminal capacity that is internationally acceptable is 12 years. The Committee also makes recommendations with regard to the upper age limit for the administration of juvenile justice, which is 18. In the past, the Committee has recognised the possibility of the presumption of a lack of criminal capacity being rebuttable (i.e. can be challenged in court after the commission of an offence by a child) between the ages of 12 and 18; however, in paragraph 16 of the General Comment #10, the Committee has stated that it is not in favour of the *doliincapax* rule⁸, preferring that an absolute minimum age of criminal capacity be set, in the upper age of the *doliincapax* principle.

Concluding Observations to the Initial Country Report from South Africa to the UN Committee on the Rights of the Child

South Africa ratified the UNCRC in 1995, and submitted its Initial Country Report to the UNCRC in 1997⁹. The UNCRC, upon receiving State Party Reports, customarily issues a set of Concluding Observations to guide the state party in its attempts to entrench child rights.

In the Concluding Observations to the 1997 Report from South Africa, the UNCRC remarked as follows:

“While the Committee notes that the State party has drafted legislation to increase the legal minimum age for criminal responsibility from 7 to 10 years, it remains concerned that ***a legal minimum age of 10 years is still a relatively low age*** for criminal responsibility. The Committee recommends that the State party reassess its draft legislation on criminal responsibility with a ***view to increasing the proposed legal minimum age*** (10 years) in this regard (italics mine).

3.2 Implications of the international instruments

The implications from international law as described above are clear. All recommend a higher rather than lower age of criminal capacity. The General Comment #10 is, however, rather more specific and clearly states the age of 12 as the minimum lower limit for criminal capacity.

The UN Committee’s approach to the issue of minimum age can be seen as three-pronged:

- **Firstly**, the Committee has been unequivocal that failure to establish a minimum age of criminal capacity is a violation of the CRC. This has been the message to States which have submitted their implementation reports and appeared before the Committee without ever having set such an age. Criticisms in the Concluding Observations to the initial State Reports of Guatemala, Micronesia, Panama and Senegal are illustrative of this stance.
- **Secondly**, the Committee’s interpretation has considered certain minimum ages set by States as astonishingly low and hence a violation of the CRC. The Committee has asserted that “an inappropriately low age for criminal responsibility shows that the State does not have a clear idea of what the criminal law can achieve with young children, and does not appreciate the harm it can cause”.

⁸ The *doliincapax* rule, is where children between certain ages [usually 7-14] are considered to lack criminal capacity unless it is proven otherwise. It is present in the laws of most English / Roman Dutch common law countries.

⁹ Note that the Second Report, due in 2002, has not yet been submitted, and the Third Country Report should have been presented in 2007

- **Thirdly**, the Committee has spoken out against the *doli incapax* rule, as is clarified above. It is highly likely that the setting of a minimum age below 12 would be considered as 'too low' by the UN Committee, in spite of arguments on the importance of the doctrine and improvement in the rebuttal procedure. This is the message in Paragraph 16 of the General Comment on Juvenile Justice.

3.3 Other considerations related to capacity

The capacity to commit a crime relates to the ability to understand the wrongfulness of an act, and the ability to act in accordance with that knowledge. Because of the very fact that they are young, children are considered to lack this capacity¹⁰. However, as they get older their capacity increases. Determination of capacity is the responsibility of the court if a child is above a certain age. We are proposing that this age be raised to 12.

The determination of capacity and thus culpability must consider a range of factors. These factors relate to cognitive and conative function. *Cognitive* functioning refers to the capacity to think, perceive and reason; *conative* functioning refers to the capacity for self-control and the ability to exercise free will.

Developmental milestones, while following a fairly predictable route, do not happen uniformly for all children, nor do they occur always at the same age. So, children of the same chronological age can be at different stages of their development. This is as true of cognitive and conative development as it is of physical development. Diverse cultural backgrounds and socio-economic circumstances may also have an impact on developmental milestones.

Children aged under about 11 or 12 years are in the concrete operational stage of their development¹¹. Their ability to use deductive logic is still developing. It is only after the age of 12 that children begin to develop and be capable of advanced reasoning and abstract thinking skills¹².

Hence, **SASPCAN** argues that children do not begin to develop true capacity to understand the wrongfulness of an act and be able to act accordingly until after the age of 12 years.

4 Other African countries

In Ghana, Kenya, Lesotho and Uganda, the *doli incapax* rule was part of the English common law inherited in these countries. Early statutory and penal laws in these countries codified this rule, providing that children below the age of 7 (8, in Kenya) were treated as not having criminal capacity. Children between the age of 7 and 14 (12 in Kenya) were however treated as lacking in capacity unless this was otherwise proven by the prosecution. This rule forms part of the common law in South Africa and Namibia.

¹⁰ Badenhorst, C. 2006. *Criminal Capacity of Children*. Thesis submitted in fulfilment of requirements towards the degree of D.Phil, University of South Africa. Accessed on line at <http://etd.unisa.ac.za/ETD-db/theses/available/etd-03022007-131553/unrestricted/thesis.pdf>

¹¹ Child Development Institute. *Stages of Intellectual Development in Children and Adolescents*. Accessed at <http://www.childdevelopmentinfo.com/development/piaget.shtml>

¹² Huebner, A. 2000. *Adolescent Growth and Development*. Virginia State University. Accessed at <http://www.ext.vt.edu/pubs/family/350-850/350-850.html>

On the other hand, the age was set much higher ages in other African countries. Senegal and Burkina Faso adopted 13 as the minimum age, and some other African countries opted for higher minimum ages - Sudan at 15 and Libya at 14. It has been asserted that 13 is "the most common African minimum age".

The *doli incapax* rule has, however, been abolished in both Uganda and Ghana. The 1996 Ugandan Children's Statute set the minimum age at 12, while a Ghanaian 1998 legislative amendment to criminal law set the age at 14. This increase in the minimum age in both countries was based on Rule 4.1 of the Beijing Rules. However, there were also practical considerations related to information showing that children under 14 years were generally involved in petty (rather than any serious offences).

5 Recommendation

Given the injunctions from international law, the evidence from research that children under the age of 12 should be considered as lacking criminal capacity in the commission of crime, and the situation in other African countries, it is **SASPCAN's** recommendation that the minimum age for criminal capacity be set at 12 years at least, and that criminal incapacity be rebuttable between the ages of 12 and 16.

5.1 Suggested text

Current wording	Proposed wording
6. (1) A child who commits an offence while below the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 8.	6. (1) A child who commits an offence while below the age of 10 <u>12</u> years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 8.
9. (1) (a) A child who is 10 years of age or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless he or she is proved to have such criminal capacity in accordance with section 10.	9. (1) (a) A child who is 10 <u>12</u> years of age or older but under the age of 14 <u>16</u> years and who commits an offence is presumed to lack criminal capacity, unless he or she is proved to have such criminal capacity in accordance with section 10.

Thank you.

Sincerely



Carol Bower
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