

**A REVIEW OF THE MINIMUM AGE OF CRIMINAL CAPACITY
AND THE PRESUMPTION OF *DOLI INCAPAX***

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By

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SUMMARY

This dissertation deals with the minimum age of criminal capacity (which is currently set at 10 years in terms of the Child Justice Act 75 of 2008). It deals in particular with the question of whether the minimum age of criminal capacity should be raised and if so, whether the presumption of *doli incapax* should be retained.

A consideration of the relevant international instruments shows that the situation as it currently stands in South African law is not internationally acceptable. South Africa is failing to comply with the obligations which it incurred through the ratification of the United Nations Convention on the Rights of the Child and with the current international practice pertaining to the minimum age of criminal capacity. The current minimum age of criminal capacity is simply too low.

The question of whether the presumption of *doli incapax* should be retained is also dealt with. The problems that are being experienced by its application in practice (*inter alia* the difficulties in the assessment of criminal capacity by mental health professionals and the possibility of an over reliance on prosecutorial discretion) leads to the conclusion that the “protective mantle” which the presumption was intended to provide no longer exists.

Furthermore, it is argued that the question of the manner in which children below the “new” minimum age of criminal capacity who come into conflict with the law should be dealt with is answered by the provisions of the Child Justice Act itself. It is submitted that the relevant provisions of the Act ensure that these children receive the necessary interventions and rehabilitation.

Finally, this dissertation deals with the position in Australia, Ireland, Uganda and Sierra Leone and the valuable lessons that may be learnt from the developments in these countries. In particular, it becomes clear from the Australian experience that the position as it currently stands (in South Africa) holds many challenges and is not likely to provide children with the required protection. From Ireland comes a warning against the over reliance on prosecutorial discretion and creating exceptions to the applicable minimum age of criminal capacity for serious offences. The position in the selected African countries provides a good example of a more child centered approach which can be followed and of positive changes to domestic law in order to comply with international norms.

The recommendations that flow from the above are as follows: Firstly the minimum age of criminal capacity must be raised to 12 years and secondly, the rebuttable presumption of *doli incapax* must be abolished. Finally, the current provisions of the Child Justice Act relating to children below the minimum age of criminal capacity must be applied in order to achieve early intervention in the lives of children who are younger than 12 years and who offend.

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CHAPTER 1

PREFACE

1.1 INTRODUCTION

Unfortunately South Africa is a country with an alarmingly high crime rate. Thus, it is only to be expected that our society demands accountability for one's actions. Even more unfortunate is the fact that although children are not responsible for *most* of these crimes, the intense media frenzy that follows when a child does commit a violent offence creates a public outcry. This, in turn, raises the question about the age at which society can hold children criminally responsible for their actions.

At common law, criminal capacity has been determined by the application of two well-known rules.¹ The first of these is that a child who has not yet completed his or her seventh year is irrebuttably presumed to lack criminal capacity and thus cannot be held criminally responsible.² Secondly, after a child has completed his or her seventh year, but before he or she is fourteen years of age, the child is rebuttably presumed to be *doli incapax*.³ A child older than fourteen is regarded as having full criminal capacity.⁴

On 1 April 2010 the Child Justice Act 75 of 2008⁵ came into operation and amended the common law pertaining to the criminal capacity of children under the age of fourteen years to the extent set out in section 7 thereof.⁶ In essence, the minimum age of

¹ Sloth-Nielsen "Child Justice and Law Reform" in Davel (ed) (2000) *Introduction to Child Law in South Africa* 393.

² Burchell "Youth" in Burchell (2008) *Principles of Criminal Law* 366; R v Lourie (1892) 9 SC 432. Labuschagne (2003) 28 *Tydskrif vir die Regswetenskap* 19 at 25 cites R v George 2 EDC 392 as the only reported decision involving a child younger than 7. Here Burchell also notes that reference to this category of children is made in certain cases dealing with older children: Attorney General, Transvaal v Additional Magistrate for Johannesburg 1924 AD 421 at 434; S v Kenene 1946 EDL 18 at 21 and S v S 1977 (3) SA 305 (O) at 311.

³ Burchell (2008) 366. S v K 1956 3 SA 353 (A); S v Pietersen and Others 1983 4 SA 904 (ECD) at 907.

⁴ Burchell (2008) 369.

⁵ Hereinafter "the Act".

⁶ Section 7(3).

criminal capacity was raised from 7 to 10 years and the rebuttable presumption of *doli incapax* was retained for children 10 years or older but under the age of 14 years.

Section 8 of the Act deals with the review of the minimum age of criminal capacity. It directs the Cabinet Member responsible for the administration of justice to submit a report to Parliament in order to determine whether or not the minimum age of criminal capacity, as set out in section 7(1) of the Act, should be raised.⁷

1.2 PROBLEM STATEMENT

In light of the abovementioned provisions it becomes clear that the problem that needs to be addressed is whether the minimum age of criminal capacity should be raised and, if so, to what age?

Another problem which is not expressly raised by section 8 but inextricably forms part of the debate is whether the presumption of *doli incapax* should stay part of our law, in the event that the minimum age of criminal capacity is raised.

1.3 RESEARCH QUESTIONS

This dissertation will therefore address the following: **A review of the minimum age of criminal capacity and the presumption of *doli incapax*.** In doing so it will attempt to answer these research questions:

- 1) What is the appropriate minimum age of criminal capacity?
- 2) Whether the presumption of *doli incapax* should be retained?
- 3) What guidance can be obtained from international law?
- 4) What is the position in selected foreign jurisdictions?
- 5) The consequences for children who come into conflict with the law and who are below the minimum age of criminal capacity.

⁷ According to section 8 of the Act, this should be done within five years after the commencement of the Act.

1.4 SIGNIFICANCE OF STUDY

The Law Reform Commission's proposals to parliament in relation to the age of criminal capacity dated back to the year 2000 and since then medical science has advanced and international law on this issue has also developed. As a result, a number of submissions were made to parliament during the debates on the Act in 2008 by civil society organizations advocating for a higher minimum age of criminal responsibility.⁸

The significance of this research thus becomes obvious when it is considered that the Act mandates such a study by the Intersectoral Committee within five years after the commencement of the Act.⁹

It also bears mention that the wording of the particular section is "open-ended" to the extent that an earlier review of those provisions of the Act dealing with the minimum age of criminal capacity is possible.

1.5 DEFINITION OF TERMS

Criminal Capacity: This relates to the age at which a child has the mental ability to distinguish between right and wrong and can understand or appreciate the consequences involved (cognitive mental function) and can act in accordance with such understanding or appreciation (conative mental function). It is the stage at which children have the capacity to commit crimes and to accept responsibility for their actions. This renders them liable for prosecution.¹⁰

Minimum age of criminal capacity: This indicates the lowest age at which a state or the international community is willing to hold children liable for their alleged criminal acts in a court of law.¹¹

⁸ Gallinetti (2009) *Getting to Know the Child Justice Act* 21.

⁹ Section 8 read with 96(4) of the Act.

¹⁰ Snyman "Skuld" in Snyman (2002) 178.

¹¹ Gallinetti (2009) 17.

1.6 PRELIMINARY LITERATURE SURVEY

In Roman law children were divided into *infantes* and *infantes maiores*.¹² *Infantiae maiores* are further divided into *infantiae proximi* and *pubertati proximi*.¹³ Only the latter group was considered to have criminal responsibility and could be held accountable for their actions.¹⁴ Labuschagne shows that this distinction was never linked to any specific age limits and it was left to the *iudex* to determine whether an *impubes* was an *infantiae proximus* or *pubertati proximus* in light of the circumstances surrounding each case.¹⁵

This approach fell into disuse in the early nineteenth century when, according to Van der Linden,¹⁶ children who were between the ages of 7 and 14 were left to the chastisement of their parents when they committed minor crimes. Only when these children committed serious crimes where “opzettelijke boosheid boven hunnen jaaren” could be assumed were they held criminally responsible.¹⁷

Labuschagne further points out that presumptions and lower age limits were never used and that our courts followed the English law in this regard,¹⁸ thus leaving us with the position as it was at common law.¹⁹ That this approach was outdated and in need of development became clear when the South African Law Commission²⁰ noted in its Issue Paper on Juvenile Justice²¹ that South Africa had one of the lowest minimum ages of criminal capacity in the world.²²

¹² Labuschagne (2003) 28 *Tydskrif vir die Regswetenskap* 19 at 21.

¹³ *Id.*

¹⁴ Labuschagne (1997) 30 *De Jure* 184 at 187.

¹⁵ *Id.*

¹⁶ As quoted in Labuschagne (2003) 28 *Tydskrif vir die Regswetenskap* 19 at 23.

¹⁷ Labuschagne (2003) 28 *Tydskrif vir die Regswetenskap* 19 at 23, Labuschagne (1997) 30 *De Jure* 184 at 187.

¹⁸ *Id.*

¹⁹ As set out above.

²⁰ Hereinafter Law Commission.

²¹ South African Law Commission *Issue Paper No 9 on Juvenile Justice* (May 1997), (“the Issue Paper”).

²² Issue Paper at paragraph 3.6.

According to the Law Commission's Report on Juvenile Justice,²³ establishing a revised minimum age of criminal capacity was one of the most challenging issues facing it.²⁴ Sloth-Nielsen provides an explanation for this when she states that although there was a consensus of a vast number of respondents to the Law Commission's Discussion Paper on Juvenile Justice²⁵ about the proposition to raise the minimum age, a large number of respondents did not agree with the proposed minimum age of ten.²⁶ She notes further that the proposed retention of the rebuttable presumption of *doli incapax* was criticised.²⁷ The Report argues that the presumption creates a "protective mantle" to immediately cover children aged between ten and thirteen years as each child's level of maturity and development differs.²⁸

The research that was done by the Law Commission Project Committee resulted in the Child Justice Act, which raised the minimum age of criminal capacity to 10 while retaining the presumption of *doli incapax*. Thus, a child who is 10 years or older but younger than 14 at the time of the alleged commission of the offence, is presumed not to have criminal capacity unless it is subsequently proved beyond reasonable doubt that the child was in fact able to distinguish between right and wrong and subsequently act in accordance with such distinction at the time of the alleged commission of the offence.²⁹

According to Gallinetti the decision to set the minimum age at ten has been the subject of criticism from a range of different quarters.³⁰ A number of submissions were made to parliament during the debates on the Act by civil society advocating for a higher

²³ South African Law Commission Report on Juvenile Justice (August 2000), (*"the Report"*).

²⁴ Report at paragraph 3.2.

²⁵ South African Law Commission Discussion Paper No 79 on Juvenile Justice (December 1998), (*"the Discussion Paper"*).

²⁶ Sloth-Nielsen in Davel (ed) (2000) 400.

²⁷ *Id.*

²⁸ Report at paragraph 3.10 and 3.11.

²⁹ Gallinetti (2009) 17.

³⁰ Gallinetti "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart (ed) (2009) *Child Law in South Africa* 651. Gallinetti notes that criticism of the minimum age of 10 did not only emanate from international scrutiny (the UN Committee on the Rights of the Child in its Concluding Observations on South Africa's Initial Country Report to the Committee on the Rights of the Child and General Comment No. 10) but it was also criticised by civil society at the 2008 parliamentary public hearings on the Child Justice Bill.

minimum age of criminal responsibility.³¹ Galinetti states further that the direct result of these strong submissions by civil society was the inclusion of section 8 of the Act which mandates the review of the minimum age of criminal capacity.³²

Gallinetti refers to the developments in relation to the minimum age which include General Comment No 10 of the United Nations Committee on the Rights of the Child, which set a minimum age of twelve years and criticises the *doli incapax* presumption.³³ Furthermore, when the position in other countries is considered it becomes clear that South Africa still has one of the lowest minimum ages of criminal capacity in the world.³⁴

It is however important to remember that the official age of criminal responsibility may not be the earliest age at which a child can be involved with the justice system due to being in conflict with the law.³⁵ Thus, Sloth-Nielsen states that while children below the minimum age who offend may not be held criminally liable, the institution of welfare proceedings may ensure that the causes of the child's offending are examined and dealt with.³⁶

1.7 PROPOSED METHODOLOGY

Since this dissertation is mainly literature-based, it will consist of a detailed and systematic analysis of the relevant texts on the subject matter thereof.

Furthermore, the relevant international instruments, such as the Convention on the Rights of the Child and General Comment No 10, will be used to assess our current law pertaining to the minimum age of criminal capacity.

³¹ Gallinetti in Boezaart (ed) (2009) 651 refers to the submissions of Childline, the South African Society on the Prevention of Child Abuse and Neglect, Sloth-Nielsen, Terblanche and NICRO.

³² Gallinetti in Boezaart (ed) (2009) 652.

³³ General Comment No 10 (2007) paragraph 16.

³⁴ Janes (2008) *Criminal liability of minors and severity of penalties: European trends and developments* 4.

³⁵ *Id.*

³⁶ Sloth-Nielsen in Davel (ed) (2000) 398.

Finally, the position in selected foreign jurisdictions will be considered. Since many countries have outdated legislation and are living with minimum ages of criminal capacity determined by colonially-inherited law, looking at international averages is not necessarily an automatic gauge of good practice.³⁷ Thus, it is important to look at the minimum age in those countries that have reformed their legislation since 1989 when the Convention on the Rights of the Child came into operation.

The position in Australia, Ireland and Uganda and Sierra Leone will be studied. These countries were selected because they have all ratified the Convention on the Rights of the Child³⁸ and they have reformed their legislation since then.³⁹

In Australia the minimum age of criminal capacity was raised from 8 to 10 years and the *doli incapax* presumption was retained for children between the ages of 10 and 14.⁴⁰ In Ireland the Children Act 24 of 2001, raised the minimum age from 7 to 12 and retained the *doli incapax* presumption for children between 12 and 14.⁴¹ The Uganda Children Act, 1997 (ch 59), raised Uganda's minimum age of criminal capacity from 7 to 12 years and repealed *doli incapax*.⁴² Sierra Leone implemented its new Child Rights Act, 1997 while facing an immense lack of recourses in order to comply with its obligations under international law by raising its minimum age of criminal capacity from 10 to 14 years.⁴³

Thus, a comparison between our current law and the position in these foreign jurisdictions will address the main issues in this research. The effectiveness of our law relating to criminal capacity can be explored by a comparison with the laws in Australia which have already been in effect for some time. Furthermore, the position in Ireland,

³⁷ International comparative information on the minimum age of criminal responsibility provided by the Department of Justice and Constitutional Development in support of the proposed raising of the minimum age of criminal capacity as provided for in the Child Justice Bill (49 of 2002).

³⁸ NICRO written submissions to the Parliamentary Portfolio Committee on Justice and Constitutional Development on the Child Justice Bill (49 of 2002).

³⁹ International comparative information on the minimum age of criminal responsibility provided by the Department of Justice and Constitutional Development in support of the proposed raising of the minimum age of criminal capacity as provided for in the Child Justice Bill (49 of 2002).

⁴⁰ See discussion of the relevant Australian law in 5.2 below.

⁴¹ See 5.3 below.

⁴² See 5.4.1 below.

⁴³ The *doli incapax* presumption never applied in Sierra Leone. See 5.4.2 below.

Uganda and Sierra Leone will provide guidance as to whether the minimum age of criminal capacity should be raised and whether or not the presumption of *doli incapax* should be retained.

1.8 STRUCTURE

Chapter two will be devoted to establishing whether, with reference to international law on the subject, the minimum age of criminal capacity should be raised and, if so, what the appropriate age would be to which it should be raised. Chapter three will address the question whether the presumption of *doli incapax* should be retained. The fourth chapter will consider the consequences for children who come into conflict with the law and who are below the minimum age of criminal capacity while the fifth chapter will deal with the position in selected foreign jurisdictions. The final chapter will contain conclusions and recommendations.

CHAPTER TWO

THE MINIMUM AGE OF CRIMINAL CAPACITY

2.1 INTRODUCTION

It was obvious to all the parties involved that the enactment of the Child Justice Act would have to bring with it an increase in the minimum age of criminal capacity. The *appropriate* minimum age of criminal capacity was less obvious. In this chapter the position in international law pertaining to the minimum age of criminal capacity will be used to evaluate the current minimum age of criminal capacity in South Africa.

2.2 THE CURRENT PROVISIONS OF THE ACT RELATING TO THE MINIMUM AGE OF CRIMINAL CAPACITY

Section 7(1) of the Act stipulates that a child, under the age of ten, who commits an offence, does not have criminal capacity and cannot be prosecuted for that offence.

2.3 THE MINIMUM AGE OF CRIMINAL CAPACITY IN INTERNATIONAL LAW

While there is a long history of developments in child justice before the United Nations Convention on the Rights of the Child, 1989 (*the CRC*), the CRC and related international instruments provide the seminal international framework within which children in conflict with the law should be managed.⁴⁴ In addition there are a number of principles, minimum rules and standards in the arena of international law which deal specifically with children in conflict with the law. Prominent in this regard are the United Nations Standard Minimum Rules on the Administration of Juvenile Justice, 1985 (*the Beijing Rules*), the United Nations Guidelines for the Prevention of Juvenile

⁴⁴Gallinetti (2009) 9.

Delinquency, 1990 (“*the Riyadh Guidelines*”), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (“*UN JDL Rules*”).

Article 3(1) of the CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.⁴⁵ This provision is resonated in Article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990 (“*the African Charter*”) and in Section 28(2) of the Constitution of the Republic of South Africa, 1996.⁴⁶

Our courts have taken note of the importance of this principle and our case law shows that the best interest of the child criterion is being applied in every matter that concerns children, the criminal courts being no exception.⁴⁷ However, it is submitted that, if reference is had to the above provisions of the CRC, the African Charter and to our own Constitution, it becomes plain that the best interest principle should not only guide our courts but also our legislature.

Ferreira⁴⁸ submits that the fact that this criterion should be employed by several entities within the countries that ratified the CRC is of great importance: courts of law and legislative bodies (*inter alia*) should not be blind to the special conditions of the person on trial. A child is a defendant whose age, in relation to his physical and psychological development and emotional and educational needs, demands particular consideration.⁴⁹

Article 40(3) of the CRC requires State Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.⁵⁰

⁴⁵ Emphasis added.

⁴⁶ Hereinafter “*the Constitution*”.

⁴⁷ See *S v Nkosi* 2002 (1) SACR 135 (W); *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC); *Centre for Child Law v The Minister of Justice and Constitutional Development and Others* (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae) 2009 (2) SACR 477 (CC).

⁴⁸ Ferreira (2008) 16 *The International Journal of Children’s Rights* 29 at 29.

⁴⁹ *Id.*

⁵⁰ Article 4 of the African Charter also provides that “[t]here shall be a minimum age below which children shall be presumed not have the capacity to infringe the penal law”.

The Beijing Rules add to this principle 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.⁵¹

In the official commentary on the Beijing Rules, the following important observations are made: Firstly, that the minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility, that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. Secondly, if the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.). Finally, the conclusion that is reached is that efforts should be made to agree on a reasonable lowest age limit that is applicable internationally.

Having accepted that states must set a minimum age of criminal responsibility and since none of the aforementioned international instruments set an actual minimum age of criminal responsibility, the issue that now falls to be discussed is the appropriate age limit to ensure adequate protection for the rights of the child, while still allowing society to be protected from crime.

With reference to the Beijing Rules, Flattery comments that age limits are necessarily arbitrary since there is no “magical transformation into a mature and responsible adult on a child’s 12th birthday, nor a sudden understanding of what constitutes a serious offence at the age of 10”.⁵² He continues to acknowledge the necessity of a minimum

⁵¹ Rule 4.1

⁵² Flattery “The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System” available at www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf at 30 [Accessed 05 February 2011].

threshold and suggests that it should be accompanied by an element of flexibility to take into account a child's actual understanding.⁵³

Odongo comments on the Beijing Rules that while a minimum age of criminal responsibility would always be considered arbitrary; the choice of such an age must never be arbitrary.⁵⁴ The United Nations Committee on the Rights of the Child (the body responsible for monitoring the implementation of the CRC) has continuously expressed its concern with regard to the vast international differences in setting a minimum age.⁵⁵ It has called for a comprehensive juvenile justice policy reflecting a more unified approach to the question of minimum age (amongst other things) so as to lessen the disparities amongst the States Parties and to raise international standards.⁵⁶

As a result of these concerns, the definitive guide to implementing effective child justice was released by the Committee on the Rights of the Child in the form of General Comment No. 10 of 2007: Children's Rights in Juvenile Justice ("*General Comment No 10*").

General Comment No. 10 elaborates on the nature of States Parties' obligations in terms of Article 37 and Article 40 of the CRC and the implementation of these obligations at national level. It also addresses the subject presently under discussion: the minimum age of criminal responsibility. In this particular regard, the obligation is clearly stated and based on universal wisdom: A fixed minimum age of criminal responsibility of not lower than 12 years was established and it was recommended that State Parties should progressively raise the minimum age where possible.⁵⁷ General Comment No. 10 provides that any age below 12 years is unacceptably low. The inference can therefore be drawn that such a low age is also in contravention of the

⁵³ *Id.*

⁵⁴ Odongo (2007) "A Case for Raising the Minimum Age of Criminal Responsibility: Challenges Regarding the Age of Criminal Responsibility" available at <http://www.africanchildforum.org>. [Accessed 11 August 2011].

⁵⁵ An assessment of the many Reports and Concluding Observations of the Committee on the Rights of the Child makes the foundation of this submission plain.

⁵⁶ General Comment No. 10 at paragraph 4.

⁵⁷ *Ibid* at paragraph 32.

CRC. This was an important milestone as it put an end to the issue as to what the international standard for an appropriate minimum age of criminal responsibility should be.

Prior to the release of General Comment No. 10, the Committee on the Rights of the Child held a Day of General Discussion on the Administration of Juvenile Justice on 17 November 1995 ("*Day of General Discussion*") where the conclusion was reached that the general principles of the CRC had not been sufficiently reflected in national legislation or practice. With particular reference to non-discrimination concern was expressed about instances where criteria of a subjective and arbitrary nature (such as with regard to the attainment of puberty, the age of discernment or the personality of the child) still prevailed in the assessment of the criminal responsibility of children and in deciding upon the measures applicable to them.⁵⁸ It was stressed that criminal responsibility should be based on objective criteria.⁵⁹

It is submitted by Sloth-Nielsen that while General Comment No. 10 does not constitute binding international law, it can nevertheless play a significant role in the interpretation of the issue of an acceptable minimum age of criminal responsibility at the domestic level.⁶⁰

The objective of establishing a reasonable minimum age of criminal responsibility and ensuring that children under that age are not criminalised was reaffirmed in August 2010 when the Interagency Panel on Juvenile Justice Reform ("*the IPPJ*") published its Criteria for the Design and Evaluation of Juvenile Justice Reform.⁶¹ The desired outcomes of this objective were identified as follows:⁶²

⁵⁸ Summary Report on Committee on the Rights of the Child Day of General Discussion, available http://www2.ohchr.org/english/bodies/crc/docs/discussion/juvenile_justice.pdf. at paragraph 218. [Accessed 08 August 2011].

⁵⁹ *Ibid* at paragraph 226.

⁶⁰ Sloth-Nielsen (2007) 9(1) *Article 40* 1 at 1.

⁶¹ Interagency Panel on Juvenile Justice Reform 37.

⁶² *Id.*

- The population is informed and supportive of the change in the age of criminal responsibility;
- The law is amended and a minimum age is set or the previous minimum age is raised.
- Law enforcement and justice officials are aware of the minimum age of criminal responsibility and respect it in their decisions.
- Children under the age of criminal responsibility are not treated as criminals.

2.4 WHAT DOES THIS MEAN WITH RESPECT TO THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN SOUTH AFRICA?

Protecting children by establishing a nationally and internationally acceptable minimum age of criminal responsibility that actively recognises their diminished understanding is a fundamental component of a child-centered approach to the issue of children who find themselves in trouble with the law.⁶³

In 2000, ten years before the Act came into operation, the United Nations Committee on the Rights of the Child took note of South Africa's intention to raise the minimum age of criminal responsibility from 7 to 10 years.⁶⁴ The Committee on the Rights of the Child expressed its concern that a minimum age of criminal responsibility of 10 years was still relatively low and it was recommended that South Africa reassess its draft legislation on criminal responsibility with a view to increase the proposed minimum age.⁶⁵

The preamble to the Act refers to South Africa's obligations as a party to international instruments relating to children yet, with respect to the minimum age of criminal capacity, we are not in compliance with the requirements of international law.

⁶³ Flattery "The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System" at 22 [Accessed 05 February 2011].

⁶⁴ United Nations Committee on the Rights of the Child (2000) *Concluding Observations of the Committee on the Rights of the Child, South Africa*. UN Doc. CRC/C/15/Add.122(2000) at paragraph 17. Available at <http://www1.umn.edu/humanrts.crc/southafrica2000.html>. [Accessed on 20 August 2011].

⁶⁵ *Id.*

It is submitted that the current minimum age of criminal capacity is entirely out of line with other responsibilities and rights in society. To name but a few examples, a person must be 18 to vote, enter into a contract in their own name or obtain a driver's license. A person must be 16 to consent to sexual acts and must be older than 12 to obtain contraceptives. Twelve is the earliest age at which children are considered to be of sufficient maturity and to have the mental capacity to understand the benefits, risks, social and other implications of medical treatment.⁶⁶ This is the age at which a child's autonomy enjoys sufficient recognition by the law and when they are deemed to have sufficient capacity to make decisions regarding their own health. It is submitted that this stands in strong contrast with the very low age of 10 at which the law is prepared to accept that children are mature enough to make concrete decisions about right and wrong and to act in accordance with those decisions. It is further submitted that the fact that there is no other legal or social arena where we bestow complete responsibility on children when they are 10 years of age⁶⁷ is an indication that the current minimum age of criminal capacity in South Africa is inappropriately low.

2.5 CONCERNS ABOUT RAISING THE MINIMUM AGE OF CRIMINAL CAPACITY

A concern that is often raised with regard to raising the minimum age of criminal responsibility is the possibility that, if the minimum age were set too high, children would be exploited by adult criminals using them to commit crimes.⁶⁸ However, it is submitted that this problem is sufficiently addressed by not only our case law⁶⁹ but also by section 92 of the Child Justice Act which provides that if it comes to the attention of any court official or probation officer that a child has been used by an adult to commit a crime, that adult must be reported to the South African Police Service for the consideration of a prosecution, and the fact of the adult's involvement must be taken into account when determining the treatment of the child in the child justice system.⁷⁰

⁶⁶ Section 129 of the Children's Act 38 of 2005.

⁶⁷ Gillen (2006) 12(2) *Child Care in Practice* 129 at 135.

⁶⁸ Sloth-Nielsen in Davel (ed) (2000) 399.

⁶⁹ *S v Dikant* 1948 1 SA 693 (O) at 700; *S v Van Dyk* 1969 1 DS 601 (K) at 603E and *S v Pietersen* 1983 4 SA 904 (ECD) at 910H offer but a few examples of this.

⁷⁰ "92. *Children used by adults to commit crime*

Another concern seems to be that, if the minimum age of criminal capacity is increased from 10 to 12 years, those children who might benefit from the rebuttable presumption of *doli incapax* who are between the ages of 12 and 14 would be disadvantaged. In this regard it is submitted that the children in this age group very rarely benefited from the rebuttable presumption. Burchell restates the well known principle in our law: The closer the accused child is to 14 years of age, the weaker the presumption of incapacity becomes.⁷¹

Furthermore, should children who are between the ages of 12 and 14 not possess criminal capacity for mental health reasons they may still be dealt with in terms of section 77 and section 78 of the Criminal Procedure Act 51 of 1977⁷² which deal with mental illness and criminal responsibility affecting an accused person's ability to understand criminal proceedings.

Section 77 of the Criminal Procedure Act provides that the accused must be capable of understanding the proceedings so as to make a proper defense. In terms of section 78, an accused person who suffers from a mental illness or mental defect which makes him incapable of appreciating the wrongfulness of his act or incapable to act in accordance with such appreciation, shall not be criminally responsible for such an act.

It is submitted that these sections still apply to *all* children since they have not been repealed or amended by the implementation of the Child Justice Act.⁷³ Children who are older than the minimum age of criminal capacity may therefore still be referred for an

If it comes to the attention of any court official or probation officer that a child has been used by an adult to commit a crime referred to in Schedule 1 or 2 of the Criminal Procedure Act, that adult must be reported to the South African Police Service for the consideration of a prosecution as provided for in section 141(1)(d), read with section 305(1)(c), of the Children's Act, and the fact of the adult's involvement must be taken into account when determining the treatment of the child in the child justice system."

⁷¹ Burchell (2008) 367. In this regard Snyman (2002) 180 cites *S v Nkamo* 1956 1 PH H28 (R); *S v K* 1956 3 SA 353 (A) at 358 and *S v Ngobese* 2002 1 SACR 562 (W) 564f-g as examples from our case law.

⁷² Hereinafter "*the Criminal Procedure Act*".

⁷³ Skelton & Badenhorst (2011) *Research Report on the Criminal Capacity of Children in South Africa: International Developments & Considerations for a Review* 23.

evaluation in terms of the aforesaid provisions of the Criminal Procedure Act should they lack criminal capacity.

Finally, it is submitted that should all the other elements necessary for accountability be present in the cases of children in the age group between 12 and 14 years, they will not be held responsible for their offences in a manner that differs from the current practice. In other words, these children will still be diverted away from the criminal justice system (in all but serious cases) and imprisonment of children below the age of 14 will still not be a sentencing option.⁷⁴

2.5 CONCLUSION

It is submitted that in order for South Africa to comply with the obligations it incurred in terms of international law, the minimum age of criminal capacity must be raised to the internationally accepted standard of 12 years.

It is further submitted that it has been shown that the presumption of *doli incapax* weakens the closer the child gets to 14 and children who lack criminal capacity due to factors other than their age may avoid liability due to the increase in the minimum age since they may still be dealt with in terms of section 77 and section 78 of the Criminal Procedure Act.

⁷⁴ Section 77(1)(a) of the Act.

CHAPTER THREE

THE PRESUMPTION OF *DOLI INCAPAX*

3.1 INTRODUCTION

Unfortunately, at common law the *doli incapax* presumption did not offer the protection to children that it was intended to. A practice had developed in the lower courts whereby the state used the child's own parent or guardian to prove that the child accused of committing an offence had criminal capacity at the time the alleged offence was committed.⁷⁵ The parent or guardian of the accused child (who had to accompany the child in terms of the then applicable section 73(3) and section 74 of the Criminal Procedure Act) was called to confirm the age of the child and to confirm that the child knew the difference between right and wrong and could make this distinction at the time of commission of the alleged offence.⁷⁶

It has also been noted that when the test to rebut the presumption of *doli incapax* was applied in practice, it focused more on the first leg of the test, i.e. whether the child could distinguish right from wrong and the second leg of the test, namely whether the child could act in accordance with what he understood to be wrong, was often ignored.⁷⁷

The common law pertaining to the criminal capacity of children younger than 14 years was amended by section 7 of the Act.⁷⁸ In terms of section 7(2) of the Act, a child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that the child has criminal capacity in accordance with section 11 of the Act.

⁷⁵ Van Dokkum 1994 7(2) *South African Journal on Criminal Justice* 213 at 214.

⁷⁶ *Ibid* at 213.

⁷⁷ Van Oosten and Louw "Children, Young Persons, and the Criminal Law" in Robinson (ed) (1997) 125; Snyman (2002) 179.

⁷⁸ Section 7(3) of the Act.

3.2 *DOLI INCAPAX* IN INTERNATIONAL LAW

In General Comment No. 10, the Committee on the Rights of the Child commented that the use of two minimum ages of criminal responsibility such as is occasioned by the retention of the rebuttable presumption for certain categories of children is in contravention of Article 2 of the CRC in that it is discriminatory.⁷⁹ It was noted that the presumption of *doli incapax* is not only confusing but also leads to children being treated differently according to their age, maturity and the nature and quality of the rebuttal evidence adduced by the prosecution.⁸⁰ The Committee notes further that, in practice, this results in the use of the lower age limit in cases of more serious crimes.⁸¹

The use of a “split” minimum age, such as occasioned by the *doli incapax* presumption, where a finding on the criminal capacity of child is largely based on an assessment of the maturity of the child, is regarded as wholly unacceptable.⁸² The Committee on the Rights of the Child commented that since this assessment of the maturity of the child leaves much to the discretion of the court, often without requiring the services of a psychological expert, this may result in discriminatory practices.⁸³

The Committee on the Rights of the Child also expressed its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally

⁷⁹ Article 2 of the CRC provides as follows:

“1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

⁸⁰ Community Law Centre 2008(10)(1) Article 40 8 at 9.

⁸¹ General Comment No. 10 at paragraph 30.

⁸² Community Law Centre 2008(10)(1) Article 40 8 at 9.

⁸³ General Comment No. 10 paragraph 16.

responsible. It was strongly recommended that States Parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.⁸⁴

3.3 THE CURRENT PROVISIONS OF THE ACT RELATING TO THE CRIMINAL CAPACITY OF CHILDREN 10 YEARS OR OLDER BUT YOUNGER THAN 14 YEARS

There are also several issues which raise concern when the practical application of the provisions of the Act relating to the rebuttable presumption of *doli incapax* is considered.

The South African Law Commission recommended the retention and codification of the rebuttable presumption in their Report on Juvenile Justice. This recommendation was largely based on the mantle of protection that the presumption was intended to provide to children between the ages of 10 and 14 years.⁸⁵ However, the presumption was criticised as being rebutted too easily in practice and therefore did not offer the protection that it was intended to.⁸⁶

One would thus expect the Act to strengthen the presumption of *doli incapax* so as to make it more difficult to rebut and effectively offer the children to which it applies the intended protection. Unfortunately the Act does not go any further than the common law to set clearly defined principles against which the criminal capacity of a child between the ages of 10 and 14 can be evaluated. Instead, the Act sets certain requirements with respect to the consideration of a child's criminal capacity. The process that must be followed in terms of the Act when considering the criminal capacity of a child between the ages of 10 and 14 years is as follows:

The Act provides that an accused child must be assessed by a probation officer unless assessment has been dispensed with by the prosecutor, and the reasons for such

⁸⁴ General Comment No. 10 paragraph 34.

⁸⁵ Report at paragraph 3.10 to 3.14.

⁸⁶ Snyman (2002) 180.

dispensing have been recorded by the inquiry magistrate.⁸⁷ In terms of section 35(g) of the Act, one of the purposes of the assessment, in the case of a child who is 10 years or older but under the age of 14 years, is to express a view on whether expert evidence on the criminal capacity of such a child would be required.

After completion of the assessment, the probation officer must compile the assessment report with recommendations on the various issues set out in the Act, including the possible criminal capacity of the child who is 10 years or older but under the age of 14 years, as well as measures to be taken in order to prove criminal capacity.⁸⁸ The assessment report must be submitted to the prosecutor before commencement of the preliminary inquiry.⁸⁹ In the case of an arrest, the preliminary inquiry must be conducted within 48 hours after the arrest.⁹⁰ The prosecutor, who is required to decide whether or not to prosecute the child, must take the following factors into account:⁹¹

- the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
- the nature and seriousness of the alleged offence;
- the impact of the alleged offence on any victim;
- the interests of the community;
- a probation officer's assessment report;
- the prospects of establishing criminal capacity if the matter were to be referred to a preliminary inquiry;
- the appropriateness of diversion; and
- any other relevant factors.

In terms of section 43, one of the objectives of the preliminary inquiry, which is in essence the first appearance of the child in a lower court, is to consider the assessment report of the probation officer, with particular reference to the view of the probation

⁸⁷ Section 34 of the Act.

⁸⁸ Section 40(1) of the Act.

⁸⁹ Section 40(5) of the Act.

⁹⁰ Section 43(3)(b) of the Act.

⁹¹ Section 10(1) of the Act.

officer regarding the criminal capacity of the child, if the child is 10 years or older but under the age of 14 years, and whether an evaluation of the criminal capacity of the child by a suitably qualified person is necessary. The Act furthermore states that the inquiry magistrate must consider the assessment report of the probation officer when making a decision regarding the criminal capacity of the child, before diverting the matter during the preliminary inquiry.⁹²

The inquiry magistrate or child justice court may, of its own accord, or on the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child by a suitably qualified person (psychiatrist or psychologist).⁹³ Section 11(5) provides that, where the inquiry magistrate has found that the child's criminal capacity has not been proved beyond a reasonable doubt he or she may, if it is in the best interest of the child, cause the child to be taken to a probation officer for any further action in terms of section 9 of the Act.

In instances where the prosecutor decided to prosecute the child to which the presumption of *doli incapax* applies and the matter has not been diverted by the prosecutor or the inquiry magistrate, the matter must be referred to the child justice court for plea and trial.

In terms of section 11(1) of the Act, at the trial of the matter the State must prove beyond reasonable doubt the capacity of a child who is 10 years or older but under the age of 14 years to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation.

It bears mention that although the onus rests on the State to prove the criminal capacity of an accused child, there is no legal obligation to prove it prior to putting charges to the child or at any specific stage during the prosecution.⁹⁴

⁹² Section 11(2)(a) of the Act.

⁹³ Section 11(3) of the Act read with Government Notice No. 273 GG 33092 of 01 April 2010: Child Justice Act (75/2008): Determination of Persons or Category or Class of Persons Competent to Conduct the Evaluation of Criminal Capacity of a Child and the Allowances and Remuneration.

⁹⁴ Badenhorst (2011) Occasional Paper No. 10 *Overview of the Implementation of the Child Justice Act 2008 (Act 75 of 2008): Good Intention, Questionable Outcomes* at 28.

The child justice court must also, when making a decision on the criminal capacity of the child in question for purposes of plea and trial, consider the assessment report of the probation officer and all evidence placed before it prior to conviction, which evidence may include a report of an evaluation on criminal capacity by a suitably qualified person.⁹⁵

It is submitted that the aforesaid requirements cause concern in their practical application.

3.4 PROBLEMS RELATING TO THE PRACTICAL APPLICATION OF THE ACT WITH RESPECT TO THE *DOLI INCAPAX* PRESUMPTION

3.4.1 THE WORDING OF SECTION 11(1) OF THE ACT

With regard to the substantive requirements for the proof of criminal capacity of children between the ages of 10 and 14 years, it appears that the common law was amended by the Act in a way that is to the detriment of the children involved.

As aforesaid, section 11(1) of the Act requires proof beyond reasonable doubt that a child between the ages of 10 and 14 years had the capacity to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation. However, Burchell sets out the common law test to determine a child's criminal capacity as: Did the child in question *in the circumstances* have the capacity to appreciate the wrongfulness of his conduct and if so, did the child have the capacity (or ability) to act in accordance with this appreciation?⁹⁶

From the above it becomes plain that the first leg of the common law test is not whether the accused was capable of appreciating the difference between right and wrong in an

⁹⁵ Section 11(2)(b) of the Act.

⁹⁶ Burchell (2008) 366. Emphasis added.

abstract sense (as prescribed by the test in section 11(1) of the Act), or even whether the child was capable of appreciating that it is generally wrong to commit conduct of the type concerned in the case, but whether the accused child was capable of appreciating the wrongfulness of his or her *own* unlawful conduct.⁹⁷ Thus, the relevant test is one that is focused on the specific child under the specific circumstances of the case and with reference to the child's specific conduct.⁹⁸ The accused child's insight about the difference between right and wrong should be assessed in relation to the child's own particular unlawful conduct, at the time and in the context in which it occurred.⁹⁹ It is not sufficient merely to establish that the child was capable of distinguishing between right and wrong in an abstract or general sense which seems to be the test that is set out in section 11(1) of the Act. Walker comments that the former approach imposes more stringent requirements of proof upon the state than the latter, which, in turn, served to enhance the protection afforded to the child by the (common) law and to advance the child's best interests. That protection that is now no longer afforded to children 10 years or older but younger than 14 years.¹⁰⁰

Walker submits that the *doli incapax* presumption as it currently stands in our law offends the best interest of the child principle and the equality provisions contained in section 9 of the Constitution.¹⁰¹

3.4.2 ASSESSMENT TO ESTABLISH CRIMINAL CAPACITY BY MENTAL HEALTH PROFESSIONALS IN TERMS OF SECTION 11(3) OF THE ACT

Badenhorst writes of an increase in the number of children 10 years or older but under the age of 14 years who are referred for an evaluation of their criminal capacity.¹⁰² This may be ascribed to the uncertainty amongst some magistrates regarding whether or not

⁹⁷ Walker (2011) 1 *South African Journal of Criminal Justice* 33 at 35.

⁹⁸ Labuschagne (2003) 28(1) *Tydskrif vir Regswetenskap* 17 at 28.

⁹⁹ *Ibid* at 38.

¹⁰⁰ Although it can be argued that the common law principles pertaining to the rebuttal of the presumption of *doli incapax* still applies to children between the ages of 10 and 14, a full discussion of the merits of this argument falls outside the scope of this research.

¹⁰¹ Walker (2011) 1 *South African Journal of Criminal Justice* 33 at 41.

¹⁰² Badenhorst (2011) 29.

they may still decide on the criminal capacity of children without referring the child for an evaluation to a psychiatrist or psychologist.¹⁰³ Their uncertainty being caused by the fact that these magistrates are of the opinion that they are not trained to determine the criminal capacity of children.¹⁰⁴

Government Notice (GNR273) sets out the categories of people who can provide these assessments in compliance with section 97(3) of the Act. In terms thereof, two categories of mental health professionals namely psychologists and psychiatrists are deemed to be competent to conduct the evaluation of the criminal capacity of a child referred to in section 11(3). The Department of Health has therefore been requested to assist with these assessments.¹⁰⁵

In this regard, Pillay identifies four challenges in the application of section 11(3) of the Act¹⁰⁶ and it is submitted that these can furthermore be divided into two categories:

3.4.2.1 PRACTICAL CHALLENGES: A LACK OF RECOURCES

With regard to the practical challenges with the application of section 11(3), Pillay expresses concern about a lack of proper facilities to conduct such evaluations in a specialised area of service.¹⁰⁷

Secondly, since these evaluations form the subject matter of a specialised area of practice, the services of scarce mental health professionals are required.¹⁰⁸ The insufficient capacity with respect to the availability of psychologists and psychiatrists on a national level is a cause for concern.¹⁰⁹ The Department of Health has indicated that it

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Badenhorst (2011) 30.

¹⁰⁶ Pillay (2011) "General Approach and Challenges in the Forensic Mental Health Assessment of Criminal Capacity in Children" *Workshop Report on Criminal Capacity of Children* 9.

¹⁰⁷ *Id.*

¹⁰⁸ Sloth-Nielsen in Davel (ed) (2000) 401.

¹⁰⁹ *Ibid* at 399.

has a shortage in psychologists and psychiatrists and that it is not currently in a position to assist with the evaluation of the criminal capacity of children.¹¹⁰

In the event that private psychologists and psychiatrists assist in the assessment of the criminal capacity of children between the ages of 10 and 14, they charge expert witness fees and the budgets allocated for these evaluations are quickly exhausted.¹¹¹

Of further concern is that the categories of persons who are identified in Government Notice (GNR 273) as being qualified to undertake the assessment of the criminal capacity of a child are authorised to do this based on their profession. Section 97(3) of the Act does not require any specific skills or experience in respect of child development.¹¹² This means that social workers and other professionals who may have the necessary expertise are excluded, while psychiatrists and psychologists who may have no specialisation in child development and whose services are more costly are authorised.¹¹³

The burden that is placed on both the human resources of the Department of Health and the financial resources of the Department of Justice causes difficulty in complying with the 30 day time period set in section 11(4) of the Act and results in undue delays in the finalisation of cases involving children 10 years or older but under the age of 14 years whose criminal capacity are uncertain.¹¹⁴

¹¹⁰ Badenhorst (2011) 30.

¹¹¹ *Id.*

¹¹² Waterhouse (2011) 13(2) *Article 40* 1 at 5.

¹¹³ *Id.*

¹¹⁴ Section 11(4) provides that "If an order has been made by the inquiry magistrate or child justice court in terms of subsection (3), the person identified to conduct an evaluation of the child must furnish the inquiry magistrate or child justice court with a written report of the evaluation within 30 days of the date of the order."

3.4.2.2 CLINICAL PRACTICE CHALLENGES: DIFFICULTY IN ASSESSMENT

Pillay further identifies the need for certainty about what the criminal capacity examination entails and a need for training in this regard.¹¹⁵

While mental health professionals have long been involved in the mental health assessments of adults, their assessments of children accused of committing offences are less well documented and there is little research available on the forensic mental health examination to determine children's criminal capacity.¹¹⁶

It seems that, at this stage, these assessments cannot be executed with the necessary clarity and precision¹¹⁷ since the current approaches to criminal capacity examinations suggest that there is no standard checklist approach.¹¹⁸

Willows is of the opinion that it would be rare to find a 10 year old that is incapable of knowing the difference between right and wrong:¹¹⁹

"The two pillars of the capacity argument are problematic in psychology. It is difficult to find a time when a person knew what they were doing is wrong but nonetheless acted against it. In law, if on the day before you turn 10 years you kill you will not be charged, and if you kill 3 days after you turn 10 years, in law there has been a fundamental developmental difference which could have devastating consequences. There is nothing like that in psychology where development is regarded as a process which differs from individual to individual."¹²⁰

¹¹⁵ Pillay (2011) 10.

¹¹⁶ Pillay (2006) 18(1) *Journal of Child and Adolescent Mental Health* 17 at 17.

¹¹⁷ *Id.*

¹¹⁸ Pillay (2011) 11.

¹¹⁹ Willows (2011) "The Child Justice Act 75 of 2008: Issues in Assessment" *Workshop Report on Criminal Capacity of Children* 14.

¹²⁰ *Id.*

The unfortunate reality is that the tests that are currently being used to determine whether or not a child between the ages of 10 and 14 has criminal capacity are mostly borrowed from the West and are definitely not based on the South African reality.¹²¹ This problem is intensified by the fact that South Africa is a multi-lingual and multi-cultural country of extremes. Expert knowledge in the area of child development is mostly confined to urban-based experts who are proficient in one or two languages only and who are often associated with materially privileged population groups.¹²² It is submitted however that they fall into the minority of the South African population. The majority of the people in our country live in great poverty. It is submitted that these factors make the accurate evaluation of the criminal capacity of children from poor rural communities much more problematic.

It is submitted that the uncertainty on the part of psychiatrist and psychologists about what exactly the test for criminal responsibility should entail is likely to lead to arbitrary results in practice.

3.4.3 OVER RELIANCE ON PROSECUTORIAL DISCRETION

When making a decision on whether or not to prosecute a child who is 10 years or older but younger than 14, the prosecutor must consider the prospects of establishing criminal capacity if the matter were referred to a preliminary inquiry.¹²³

If the prosecutor decides that the criminal capacity of a child between the ages of 10 and 14 is likely to be proved, he or she may either divert the matter if the child is alleged to have committed an offence referred to in Schedule 1 of the Act or refer the matter to a preliminary inquiry.¹²⁴ If the prosecutor decides that criminal capacity is not likely to be

¹²¹ Pillay (2011) 11.

¹²² Sloth-Nielsen in Davel (ed) (2000) 399.

¹²³ Section 10(1)(f) of the Act.

¹²⁴ Section 10(2)(a) of the Act.

proved, he or she may cause the child to be taken to a probation officer to be dealt with in terms of section 9 of the Act.¹²⁵

The phrases “*prospects of establishing criminal capacity*” and “*criminal capacity is likely to be proved*” are too vague and do not provide for a standardised approach to the issue of criminal capacity either. Since there is no measure of accountability on the part of the prosecutor in the form of a requirement to record the reasons for his or her decision when he or she comes to the conclusion that the prospects are good and that criminal capacity will likely be proved, the risk for arbitrary results and discriminatory practices is substantial.¹²⁶

The question has to be posed: Is this not the exact situation that was envisioned by the Committee on the Rights of the Child when it voiced its concerns on the application of the rebuttable presumption of *doli incapax*?¹²⁷ The danger of an over reliance on discretion leading to arbitrary, discriminatory results.

3.5 CONCLUSION

Since there exists no standardised test (adapted or developed to be applied under South African conditions) to determine whether a child has criminal capacity and to effectively rebut the presumption of *doli incapax*, it is submitted that the law leaves too much to the individual discretion of the various role players and in particular the discretion of the prosecutor and the mental health practitioner conducting the section 11(3) evaluation. It is submitted that the current practice is likely to lead to arbitrary results and inequality amongst children in the affected age group.

¹²⁵ Section 10(2)(b) of the Act.

¹²⁶ Skelton and Badenhorst (2011) 24.

¹²⁷ See General Comment No. 10 paragraph 16.

CHAPTER FOUR

CHILDREN BELOW THE NEW MINIMUM AGE OF CRIMINAL CAPACITY

4.1 INTRODUCTION

By increasing the minimum age of criminal capacity to a standard minimum age of 12 years and removing the presumption of *doli incapax*, some of the uncertainty is taken out of the consequences that will follow for children who find themselves in conflict with the law. Children who are 12 years or older will be held responsible for their offences and should be dealt with in accordance with the provisions of the Act while keeping in mind the preamble, objects and guiding principles of the Act. However, setting a higher minimum age cannot be separated from the question as to how the children who are below the minimum age and who might find themselves in conflict with the law, are dealt with in our legal system.¹²⁸ This issue will be explored in the remainder of this chapter.

4.2 CHILDREN BELOW THE MINIMUM AGE OF CRIMINAL CAPACITY IN INTERNATIONAL LAW

In dealing with the impact of the proposed reforms to bring national laws pertaining to the minimum age of criminal responsibility in line with the CRC and its related instruments, the IPPJ noted that the implementation of the change will be influenced by the manner in which criminal incidents involving children under the minimum age of criminal responsibility are treated as it warned that children under the age of criminal responsibility may still be deprived of their liberty, but without the legal guarantees offered by the justice system.¹²⁹

¹²⁸ Issue Paper paragraph 3.16 – 3.18.

¹²⁹ *Id.*

Thus, when considering the appropriate minimum age of criminal responsibility it is also important that, the lack of due process guarantees is indeed the main concern arising from the establishment of a minimum age of criminal responsibility that is too high.¹³⁰ For children under the minimum age, it then often means the non-intervention of the justice system in which, alone, those due process guarantees are safeguarded, in theory at least. Hearings and decisions outside that system, including those by administrative bodies, are not bound by the same rules and may, it is feared, easily take on an arbitrary nature.¹³¹

4.3 THE EFFECT OF RAISING THE MINIMUM AGE OF CRIMINAL CAPACITY AND ABOLISHING THE PRESUMPTION OF *DOLI INCAPAX* ON DIVERSIONS

In matters involving children who are accused of committing minor offences (contained in Schedule 1 of the Act) a prosecutor may divert such a child¹³² if the prosecutor is satisfied that, in the case of a child who is 10 years or older but under the age of 14 years, the criminal capacity of the child is likely to be proved.¹³³ Furthermore, in order for a child accused to be diverted away from the criminal justice system at a preliminary inquiry or at a trial, the child must acknowledge responsibility for the offence and there must be a *prima facie* case against the child.¹³⁴ It is submitted that such a *prima facie* case includes evidence that the child is *doli capax*.

Children below the minimum age are conclusively presumed not to have the capacity to infringe the penal law.¹³⁵ In terms of the Act a child who commits an offence while below the minimum age of criminal capacity cannot be prosecuted for that offence.¹³⁶ Accordingly, children who are 10 years or older but younger than the new minimum age

¹³⁰ UNICEF Innocenti Digest on Juvenile Justice 1998 available at <http://www.unicefirc.org/publications/pdf/degest3e.pdf> at 4. [Accessed 05 March 2011].

¹³¹ *Id.*

¹³² By selecting any level one diversion option contained in section 53(3) of the Act.

¹³³ Section 41(1)(b) of the Act. It is important to note that in terms of section 41(1)(a) of the Act, the prosecutor must also be satisfied that the factors referred to in section 52(1)(a) to (d) of the Act have been complied with before the child may be diverted.

¹³⁴ Section 52(1)(a) and section 52(1)(c) of the Act.

¹³⁵ Burchell (2008) 366; Article 40(3)(a) of the CRC.

¹³⁶ Section 7(1) of the Act.

of criminal capacity (12) will no longer be suitable candidates for any diversion orders. In short, the prosecutor can never be satisfied that the child's criminal capacity is likely to be proved and there can never exist a *prima facie* case against the child since the child cannot, in law, acknowledge responsibility for his or her actions. However, it is submitted that this is a good outcome of raising the minimum age of criminal capacity and doing away with the presumption of *doli incapax*.

Badenhorst identifies three reasons why certainty about the criminal capacity of a child is essential before diversion is considered.¹³⁷

In the first instance the diversion of a child who does not have the necessary criminal capacity to be prosecuted for his or her offence would be entirely unfair and unmerited.¹³⁸ This becomes even more obvious when the consequences of non-compliance with a diversion order are considered. In terms of section 58 of the Act, a child who fails to comply with a diversion order may be arrested or summonsed to reappear in the child justice court.¹³⁹ If it is found that that the failure is due to the child's fault the prosecutor, in the case where the matter was diverted by a prosecutor in terms or at a preliminary inquiry, may decide to proceed with the child's prosecution.¹⁴⁰ The child justice court, in the case where the matter was diverted by the court, may record the acknowledgement of responsibility made by the child as an admission and proceed with the trial.¹⁴¹ Alternatively, where the matter does not go to trial, the prosecutor or child justice court must decide on another diversion option which is more onerous than the diversion option originally decided on.¹⁴²

Secondly, where a diversion order from the level two diversion options (which applies to the more serious offences as referred to in Schedule 2 and Schedule 3 to the Act)¹⁴³ is

¹³⁷ Badenhorst (2011) 29.

¹³⁸ *Id.*

¹³⁹ Section 58(1) of the Act.

¹⁴⁰ Section 58(4)(a) of the Act.

¹⁴¹ Section 58(4)(b) of the Act.

¹⁴² Section 58(4)(c) of the Act.

¹⁴³ Section 53(2)(b) of the Act.

selected in respect of a child who is under the age of 14 years, the order may operate for a period of up to 24 months.¹⁴⁴ Under these circumstances, certainty about the accused child's criminal capacity is crucial since it would be entirely unfair and unreasonable to expect a child, who does not have the necessary criminal capacity to comply with a diversion order for such a long time.¹⁴⁵

Finally, Badenhorst submits that the effective implementation of the Act may be hampered should the situation arise where children are diverted when they do not possess the criminal capacity required for their prosecution.¹⁴⁶ A child who does not have the criminal capacity to accept responsibility for his or her actions is much less likely to comply with a diversion order and this may result in an opinion amongst prosecutors and magistrates that diversion is ineffective.¹⁴⁷ This may lead to a situation where children who are truly in need of the rehabilitation that diversion orders offer, are prosecuted for their offences.

4.4 WHAT SHOULD THE CONSEQUENCES BE FOR CHILDREN WHO COME INTO CONFLICT WITH THE LAW WHILE THEY ARE BELOW THE MINIMUM AGE OF CRIMINAL CAPACITY?

It is submitted that it has been shown that it is not in the best interest of these children to enter the child justice system at the tender age of 10 and 11 and that they should be shielded from this by prohibiting their prosecution and raising the minimum age of criminal responsibility. However, it will also not be in their best interest to simply leave them be and to allow them to continue with their unlawful behaviour until they are eventually old enough to be held criminally liable. It is submitted that in order to achieve the objects of the Act, the causes of the child's offending behavior must be examined and dealt with.

¹⁴⁴ Section 53(6)(a)(i) of the Act.

¹⁴⁵ Badenhorst (2011) 29.

¹⁴⁶ Id.

¹⁴⁷ Id.

To this end, the institution of welfare proceedings has been recommended in the past.¹⁴⁸ In many instances a Children's Court inquiry may be entirely appropriate, given that many of the children who appear before Child Justice Courts for criminal offences are living without adequate adult supervision or are street children who are no longer attending school on a regular basis and are bedraggled, unkept and ill-fed or who are children that, by virtue of their offences, display behaviour that can be described as uncontrollable.¹⁴⁹

It is, however, submitted that not all children who are below the minimum age of criminal capacity and who offend should be referred to a Children's Court for an inquiry because of the possibility that these children could then be subjected to lengthy and indeterminate placements in institutions which they may not leave of their own free will.¹⁵⁰ Although such placements will only be ordered after a Children's Court inquiry, it is submitted that a criminal trial and the due process guarantees that it implies may provide better protection.

Section 9 of the Child Justice Act contains the manner in which children below the minimum age of criminal capacity (thus children aged below 10 years) are currently dealt with. It is submitted that these provisions offer sufficient protection to the child below the minimum age of criminal capacity to address the aforementioned concerns.

Where a police official has reason to believe that a child suspected of having committed an offence is under the minimum age of criminal capacity, he or she may not arrest the child and must immediately hand the child over to his or her parents or an appropriate adult or a guardian or if no parent, appropriate adult or a guardian is available or if it is not in the best interests of the child to be handed over to the parent, an appropriate adult or a guardian, to a suitable child and youth care centre and he or she must notify a probation officer.¹⁵¹ A probation officer who receives such a notification from a police

¹⁴⁸ Issue Paper paragraph 3.19.

¹⁴⁹ Sloth-Nielsen in Davel (ed) (2000) 398.

¹⁵⁰ *Ibid* at 399.

¹⁵¹ Section 9(1) of the Act.

official must assess the child as soon as possible but not later than seven days after being notified.¹⁵²

After assessing the child, the probation officer may take one of the following actions:¹⁵³

- refer the child to the Children's Court;
- refer the child for counselling or therapy;
- refer the child to an accredited programme designed specifically to suit the needs of children under the age of 10 years;
- arrange support services for the child;
- arrange a meeting, which must be attended by the child, his or her parent or an appropriate adult or a guardian, and which may be attended by any other person likely to provide information. The purpose of the meeting being to assist the probation officer to establish more fully the circumstances surrounding the allegations against a child and to formulate a written plan appropriate to the child and relevant to the circumstances.¹⁵⁴
- alternatively, the probation officer can decide to take no action.

The probation officer must record, with reasons the outcome of the assessment and which of the aforesaid actions he or she decided to take.¹⁵⁵ Any action taken by the probation officer does not imply that the child is criminally liable for the incident that led to the assessment.¹⁵⁶

This written plan that the probation officer formulates must, at least:¹⁵⁷

- specify the objectives to be achieved for the child and the period within which they should be achieved;

¹⁵² Section 9(2) of the Act.

¹⁵³ Section 9(3)(a) of the Act.

¹⁵⁴ Section 9(4) of the Act.

¹⁵⁵ Section 9(6) of the Act.

¹⁵⁶ Section 9(3)(b) of the Act.

¹⁵⁷ Section 9(5) of the Act.

- contain details of the services and assistance to be provided for the child;
- specify the persons or organisations to provide the services and assistance, as prescribed; and
- state the responsibilities of the child and of the parent, appropriate adult or a guardian.

In the event of a child failing to comply with any obligation imposed on him or her, including compliance with the written plan referred to above, the probation officer must refer the matter to a Children's Court to be dealt with in terms of Chapter 9 of the Children's Act 38 of 2005¹⁵⁸ for the child to be dealt with as a child in need of care and protection.¹⁵⁹ When reference is had to the relevant provisions of the Children's Act, it is clear that the best interest of the child remains the determining factor when decisions on the way forward in the child's life are made.

Placement of the child in a child and youth care centre is one of the many orders that a Children's Court may make and can be identified as the main cause of concern with respect to children below the minimum age of criminal capacity who commit offences. This is due to the fact that legal representation is only guaranteed by the Child Justice Act while the Children's Act does not demand the same. Therefore the due process guarantees offered in the child justice arena is stronger.

However, section 158 of the Children's Act makes plain that a Children's Court may issue an order placing a child in the care of a child and youth care centre only if another option is not appropriate.¹⁶⁰ Furthermore, provision is made in the Children's Act for the most appropriate placement of a child which will best suit the needs of the particular child.

It is therefore submitted that the many options available to deal with a child who offends while he or she is below the minimum age of criminal capacity allows for the best option

¹⁵⁸ Hereinafter "the Children's Act".

¹⁵⁹ Section 9(7) of the Act.

¹⁶⁰ Section 158(1) of the Children's Act.

to be chosen with respect to each individual child. It does not necessarily mean that the child will end up in a child and youth care centre since, if both the Child Justice Act and the Children's Act are properly applied, this option would only be applied in cases where is absolutely necessary.

4.5 CONCLUSION

It is submitted that the Act provides sufficient protection in its provisions relating to the manner in which children below the minimum age of criminal capacity are dealt with. Although children between the ages of 10 and 12 will no longer be candidates for diversion, the Act envisions other measures to address the causes of the child's offending behaviour in order to play a rehabilitative role through early intervention strategies.

CHAPTER FIVE

THE POSITION IN SELECTED FOREIGN JURISDICTIONS

5.1 INTRODUCTION

In the first instance, it is important to note that the concept of criminal responsibility does not bear the same meaning in all jurisdictions. In particular, in some countries one age hides another since the official age of criminal responsibility may not be the lowest age at which a child can be involved with the justice system because of an offence.¹⁶¹ Alternatively, the minimum age may be applicable to all offences except serious crimes.¹⁶² Yet another alternative approach exists in that some countries with low minimum ages have a system of “steps” whereby different measures are applicable for specified age groups.¹⁶³ It is therefore important to keep in mind that the minimum age of criminal responsibility in each country is in no way an automatic indication of the way a child will be dealt with after committing an offence.

In what follows the developments pertaining to the minimum age of criminal responsibility in several foreign jurisdictions which amended their legislation pursuant to ratifying the CRC will be examined.

5.2 AUSTRALIA

The laws regulating the imposition of criminal responsibility on children in Australia are, like the South African Child Justice Act, based on a child’s age and his or her knowledge of the wrongness of a criminal act. Since 2000 the statutory minimum age of

¹⁶¹ UNICEF Innocenti Digest on Juvenile Justice 1998 available at <http://www.unicefirc.org/publications/pdf/degest3e.pdf>. at 5 [Accessed 05 March 2011].

¹⁶² UNICEF Innocenti Digest at 5. The Children, Young Persons and their Families Act, 1989 of New Zealand being a case in point wherein the minimum age of criminal responsibility is set at 14 years except for murder or manslaughter where the minimum age of 10 applies together with the presumption of *doli incapax*.

¹⁶³ *Id.*

criminal responsibility is 10 years in all Australian jurisdictions.¹⁶⁴ Between the ages of 10 and 14 a further rebuttable presumption operates to deem a child incapable of committing a criminal act.¹⁶⁵ For children between the ages of 10 and 14 to be held criminally responsible for their acts, the prosecution has to prove either that the child knew that his or her act was wrong or that he or she had the capacity to know that his or her act was wrong, depending on the jurisdiction.¹⁶⁶

To rebut the presumption of *doli incapax*, according to the Australian Law Reform Commission, the prosecution must prove that the accused child knew that the criminal act which he is charged with was wrong at the time it was committed.¹⁶⁷ Urbas writes that the following basic principles have been recognised by the Australian courts as governing the operation of the presumption of *doli incapax*.¹⁶⁸

- The standard of proof for the evidence brought forward to prove that an accused child had sufficient appreciation of the wrongfulness of an act is that such evidence must be “strong and clear beyond all doubt and contradiction”.
- Secondly, the aforesaid evidence “must not consist merely of evidence of the acts amounting to the offence itself”.
- Finally, the prosecution must show that the accused child knew the particular act to be “seriously wrong, as opposed to something merely naughty or mischievous”.

Urbas submits about the problems that occur with the rebuttal of the presumption of *doli incapax* in practice that while these may seem significant evidentiary obstacles, it has been observed that in attempting to rebut the presumption of *doli incapax* the

¹⁶⁴ The last Australian jurisdiction to amend its law pertaining to the minimum age of criminal responsibility was Tasmania. Section 18(1) of its Criminal Code, 2000 reflects the minimum age of criminal responsibility as being 10 years. For an account of the laws that regulate the minimum age of criminal responsibility and the operation of the presumption of *doli incapax* in each Australian jurisdiction see Urbas G (2000) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1 at 3.

¹⁶⁵ *Ibid* at page 1.

¹⁶⁶ Mathews (2003) 5(2) *Newcastle Law Review* 65 at 66.

¹⁶⁷ Australian Law Reform Commission (1997) “Seen and Heard: Priority for Children in the Legal Process” *Australian Law Reform Commission Report No. 84* at paragraph 18.20.

¹⁶⁸ Urbas (2000) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1 at 4.

prosecution is allowed considerable evidentiary concessions whereby normally inadmissible, highly prejudicial material is deemed admissible.¹⁶⁹ According to Urbas this evidence regularly takes the form of admissions by the accused during police interviews, notably including admissions in relation to earlier acts of misconduct which is, of course, rarely admissible to prove an issue in a criminal trial.¹⁷⁰ Even where an accused makes no admissions showing a consciousness of wrongdoing, the prosecution may introduce evidence of surrounding circumstances from which such consciousness may be inferred which may include evidence of attempts to run from police or to hide the facts.¹⁷¹

Mathews submits that despite the presence of the rebuttable presumption, it rarely operates in the accused child's favour regardless of the jurisdiction the child finds himself in.¹⁷² He writes that "[w]hat originated as a protective presumption of irresponsibility to protect young offenders from harsh punishment has now been read down and often simply ignored, so that children of 10 or more are usually at best judged for normalcy for their age. If found to be of normal intelligence for their age, a child is deemed to know whether certain acts are right or wrong. This is a generic judgment of children who occupy a society featuring compulsory education and media and information saturation, and this judgment is perhaps motivated by a cynical perception of children who no longer inhabit a time of innocence for long."¹⁷³

When the aforesaid comments on the practical application of the presumption of *doli incapax* are considered it becomes obvious why Crofts writes that the validity and fairness of the rebuttable form of the presumption has been increasingly questioned in Australia in recent years.¹⁷⁴ Crofts argues for the retention of the presumption, however, his statement in his concluding remarks that the presumption and its practical

¹⁶⁹ *Id.*; Australian Law Reform Commission (1997) "Seen and Heard: Priority for Children in the Legal Process" *Australian Law Reform Commission Report No. 84* at paragraph 18.19

¹⁷⁰ Urbas (2000) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1 at 4.

¹⁷¹ *Id.*

¹⁷² Mathews (2003) 5(2) *Newcastle Law Review* 65 at 70.

¹⁷³ *Id.*

¹⁷⁴ Crofts (2003) 10(3) *Murdoch University Electronic Journal of Law* 26 at paragraph 2.

application is misunderstood¹⁷⁵ and his call to “take the presumption seriously”¹⁷⁶ indicates that the presumption of *doli incapax* is not offering Australian children between the ages of 10 and 14 the protection that was intended.

In 2005 the Committee on the Rights of the Child expressed its concern that Australia’s minimum age of criminal responsibility of 10 years is set too low¹⁷⁷ and recommended that it should bring its juvenile justice system in to line with the CRC and other United Nations standards in the field by raising the age of criminal responsibility to an internationally acceptable level.¹⁷⁸

It is submitted that South Africa currently faces the same problems with reference to our minimum age of criminal responsibility and the rebuttal of the presumption of *doli incapax* as contained in section 7 as read with section 11 of our Child Justice Act. Although the presumption is intended to act as a “protective mantle” for accused children between the ages of 10 and 14 years, its application in practice is unlikely to provide the intended protection. It is further submitted that when reference is had to the position in Australia, where provisions similar to those in South Africa have already been in operation for at least 11 years, it becomes clear that the low minimum age of criminal responsibility of 10 years together with the presumption of *doli incapax* is ineffective and causes major concerns with regard to the protection it provides to child accused between the ages of 10 and 14 years.

5.3 IRELAND

In Ireland the age of criminal responsibility is governed by the Children Act, 2001 as amended by the Criminal Justice Act, 2006.

¹⁷⁵ *Ibid* at paragraph 43.

¹⁷⁶ *Ibid* at paragraph 44.

¹⁷⁷ United Nations Committee on the Rights of the Child (2005) *Concluding Observations of the Committee on the Rights of the Child, Australia*. UN Doc. CRC/C/15/Add.268(2005). Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?Opendocument). [Accessed 12 March 2011].

¹⁷⁸ *Ibid* at paragraph 74.

In 2006 the minimum age of criminal responsibility was raised from 7 to 12 years for most offences.¹⁷⁹ No child under the age of 12 years can be charged with an offence. However, in the case of serious offences such as murder, rape or aggravated sexual assault, an exception to the aforesaid prohibition on prosecution is made for 10 and 11 year old children accused of such offences.¹⁸⁰ Furthermore, the rebuttable presumption of *doli incapax* is abolished¹⁸¹ and the consent of the Director of Public Prosecutions is required before any child under 14 years can be charged with an offence.¹⁸²

Even though the aforesaid developments were warmly welcomed in Ireland in that they indicated a revised focus on diversion from the criminal justice system, rehabilitation and of ensuring the best interest of the child. Nevertheless Flattery notes his concern that many of the developments are still incompatible with Ireland's obligations under international law.¹⁸³ With references to children between the ages of 12 and 14 accused of committing offences, Flattery submits that there has been a shift of power from the Court to the Director of Public Prosecutions in that the Court no longer rules on the capacity of the child to commit the offence in question but the discretion of the Director of Public Prosecution is relied upon to decide whether or not to prosecute the child.¹⁸⁴

The final say in any matter concerning a child accused still, however, rests with the Court as it is given the power to dismiss on its merits a case against a child if it determines that the child, having regard to the child's age and level of maturity, did not have a full understanding of what was involved in the commission of the offence.¹⁸⁵ Despite avoiding the use of the term "capacity", the Court is given the power to consider the child's actual capacity and his or her legal liability for the specific offence in question.¹⁸⁶

¹⁷⁹ Section 52 of the Children's Act, 2001 as amended by the Criminal Justice Act, 2006.

¹⁸⁰ Section 52(1) of the Children's Act, 2001 as amended by the Criminal Justice Act, 2006.

¹⁸¹ Section 52(3) of the Children's Act, 2001 as amended by the Criminal Justice Act, 2006.

¹⁸² Section 52(4) of the Children's Act, 2001 as amended by the Criminal Justice Act, 2006.

¹⁸³ Flattery "The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System" at 26.

¹⁸⁴ *Id.*

¹⁸⁵ Section 76C of the Children's Act 2001.

¹⁸⁶ Flattery "The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System" at 27.

It therefore seems that the Irish legislature attempted to mitigate the harshness of deeming the child aged 12 years and over to be fully capable of committing an offence (regardless of his actual capacity) by firstly requiring the exercise of the Director of Public Prosecutions' discretion to determine whether or not a child over 12 will be charged with an offence and secondly through the powers of the Court to dismiss the case against a child who did not have a full understanding of what was involved in the commission of the offence.

Finally, it is submitted that, although there is much to be learnt from the position in Irish law, it cannot be followed blindly. The exception created for 10 and 11 year old children who are accused of committing serious offences is not in accordance with the international standard set by the Committee on the Rights of the Child in General Comment No. 10 and in fact stands in direct contrast to paragraph 34 thereof (as referred to above) which strongly recommends that State Parties do not allow, by way of exception, the use of a lower age for serious offences.

5.4 AFRICA

Before considering the developments in selected African states, it is necessary to momentarily reflect on the progress of the African region as a whole.

Skelton writes that the ratification of international children's rights instruments, particularly the CRC and the African Charter, has undoubtedly had positive effects on the African continent in that several countries have drafted new legislation pertaining to children in recent years, particularly Uganda, Ghana, Kenya and Rwanda, Nigeria and South Africa and there are bills pending in a number of other states such as Mozambique, Namibia, Malawi and Lesotho.¹⁸⁷

¹⁸⁷ Skelton (2009) 9 *African Human Rights Law Journal* 483 at 486. Since Skelton's article was published, both Malawi and Lesotho have passed their respective Bills.

An unfortunate reality about the African region is the lack of resources which is a consistent barrier of implementation of the relevant international instruments.¹⁸⁸ Although several African countries have expressed in law a firm commitment to upholding children's rights in juvenile justice, their ability to achieve effective and consistent implementation in practice is constantly challenged.¹⁸⁹ It is submitted that South Africa is no exception in this regard and is also faced with this challenge. A consideration of an appropriate minimum age of criminal responsibility should therefore take this into account in order to arrive at a solution that would produce positive, effective and realistic results.

5.4.1 UGANDA

Uganda has been a pioneer in child justice law reform in Africa. In 1990, shortly before ratifying the CRC, the Ugandan Child Law Review Committee was appointed to draft comprehensive new legislation to regulate Uganda's child welfare system as well as situations where children come into conflict with the law.¹⁹⁰ One of the agreed principles to guide the work of the aforesaid committee was that the CRC, the African Charter and other non-binding international instruments would be the guide when legislating for children.¹⁹¹

The Ugandan Children Act, 1997, raised the minimum age of criminal responsibility from 7 years to 12 years and abolished the presumption of *doli incapax*.¹⁹²

With regard to children below the minimum age of criminal responsibility that come into conflict with the law, the Ugandan Children Act makes no clear statements but for making provision for the matter to be heard by local government councils that are mandated to take a restorative justice approach with the order they make in such

¹⁸⁸ Defense for Children International (2009) 6.

¹⁸⁹ *Id.*

¹⁹⁰ Odongo (2004) 6(2)(5) *Article 40* 8 at 9.

¹⁹¹ Ramages 2009 (11)(1) *Article 40* 6 at 7.

¹⁹² Section 88 Uganda Children Act, 1997 (Ch59).

cases.¹⁹³ Should the council fail to resolve the matter or should the matter fall outside the jurisdiction thereof, application to the Family and Children's Court for a supervision or care order must be made by a social welfare and probation officer.¹⁹⁴ A positive aspect of this approach is the mandate placed upon the probation and social welfare officer to monitor the child's progress, including continuing interaction with the child's parents while bearing in mind the wishes of the child, during placement of the child anywhere other than with the child's parents.¹⁹⁵

Odongo comments that the Ugandan law reform process reveals that the debate on raising the minimum age goes beyond the rhetoric of child rights.¹⁹⁶ Therefore, the comparative example of other countries' legislation and research into the ages and offences of children committing crimes were relevant factors that were considered before arriving at the decision to fix the minimum age of criminal responsibility.¹⁹⁷ Importantly, research into the age at which it was reasonable to expect children to fully understand the consequences of their actions and to have the maturity to resist the pressure of peers and adults, was crucial to the Ugandan Child Law Review Committee.¹⁹⁸ Odongo concludes that this is in keeping with the provisions of the Beijing Rules to the effect that, in setting the minimum age of criminal responsibility, the facts of a child's emotional, mental and intellectual maturity must be borne in mind.¹⁹⁹

However, the rationale behind Uganda's development of child justice legislation seems to be based not solely on a desire to strive toward the realisation of the ideology of children's rights but also on the Ugandan Child Law Review Committee's findings that showed that very few children under the age of 14 had been arrested and charged with serious offences during a two year period rather.²⁰⁰ The inference can therefore be

¹⁹³ Uganda Children Act, 1997 at Section 20 to 43.

¹⁹⁴ *Id.*

¹⁹⁵ Uganda Children Act, 1997 at Section 33.

¹⁹⁶ Odongo (2004) 6(2)(5) 8 at 9.

¹⁹⁷ *Id.*

¹⁹⁸ Child Law Review Committee of Uganda (1992) *Report of the Child Law Review Committee* 114

¹⁹⁹ Odongo (2004) 6(2)(5) 8 at 9.

²⁰⁰ Odongo (2007) "A Case for Raising the Minimum Age of Criminal Responsibility: Challenges Regarding the Age of Criminal Responsibility" available at <http://www.africanchildforum.org>. [Accessed 11 August 2011].

drawn that the Ugandan Child Law Review Committee based its finding, in part, on the fact that the presumption of *doli incapax* was rarely invoked by the courts in the period before reform.²⁰¹

It is unfortunate that more reliance wasn't placed on the position as pronounced in international law however, it has to be borne in mind that the Ugandan law reform process took place long before the clear guidelines that we now have at our disposal were available. Therefore, although the debates in the reform process were largely based on the local contexts of Uganda and a reference to comparative examples, it is of note that the minimum age set in Ugandan law is consistent with the Committee on the Rights of the Child's approach to the minimum age of criminal responsibility and the application of the presumption of *doli incapax* as pronounced in General Comment No. 10.²⁰²

5.4.2 SIERRA LEONE

When children's rights in Sierra Leone are considered, it should be done, bearing in mind its unfortunate history of poverty and devastating civil war that lasted for eleven years.

However, as the country rebuilds from a decade of civil war, children's rights in child justice has gained increasing attention and an enhanced focus on children becomes clear in the recent developments in policy, in the form of the National Child Justice Strategy, 2006 and in law in the form of the Child Rights Act, 2007 (*"the Child Rights Act"*).

The reform process started in 2000 when the Committee on the Rights of the Child expressed its serious concern regarding Sierra Leone's "extremely low" age of criminal

²⁰¹ Odongo (2005) *The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context* (Unpublished LLD Thesis) 187.

²⁰² *Id.*

responsibility which was set at 10 years by common law and recommended that the country reviewed its legislation and raised the minimum age accordingly.²⁰³

The Child Rights Act raised the minimum age of criminal responsibility from 10 to 14 years and brought it into line with international standards on juvenile justice including General Comment No 10.²⁰⁴

Active participation by the children of Sierra Leone is a laudable aspect of the law reform process in this country. Defense for Children International - Sierra Leone conducted a nationwide consultation with children, which included children in school, children living on the street and child offenders detained in prisons, where one of the issues discussed was the age of criminal responsibility.²⁰⁵ The report that followed from the consultation with children was then presented by two children in a national workshop organised by the government's Justice Sector Development Programme.²⁰⁶ The active participation of children was a key influence in the law reform. As Defense for Children International notes in its manual, children themselves served as effective advocates for their rights and produced convincing evidence obtained from their own experiences and because children are embedded within the society their views were seen as powerful indicators rather than being dismissed as outside critics.²⁰⁷

Unfortunately, despite the revision of the law and the progress that has been made thereunder, research conducted on the administration of juvenile justice after the Children's Rights Act came into operation shows instances of children below the minimum age of criminal responsibility being apprehended, interrogated by the police, charged with offences and convicted in court.²⁰⁸ It also implies that there is insufficient knowledge of, or a disregard for, the minimum age of criminal responsibility and the

²⁰³ United Nations Committee on the Rights of the Child *UN Committee on the Rights of the Child: Concluding Observations: Sierra Leone*, 24 February 2000, CRC/C/15/Add.116, available at: <http://www.unhcr.org/refworld/docid/3ae6afc518.html> [Accessed 24 August 2011].

²⁰⁴ Child Rights Act, 2007 Section 70. Defense for Children International (2007) 23.

²⁰⁵ Defense for Children International (2009) 35.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Audet (2010) 28.

effects thereof by the police and certain Magistrates in the country.²⁰⁹ This leads to the unfortunate situation where children below the minimum age of criminal responsibility are being put through the rigours of a criminal trial only to be discharged at the point of judgment on the basis of their low age.²¹⁰

According to the United Nations Development Programme on Human Development Index, 2005, Sierra Leone may be ranked as the second least developed country in the world.²¹¹ Despite this fact, children in conflict with the law have been put as a priority and have gained increasing attention. Mezmur writes that Sierra Leone sets a good example for other countries with considerably more resources but less political will.²¹² Since ratifying the CRC, it has enacted legislation to comply with the relevant international standards pertaining to juvenile justice and was enacted with General Comment No. 10 in mind.²¹³ It is therefore submitted that the problems that Sierra Leone faces in its child justice system have more to do with the practical application of its new legislation and less to do with incorrect ideology and can therefore be overcome by increased sensitization as to the implications of the minimum age of criminal responsibility and heightened enforcement of these implications so as to avoid children under the age of 14 being put through trial proceedings.²¹⁴

In the South African context, the legislature in Sierra Leone sets a good example in its fearless commitment to the realization of children's rights in juvenile justice and to the fulfillment of its obligations under international law in spite its constrained resources.

²⁰⁹ *Ibid* at 29 to 30.

²¹⁰ *Id.*

²¹¹ Available at <http://www.undp.org/hdro/HD.html>. [Accessed 09 August 2011].

²¹² Mezmur (2006) (8)(3) *Article 40* 11 at 12.

²¹³ Defense for Children International (2009) 6 in particular gives a clear indication that General Comment No 10 was relied upon in the process of legislative reform.

²¹⁴ Audet (2010) 30.

5.5 CONCLUSION

There are several valuable lessons to be learnt from the position in the above foreign jurisdictions.

From the Australian experience it becomes clear that the position as it currently stands (in South Africa) holds many challenges and is not likely to provide children with the required protection.

From Ireland comes a warning against the over reliance on prosecutorial discretion and creating exceptions to the applicable minimum age of criminal capacity for serious offences. This is not in accordance with international law.

Africa provides a good example of a more child centered approach which can be followed and of positive changes to domestic law in order to comply with international norms.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

The Child Justice Act sets the minimum age of criminal capacity of children at 10 years and codifies the rebuttable presumption of *doli incapax*.

Fortunately this position is not set in stone since the Act also envisions a review of the minimum age of criminal capacity with the possibility of increasing the same due to very convincing arguments that were raised during the parliamentary debates on the Act.

South Africa incurred various obligations with respect to the treatment of children, including children in conflict with the law, when it ratified the CRC. The United Nations Committee on the Rights of the Child pronounced on the minimum age of criminal capacity of children in its General Comment No. 10. It states in no uncertain terms that a minimum age of criminal capacity below the age of 12 is considered unacceptable. South Africa is failing to comply with its obligations which were incurred through the ratification of the CRC and with international practice with respect to our minimum age of criminal capacity since 10 is simply too low an age.

The Committee on the Rights of the Child also expressed its concern with the use of two minimum ages, such as is occasioned by the rebuttable presumption of *doli incapax* since this leads to discriminatory practices and arbitrary results.

In practice, the application of the *doli incapax* presumption also leads to difficulties.

In the first instance the wording in the current provision of the Act leads to an anomaly in that the test contained in the Act that applies to children between 10 and 14 years is less onerous than its common law counterpart which still applies to children who are older than 14 years. The first leg of the test ought not to be whether the accused was

capable of appreciating the difference between right and wrong in an abstract sense (as prescribed by the test in section 11(1) of the Act), or even whether the child was capable of appreciating that it is generally wrong to commit conduct of the type concerned in the case, but whether the accused child was capable of appreciating the wrongfulness of his or her *own* unlawful conduct.

Secondly, the assessment of the child by a mental health professional as envisioned in section 11(3) of the Act creates practical difficulties. The increase in the number of children referred for these assessments (due to Magistrates being uncertain about the criminal capacity provisions in the Act) has brought the lack of human and financial resources to light. The Department of Health does not have the facilities or enough psychologists and psychiatrists to conduct the assessments. Furthermore, there is no uniform model or test to be applied to the assessment of a child's criminal capacity. Therefore the results of these assessments are not standardised which increases the risk of arbitrary treatment exponentially.

Also of concern is the vague terminology used in the Act to govern prosecutorial discretion. In making a decision on whether or not to prosecute a child between the ages of 10 and 14, the prosecutor must consider "*the prospects of criminal capacity being proved*" and if he or she is of the opinion that criminal capacity is "*likely to be proved*" the matter may be diverted. It is submitted that these terms are vague and uncertain and that they result in an over reliance on the prosecutor's discretion. This may lead to arbitrary and discriminatory practices.

Should the minimum age of criminal capacity be raised to 12, the question of the manner in which children, below the "new" minimum age and who come into conflict with the law, will be dealt with must be answered. Diversion will no longer be a suitable option in dealing with children between the ages of 10 and 12 since they will not have the capacity to be held responsible for their offences.

This seems a pertinent issue since a view on the part of the general public or in parliament that these children could have been held responsible for their actions and are now “getting off scott free” might be a reason why maintaining the status quo will be supported.

It is submitted that the current provisions of the Act offers suitable alternatives to the criminal justice system for children below the minimum age of criminal capacity who offend.

The adoption of the CRC has led many of the State Parties to reconsider their child justice policies and the legislation governing them or to enact new legislation to comply with the standards of the CRC which included a review of the minimum age of criminal capacity and the application of the *doli incapax* presumption.

In Australia the situation is similar to that in South Africa. The minimum age of criminal capacity was raised from 7 to 10 years and the rebuttable presumption of *doli incapax* was retained. The difference between Australia and South Africa being that these amendments were effected in 2000 and thus before the United Nations Committee on the Rights of the Child issued its General Comment No. 10.

Ireland increased its minimum age of criminal capacity from 7 to 12 years but unfortunately created an exception in the cases of 10 and 11 year olds who are accused of committing serious offences. The rebuttable presumption of *doli incapax* was abolished.

In Africa, the adoption of the CRC also had positive effects on the minimum age of criminal capacity.

Uganda raised its minimum age of criminal capacity from 7 to 12 years and abolished the presumption of *doli incapax* in 1996.

In Sierra Leone the minimum age of criminal capacity was raised to 14 years in a process which included child participation. In the face of many challenges an attempt is made to comply with its obligations to its children under international law.

The recommendations that flow from the above are as follows:

Firstly, in order to comply with our international obligations to the children of our country and in order to protect them in a manner which takes cognisance of their young minds, the minimum age of criminal capacity must be raised to 12 years.

Secondly, in order to achieve a uniform approach with standardised outcomes which are not arbitrary or discriminatory, the rebuttable presumption of *doli incapax* must be abolished.

Finally, it is submitted that the current provisions of the Act relating to children below the minimum age of criminal capacity must be applied in order to achieve early intervention in the lives of children who are younger than 12 years and who offend in order to address the causes of their behaviour before they are old enough to be exposed to the rigours of the criminal justice system.

BIBLIOGRAPHY

STATUTES

The Child Justice Act 75 of 2008.

The Children's Act 38 of 2005.

The Constitution of the Republic of South Africa, 106 Of 1996.

The Criminal Procedure Act 51 of 1977.

REGULATIONS

Government Notice No. 273 Government Gazette No. 33092 of 01 April 2010: Child Justice Act (75/2008): Determination of Persons or Category or Class of Persons Competent to Conduct the Evaluation of Criminal Capacity of a Child and the Allowances and Remuneration.

INTERNATIONAL INSTRUMENTS

African Charter on the Rights and Welfare of the Child (1990).

Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules).

United Nations Committee on the Rights of the Child General Comment No. 10 of 2007: Children's Rights in Juvenile Justice.

United Nations Convention on the Rights of the Child (1989).

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

FOREIGN LAW

Australia : Crimes Amendment Act, 11 of 1995.

Ireland: Children Act, 24 of 2001.

Uganda: The Uganda Children Act, 1997 (Ch59).

Sierra Leone: Child Rights Act, 2007

BOOKS

Burchell J "Youth" in Burchell J (2008) *Principles of Criminal Law* Lansdowne: Juta .

Gallinetti J "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart CJ (ed) (2009) *Child Law in South Africa* Claremont: Juta.

Sloth-Nielsen J "Child Justice and Law Reform" in Davel CJ (ed) (2000) *Introduction to Child Law in South Africa* Cape Town: Juta.

Snyman CR "Toerekeningsvatbaarheid" in Snyman CR (2002) *Strafreg* Durban: Butterworths.

Van Oosten FFW and Louw AS "Children, Young Persons, and the Criminal Law" in Robinson JA (ed) (1997) *The Law of Children and Young Persons in South Africa* Durban: Butterworths.

OTHER PUBLICATIONS

Audet A (2010) *Beyond the Law: Assessing the Realities of Juvenile Justice in Sierra Leone* Defense for Children International - Sierra Leone

Australian Law Reform Commission (1997) "Seen and Heard: Priority for Children in the Legal Process" *Australian Law Reform Commission Report No. 84*

Badenhorst C (2011) Occasional Paper No. 10 *Overview of the Implementation of the Child Justice Act 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* Open Society Foundation for South Africa, Criminal Justice Initiative.

Child Law Review Committee of Uganda (1992) *Report of the Child Law Review Committee*

Defense for Children International (2007) *From Legislation to Action: Trends in Juvenile Justice Systems across 15 Countries* Defense for Children International

Defense for Children International (2009) *Advocacy Strategies Training Manual General Comment Number 10: Children's Rights in Juvenile Justice* Defense for Children International

Department of Justice and Constitutional Development International comparative information on the minimum age of criminal responsibility provided in support of the proposed raising of the minimum age of criminal capacity as provided for in the Child Justice Bill (49 of 2002).

Gallinetti J (2009) "*Getting to know the Child Justice Act*" Child Justice Alliance.

Interagency Panel on Juvenile Justice Reform (2010) "*Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes*" United Nations Office on Drugs and Crime

Janes L (2008) "*Criminal liability of minors and severity of penalties: European trends and developments*" The Howard League for Penal Reform (England and Wales).

NICRO Written Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development on the Child Justice Bill (49 of 2002). Submission made by L Muntingh (Deputy Executive Director) 01 March 2003.

Odongo G O (2005) *The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context* (Unpublished LLD Thesis)

Pillay AL (2011) "General Approach and Challenges in the Forensic Mental Health Assessment of Criminal Capacity in Children" *Workshop Report on Criminal Capacity of Children* Child Justice Alliance.

Skelton A and Badenhorst C (2011) *Research Report on the Criminal Capacity of Children in South Africa: International Developments & Considerations for a Review* Child Justice Alliance.

South African Law Commission Project 106: *Juvenile Justice* Issue Paper 9 May 1997.

South African Law Commission Project 106: *Juvenile Justice* Report August 2000.

Willows C (2011) "The Child Justice Act 75 of 2008: Issues in Assessment" *Workshop Report on Criminal Capacity of Children* Child Justice Alliance.

ARTICLES

Crofts T (2003) 10(3) "Doli Incapax: Why Children Deserve its Protection" *Murdoch University Electronic Journal of Law* 26

Community Law Centre 2008(10)(1) "The Minimum Age of Criminal Responsibility: 10 or 12 years?" *Article* 40 8

Ferreira N (2008) 16 "Putting the Age of Criminal and Tort Liability into Context: A Dialogue between Law and Psychology" *The International Journal of Children's Rights* 29

Gillen J (2006) 12(2) "The Age of Criminal Responsibility: The Frontier between Care and Justice" *Child Care in Practice*, 129.

Labuschagne JMT (2003) 28(1) "Die status van fiksies in die regstaat: opmerkinge oor ouderdomsgrense en die kind as dader en slagoffer in die strafreg." *Tydskrif vir die*

Regswetenskap 19.

Mathews B (2003) 5(2) "Time, Difference and the Ethics of Children's Criminal Responsibility" *Newcastle Law Review* 65

Mezmur B D (2006) (8)(3) "A Small Country's Big Efforts at Law and Policy Reform" *Article* 40 11

Odongo G O (2004) 6(2)(5) "Child Justice Law Reform Development in Africa and International Standards of the Rights of the Child" *Article* 40 8

Pillay AL (2006) 18(1) "Criminal capacity in children accused of murder: challenges in forensic mental health assessment." *Journal of Child and Adolescent Mental Health* 17.

Ramages K A 2009 (11)(1) "The Minimum Age of Criminal Responsibility in Selected African States" *Article* 40 6

Skelton A (2009) 9 "The Development of a Fledgling Child Rights Jurisprudence in Eastern and Southern Africa based on International and Regional Instruments" *African Human Rights Law Journal* 483

Skelton A (2009) 22 "Fear for children or fear of children: Child Justice Bill breaches the divide" *Acta criminologica* 1.

Sloth-Nielsen J (2007) 9(1) "A New Vision for Child Justice in International Law" *Article* 40 1

Urbas G (2000) "The Age of Criminal Responsibility" *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1

Van Dokkum N (1994) 7(2) "Unwelcome Assistance: Parents Testifying Against Their Children" *South African Journal on Criminal Justice* 213.

Walker S (2011) 24(1) "The Requirements of Criminal Capacity in Section 11(1) of the new Child Justice Act, 2008: A Step in the Wrong Direction" *South African Journal on Criminal Justice* 33.

Waterhouse S (2011) 13(2) "Parliament Reviews the Implementation of the Child Justice Act" *Article 40* 1.

WEBSITES

Flattery J "The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System" available at www.nuigalway.ie/law/GSLR/2010/Vol4GSLR%20-%20Flattery.pdf at 30 [accessed 05 February 2011]

Odongo G O (2007) "A Case for Raising the Minimum Age of Criminal Responsibility: Challenges Regarding the Age of Criminal Responsibility" available at <http://www.africanchildforum.org>. [accessed 11 August 2011].

UNICEF Innocenti Digest on Juvenile Justice 1998 available at <http://www.unicef-irc.org/publications/pdf/degest3e.pdf> at 4. [accessed 05 March 2011].

United Nations Committee on the Rights of the Child (2000) *Concluding Observations of the Committee on the Rights of the Child, South Africa*. UN Doc. CRC/C/15/Add.122(2000). Available at <http://www1.umn.edu/humanrts.crc/southafrica2000.html>. Accessed on 20 August 2011.

United Nations Committee on the Rights of the Child *UN Committee on the Rights of the Child: Concluding Observations: Sierra Leone, 24 February 2000*, CRC/C/15/Add.116, available at: <http://www.unhcr.org/refworld/docid/3ae6afc518.html> [accessed 24 August 2011].

United Nations Committee on the Rights of the Child (2005) *Concluding Observations of the Committee on the Rights of the Child, Australia*. UN Doc. CRC/C/15/Add.268(2005). Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?Opendocument). Accessed 12 March 2011].

United Nations Development Programme on Human Development Index, 2005. Available at <http://www.undp.org/hdro/HD.html>. [accessed 09 August 2011].

Summary Report on Committee on the Rights of the Child Day of General Discussion, available http://www2.ohchr.org/english/bodies/crc/docs/discussion/juvenile_justice.pdf at paragraph 218. [accessed 08 August 2011].

CASES

Attorney General, Transvaal v Additional Magistrate for Johannesburg 1924 AD 421

Centre for Child Law v The Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae) 2009 (2) SACR 477 (CC).

R v George 2 EDC 392.

R v Lourie (1892) 9 SC 432.

S v Dikant 1948 1 SA 693 (O).

S v K 1956 3 SA 353 (A).

S v Kenene 1946 EDL 18

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)

S v Ngobese and others 2002 (1) SACR 562 (SCA).

S v Nkamo 1956 1 PH H28 (R).

S v Nkosi 2002 (1) SACR 135 (W).

S v Pietersen and others 1983 (4) SACR 904 (ECD).

S v S 1977 (3) SA 305 (O)

S v Van Dyk 1969 1 DS 601 (CPD)

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