

# The Criminal Capacity of Child Offenders in South Africa Revisited

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## **LIST OF ABBREVIATIONS**

ACRWC	African Charter on the Rights and Welfare of the Child
CJA	The Child Justice Act
CRC	United Nations Convention on the Rights of the Child
SACJ	South African Journal of Criminal Justice
SALJ	South African Law Journal
SALRC	South African Law Reform Commission

## **ABSTRACT**

Criminal capacity concerns the ability of individuals to understand the implications of their actions related to the commission of an offence. The consideration of criminal capacity for children, however, is determined by their age. The minimum age of criminal capacity of a child in South Africa is currently at ten years and as provided for by Section 8 of the Child Justice Act it must be reviewed within five years of commencement of the Act.

Since the coming into operation of the Child Justice Act in April 2010, the necessary information required for the review of the minimum age of criminal capacity has not yet been gathered completely. The Committee on the Rights of the Child (the United Nations Committee responsible for monitoring the implementation of the UNCRC) then decided on conducting a workshop on criminal capacity with the prospect of viewing the diverse debates put forward regarding the minimum age of criminal responsibility. It also aimed to contemplate the hurdles faced during evaluation of criminal capacity, to deliberate on solutions and the authority responsibility for conducting evaluations of criminal capacity of children in instances where rebuttable presumption was concerned. This was done so as to minimize the inconsistencies between State parties around the issue and to raise international standards.

The aim of this study is to determine whether the time has come for South Africa to review its current practice/standards on the age of criminal capacity hence the research question: To what extent are the laws relating to the criminal capacity of child offenders in South Africa, aligned with international standards?

**Key words:** Criminal capacity and child offenders.

## **ABSTRAK**

Toerekeningsvatbaarheid het betrekking op die vermoë van individue om die implikasies van hul optrede met betrekking tot die pleging van 'n misdryf te verstaan. Die oorweging van toerekeningsvatbaarheid vir kinders, word egter deur hul ouderdom bepaal. Die minimum ouderdom van toerekeningsvatbaarheid vir 'n kind in Suid-Afrika staan tans op tien jaar en soos bepaal deur artikel 8 van die Wet op Kinderegeregtheid moet dit binne vyf jaar van die inwerkingtreding van die Wet hersien word.

Sedert die inwerkingtreding van die Wet op Kinderegeregtheid in April 2010, was die nodige inligting wat vereis word vir die hersiening van die minimum ouderdom van toerekeningsvatbaarheid nog nie heeltemal versamel nie. Die Komitee het toe besluit om 'n werkswinkel oor toerekeningsvatbaarheid uit te voer, met die vooruitsigte dat dit die diverse debatte, met betrekking tot die minimum ouderdom van strafregtelike aanspreeklikheid, wat na vore gebring was kon aanhoor. Dit het verder ook gemik om die struikelblokke wat tydens evaluering van toerekeningsvatbaarheid na te dink, om te beraadslaag oor oplossings en gesag verantwoordelikheid in die uitvoering van toerekeningsvatbaarheid evaluering vir kinders in gevalle waar daar 'n weerlegbare vermoede betrokke is. Dit is gedoen om ten einde die teenstrydighede tussen staat partye rondom die kwessie te verminder en om internasionale standarde te verhoog.

Die doel van hierdie studie is dus om te bepaal of die tyd aangebreek het vir Suid-Afrika om sy huidige praktyke/standarde te hersien rakende die ouderdom van toerekeningsvatbaarheid en vandaar die navorsingsvraag: Tot watter mate is die wette met betrekking tot die toerekeningsvatbaarheid van kinder oortreders in Suid Afrika, in lyn met internasionale standarde?

**Sleutelwoorde:** Toerekeningsvatbaarheid en jeugdige oortreders.

# Chapter 1 Introduction

## 1.1 Context

The lowest age at which a state or international community holds its children liable for alleged criminal acts in a court of law is referred to as the minimum age for criminal capacity.<sup>1</sup> Criminal capacity concerns the ability of an individual to understand the implications of his/her actions related to the commission of an offence.<sup>2</sup> The consideration of criminal capacity for children,<sup>3</sup> however is determined by their age.<sup>4</sup> Following the adoption of the *United Nations Convention on the Rights of the Child* (hereinafter referred to as the CRC),<sup>5</sup> South Africa undertook a review of its set minimum age for criminal capacity along the lines of the CRC.<sup>6</sup>

South Africa ratified the CRC in 1995 and during that period its minimum age of criminal capacity was at seven years and it was regarded as being the lowest in the world.<sup>7</sup> The criminal capacity of children was governed by common law presumptions and it was

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<sup>1</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009.

<sup>2</sup> Snyman *Criminal Law* 2002 158 – 179.

<sup>3</sup> For purposes of this dissertation the following definition of child will be used. The *Constitution of the Republic of South Africa, 1996* (hereinafter referred to as the "Constitution"), defines a child as any person under the age of 18. However, the *Child Justice Act, 2008* (hereinafter referred to as CJA) recognizes that in certain instances, it would be fair to apply its provisions to persons older than 18 years and therefore, the Child Justice Act creates three distinct categories of children and persons:

- i. Children under ten years old at the time of the commission of the offence are not criminally liable and the Act sets out procedures that apply to children under 10 who commit a crime. These include referral to a children's court or counselling if necessary.
- ii. Children over ten years old but younger than 18 years at the time of arrest or when the summons or written notice was served on them are the ones who are specifically targeted by the Act and who they aim to protect.
- iii. Persons between the ages of 18 and 21 who committed the offence when they were under 18 years of age are recognized as still young and can benefit from the procedures in the Act.

<sup>4</sup> Snyman *Criminal Law* 2002 158 – 179.

<sup>5</sup> United Nations Convention on the Rights of the Child 1989.

<sup>6</sup> Skelton *Acta Juridica* 1996 180-186.

<sup>7</sup> It has been pointed out that this is one of the lowest ages of commencement of criminal capacity in the world. Skelton; *Acta Juridica*; 1996 180-186.

from there that this age came from.<sup>8</sup> These common law presumptions provided that every child below the age of seven was irrebuttably presumed to be *doli incapax*,<sup>9</sup> and such a child could never be prosecuted.<sup>10</sup> For children between the ages of seven and 14 years, they were rebuttably presumed to be *doli incapax*.<sup>11</sup> It was up to the prosecution to prove that at the time of the commission of the offence, the child had the required criminal capacity.<sup>12</sup> Thus, the onus rests on the prosecution to rebut the *doli incapax* presumption.<sup>13</sup>

## 1.2 Background

There have been concerns raised by The Committee on the Rights of the Child (the United Nations Committee responsible for monitoring the implementation of the UNCRC) on how there are substantial international differences when it comes to setting a minimum age.<sup>14</sup> As a means to address the issue of minimum age, the Committee called for a comprehensive juvenile justice policy which was aimed at tackling the issue and reveal a united approach when dealing with setting a minimum age.<sup>15</sup> This was done so as to minimize the inconsistencies between State parties around the issue and to raise international standards.<sup>16</sup>

An inter-sectoral workshop was conducted in 1990 at the University of Pretoria where strong support of the notion of raising the minimum age of criminal capacity from seven

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<sup>8</sup> It had to be identified whether, at the time of his or her unlawful conduct, the accused in question was capable, firstly, of appreciating the wrongfulness of that conduct commonly referred to as the 'insight' leg of the test and was capable, secondly, of acting in accordance with that appreciation commonly referred to as the 'self-control' leg of the test.

<sup>9</sup> Deemed incapable of forming the intent to commit a crime or tort, especially by reason of age (under seven years old).

<sup>10</sup> Burchell *Principles of Criminal Law* 3<sup>rd</sup> ed 2005 358.

<sup>11</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance, 2009 18.

<sup>12</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance, 2009 18.

<sup>13</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance, 2009 18.

<sup>14</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30.

<sup>15</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009.

<sup>16</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009.

years was maintained.<sup>17</sup> The rebuttable presumption for children under the age of 14 years was also to be preserved which would enable the State to ascertain whether child actually had the required criminal capacity.<sup>18</sup> The South African Law Reform Commission (hereinafter referred to as SALRC) drafted the *Child Justice Bill* 49 of 2002 (hereinafter referred to as the Child Justice Bill) and in its body several alternatives and characteristics relating to criminal capacity were deliberated on.<sup>19</sup>

Among the aspects recommended by the Child Justice Bill was that of the raising of the minimum age of criminal capacity from seven to ten years while retaining the rebuttable presumption for those ten and older but under 14 years.<sup>20</sup> The recommendations were mostly acknowledged so there was no need for debates regarding the matter although arguments arose from a few critics who believed the minimum age of criminal responsibility should continue to rest at seven years.<sup>21</sup> In 2002 the Child Justice Bill was presented in Parliament.

The CRC fails to set a specific minimum age of criminal capacity but instead encourages State Parties to establish a fixed minimum age.<sup>22</sup> The United Nations Committee on the Rights of the Child (hereinafter referred to as the Committee) indicated in 2007 in the *United Nations General Comment No. 10 Children's Rights in Juvenile Justice* (hereinafter referred to as General Comment 10) that a minimum age of criminal capacity of less than 12 years is perceived not to be internationally acceptable by the Committee.<sup>23</sup>

Moreover the Committee also reflected that they did not prefer the Committee method of using a 'presumption' but rather strongly commended for the State Parties to set a

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<sup>17</sup> Gallinetti *Child Justice in South Africa: Children's Rights under Construction* 2006 8.

<sup>18</sup> Gallinetti *Child Justice in South Africa: Children's Rights under Construction* 2006 8.

<sup>19</sup> Gallinetti *Child Justice in South Africa: Children's Rights under Construction* 2006 8.

<sup>20</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

<sup>21</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

<sup>22</sup> Article 40(3) (A) UNCRC.

<sup>23</sup> General Comment No. 10 Children's Rights in Juvenile Justice Para 32.

minimum age that does not permit the use of a lower age even through the use of exceptions.<sup>24</sup> This demonstrates the Committee's preference of a clear single age below which prosecution of a child cannot be effected.

The rebuttable presumption of criminal capacity for children has existed for decades and the problem it faces is its application when dealing with children.<sup>25</sup> One such example of this is the common law exercise that existed in the past in which the rebuttal of criminal capacity was established by calling of the parent and questioning them on their child's ability to determine between right and wrong.<sup>26</sup> An affirmative answer was then viewed as a sign of refuting the presumption of criminal capacity.<sup>27</sup> The courts were formerly dependent on this confirmation obtained from the parent to determine whether the child possessed the necessary criminal capacity when the crime was committed.<sup>28</sup>

The Child Justice Alliance maintained that in order for the rebuttable presumption to be retained, the law had to provide satisfactory evidence rather than depending on the evidence provided by a parent in coming up with a resolution of criminal capacity of a child.<sup>29</sup> In 2006 "A Child Justice Alliance" conference took place and the Committee criticized the approach that was being taken regarding criminal capacity by the Child Justice Bill.<sup>30</sup>

An attempt was made to convince South Africa to agree to setting a higher minimum age that was not less than 12 years old.<sup>31</sup> In 2008 the Child Justice Bill was again taken up by Parliament and this time the Child Justice Alliance resolved to support the

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<sup>24</sup> General Comment No. 10 Children's Rights in Juvenile Justice Para 34.

<sup>25</sup> Van Oosten and Louw *Children, Young Persons and the Criminal Law* (1997) 125.

<sup>26</sup> Van Oosten and Louw *Children, Young Persons and the Criminal Law* (1997) 125.

<sup>27</sup> Van Oosten and Louw *Children, Young Persons and the Criminal Law* (1997) 125.

<sup>28</sup> Van Oosten and Louw *Children, Young Persons and the Criminal Law* (1997) 125.

<sup>29</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

<sup>30</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

<sup>31</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

provision of the Bill which maintained the rebuttable presumption of criminal capacity for children between ten years and older but under 14 years.<sup>32</sup> It, however, motivated the Alliance members to submit written and oral presentations indicating their diverse opinions on the matter of criminal capacity.<sup>33</sup>

Among the proposals put forward by the Alliance, several members recommended 12 years and others 14 years as a minimum age.<sup>34</sup> Some opted for maintaining the presumption and others on eliminating the presumption and deciding on adopting a single age of 12 or 14 years.<sup>35</sup> Open and participative deliberations related to the issue were held by the Committee as it prepared to deliberate on the diverse options put forward.<sup>36</sup> Excessive deliberation was to be made as the presumption was regarded as flexible and distinct hence substantial while having a single minimum age was straightforward.<sup>37</sup>

The Parliament had to then finally come to the conclusion that it did not have adequate statistics on the type and number of crimes committed by ten, 11, 12 and 13 year olds.<sup>38</sup> After conducting consultations it was decided that within five years after implementation of the *Child Justice Act* 75 of 2008 (hereinafter referred to as the CJA), after having obtained more information the Parliament would deliberate further on raising the minimum age of criminal capacity.<sup>39</sup>

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<sup>32</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

<sup>33</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

<sup>34</sup> South African Law Commission Discussion Paper 79 Juvenile Justice Project 106 at 97.

<sup>35</sup> South African Law Commission Discussion Paper 79 Juvenile Justice Project 106 at 97.

<sup>36</sup> South African Law Commission Discussion Paper 79 Juvenile Justice Project 106 at 101.

<sup>37</sup> South African Law Commission Discussion Paper 79 Juvenile Justice Project 106 at 106.

<sup>38</sup> Section 96(4) of the CJA.

<sup>39</sup> Section 8 of the CJA.

### 1.3 *Problem statement*

Since the coming into operation of the CJA in April 2010, the necessary information required for the review of the minimum age of criminal capacity has not yet been gathered completely.<sup>40</sup> The Committee then decided on conducting a workshop on criminal capacity with the prospects of viewing the diverse debates put forward regarding the minimum age of criminal capacity.<sup>41</sup> It also aimed to contemplate the hurdles faced during evaluation of criminal capacity, to deliberate on solutions and the authority responsibility for conducting evaluations of criminal capacity of children in instances where rebuttable presumption was concerned.<sup>42</sup>

In view of this background, this study seeks to determine whether the time has come for South Africa at all to review its current practice/standards on the age of criminal capacity. As such, the main research question is as follows: to what extent are the laws relating to the criminal capacity of child offenders in South Africa aligned with international standards?

In attempting to answer this question, the study addresses the following sub-questions that feed into the main research question:

- i) What are the international trends on the age of criminal capacity?
- ii) Historically, how has South Africa addressed the issues of age in criminal capacity and how does it compare to international standards?
- iii) What factors should the South African Law Reform Commission consider when determining whether the age of criminal capacity must be amended/ changed in South Africa?

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<sup>40</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

<sup>41</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

<sup>42</sup> Justice Alliance Report of the Workshop on Criminal Capacity of Children 2011.

This study is a literature study and desktop based. It relies on the review of primary and secondary sources dealing with the criminal capacity of child offenders which include relevant textbooks, case law, law journals, International Conventions, legislation and internet sources. Research in theory will be adopted as it involves an inquiry into conceptual bases of legal rules, principles or doctrines and provides stimulus and intellectual infrastructure for advancements in law through legislative, judicial and administrative process.<sup>43</sup>

The reason for choosing this approach for the methodology was because qualitative research provides a thorough explanation and description to a problem or circumstance.<sup>44</sup> An in-depth analysis approach is usually taken when dealing with situations the only challenge being that the method does not attempt to quantify results.<sup>45</sup> Its objective is to afford an account of the research topic that is complete and comprehensive.<sup>46</sup>

#### 1.4 *Chapter outline*

The mini-dissertation is divided into four parts. Apart from the introduction, the mini dissertation analyses in chapter two the international benchmarks on the age of criminal capacity as they are espoused in the CRC; *General Comment 10; United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (hereinafter referred to as The Beijing Rules); *African Charter on the Rights and Welfare of the Child, 1990* (hereinafter referred as ACRWC). This is done for the purpose of outlining the standards that South Africa as a signatory to these international standards must adhere to. Chapter three contextualises the historical development of criminal capacity of children in South Africa and its current orientation. The last chapter analyses the

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<sup>43</sup> <http://www.google.com>: *Research methods- Some notes to Orient you.*

<sup>44</sup> Diem K *Choosing Appropriate Research Methods to Evaluate Educational Programs.*

<sup>45</sup> <http://www.experiment-resources.com/different-research-methods.html>.

<sup>46</sup> <http://www.experiment-resources.com/different-research-methods.html>.

problems inherent in South Africa's current positioning of children's criminal capacity and it goes on to make recommendations on how this could be addressed.

## Chapter 2      International Trends and Guiding Principles

### 2.1 *Introduction*

International instruments serve as authoritative guiding principles in relation to how children in conflict with the law should be dealt with.<sup>47</sup> This framework comprises treaties, inter-state agreements and also instruments of 'soft law' both binding and non-binding but having a direct impact on children who come into conflict with the law.<sup>48</sup> Section 39(1) of the Constitution provides that a court may consider international law when interpreting the Bill of Rights as well as foreign law.<sup>49</sup> Furthermore a reasonable interpretation of the legislation that is consistent with international law should be of preference when interpreting any legislation as stipulated in Section 233.<sup>50</sup>

This chapter highlights the various International Instruments that provide guidelines regarding the establishment of a minimum age for criminal capacity and the developments regarding criminal capacity and implementation it entails. There are a number of international instruments that deal with child-related issues.<sup>51</sup> Those that deal specifically with the determination of criminal capacity of children are discussed in this chapter.

#### 2.1.1 *Age of criminal capacity*

The 20<sup>th</sup> century has seen a development in international law focusing more on children promoting an evolution of the concept of childhood.<sup>52</sup> International law provides for a combination of basic principles upon which a juvenile justice system should be based.

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<sup>47</sup> Davel *Introduction to Child Law in South Africa* 2000 199.

<sup>48</sup> Davel *Introduction to Child Law in South Africa* 2000 199.

<sup>49</sup> *Constitution of the Republic of South Africa, 1996.*

<sup>50</sup> *Constitution of the Republic of South Africa, 1996.* When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

<sup>51</sup> Davel *Introduction to Child Law in South Africa* 2000 199.

<sup>52</sup> Van Bueren *International documents on children* Save the Children 1993 172.

The first purpose is that it is done so as to encourage of the well-being of children; to ensure that children are handled in a manner that is balanced to both their circumstances and to the offence committed;<sup>53</sup> and another objective is that the concept of criminal capacity should be linked to the age where children appreciate the wrongfulness of their crimes and are able to understand the consequences of their actions.<sup>54</sup>

In order for the development of a separate child justice system one of the key principles to be put in place is the establishment of a minimum age below which a child shall be presumed not to have the necessary capacity to infringe the law.<sup>55</sup> When the concept of criminality is being deliberated on, childhood is considered to be of great significance.<sup>56</sup>

## ***2.2 International/Regional instruments***

### ***2.2.1 United Nations Convention on the Rights of the Child***

International law is identified as a 'revolution' for child justice, the primary reason being two extensive articles on child justice that are found in the CRC.<sup>57</sup> The CRC is an important document when it comes to dealing with children's rights. It combines and clarifies all children's human rights provided for in other international instruments and then offers a set of guiding principles that determine the way in which we view children.<sup>58</sup>

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<sup>53</sup> Van Bueren *the International Law on the Rights of the Child* 1995 172.

<sup>54</sup> Van Bueren *the International Law on the Rights of the Child* 1995 173.

<sup>55</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments & Considerations for Review* (2012) 31.

<sup>56</sup> Article 40(3) (a) of the CRC.

<sup>57</sup> Skelton and Tshehla *International Instruments pertaining to child justice in South Africa* Monograph No 150 2008. Article 37 and 40 of the CRC.

<sup>58</sup> Skelton and Tshehla *International Instruments pertaining to child justice in South Africa* Monograph No 150 2008.

The CRC provides a framework that is extensive on how juvenile justice should be dealt with and Articles 37 and 40 refer directly to juvenile justice.<sup>59</sup> The CRC should, however, be read in its entirety because the rights are intertwined and one cannot separate juvenile justice from all other developmental issues concerning children.<sup>60</sup> Article 37 of the CRC is fundamental to the rights of children in conflict with law as it gives special emphasis to the fact that no child should be subjected to torture, cruel, inhuman or degrading treatment or punishment.<sup>61</sup>

Article 40 deals with the administration of juvenile justice. It sets out a child-centred approach and high standards that are provided for in Article 40(1):

State parties recognize the right of every child alleged as, accused of or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.<sup>62</sup>

The second part of article 40(1), however, suggests a more restorative justice approach when dealing with children as it provides for reintegration and the child assuming a constructive role in society. Due process rights are afforded to every child accused of a criminal offence and they are set out in Article 40(2).<sup>63</sup> Once combined with sections

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<sup>59</sup> Skelton *developing a juvenile justice system for South Africa: International instruments and Restorative justice* 1996 182.

<sup>60</sup> Skelton *developing a juvenile justice system for South Africa: International instruments and Restorative justice* 1996 182.

<sup>61</sup> Du Toit 2006 17 in Skelton and Tshehla *International Instruments pertaining to child justice in South Africa* Monograph No 150 2008.

<sup>62</sup> Article 40(1) of the CRC.

<sup>63</sup> Skelton *developing a juvenile justice system for South Africa: International instruments and Restorative justice* 1996 182.

28(1) (g) and 35 of the Constitution these provisions provide a protective shield for children charged with crimes in South Africa.<sup>64</sup>

If written into law, such provisions are developed and refined into a process that then aligns with Article 40(3) of the CRC which enforces a duty on states to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law.<sup>65</sup> Such a duty is imposed on South Africa because it ratified the CRC meaning that it undertook to develop a legal framework and infrastructure focused on dealing with children suspected or accused of committing crimes.<sup>66</sup>

State parties to the CRC are obliged by Article 40(3(a) to establish a minimum age at which children are said to lack criminal capacity.<sup>67</sup> The Beijing Rules which are a resolution made by the United States on the treatment of juvenile prisoners and offenders by member states also echo the same principle in its Rule 4 and go on to add that the minimum age should not be fixed at too low an age. They state that the minimum age for criminal responsibility shall not be fixed at too low an age level, keeping in mind the facts of emotional, mental and intellectual maturity.<sup>68</sup> Though

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<sup>64</sup> 28. (1) Every child has the right—  
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—  
(i) kept separately from detained persons over the age of 18 years; and  
(ii) treated in a manner, and kept in conditions, that take account of the child's age;  
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and  
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict  
35. Arrested, detained and accused persons.

<sup>65</sup> Skelton *developing a juvenile justice system for South Africa: International instruments and Restorative justice* 1996 182.

<sup>66</sup> Davel *Introduction to Child Law in South Africa* 2000 199.

<sup>67</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009.

<sup>68</sup> Rule 4 of the Beijing Rules.

guidelines are provided neither of these instruments set an actual age for the minimum age of criminal responsibility.<sup>69</sup>

### 2.2.2 *General Comment No 10 on Juvenile Justice*

As a response, General Comment No. 10 on Juvenile Justice was released. It turned out to be a significant breakthrough as it managed to regulate the appropriate age for the minimum age of criminal capacity.<sup>70</sup> State parties provided the Committee with reports that confirmed the presence of an extensive range of minimum ages when it came to criminal capacity.<sup>71</sup> They observed a variation of ages ranging from a low 7 or 8 years, to the acceptable high standards of 14 or 16 years but still a few State Parties recognize the usage of two minimum ages of criminal capacity.<sup>72</sup>

Where a child commits a crime and he/she is above the lower minimum age but below the higher minimum age, the presumption is that they are criminally accountable if the essential maturity needed exists.<sup>73</sup> Such maturity is evaluated at the discretion of the court/judge without the need for a psychological specialist to conduct it. What this then entails is that in the event of a serious crime being committed, the lower minimum age is used.<sup>74</sup> This practice is found to be usually unclear as much is left to the discretion of the court/judge leading to discriminatory practices. As a result of such issues arising from the extensive range of minimum ages of criminal capacity, the Committee finds it

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<sup>69</sup> Rule 4 of the Beijing Rules recommends that facts of emotional, mental and intellectual maturity have to be taken into consideration when setting a minimum age of criminal capacity and thus the beginning of MACR shall not be fixed at too low an age level. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level.

<sup>70</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30-35.

<sup>71</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30.

<sup>72</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30.

<sup>73</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30.

<sup>74</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30.

essential to afford State Parties with clear regulations and references on the minimum age of criminal capacity.<sup>75</sup>

A fixed minimum age of 12 years and constantly increasing it to a higher age level was recommended by the Committee.<sup>76</sup> They determined that a minimum age of criminal capacity below the age of 12 years was not internationally acceptable.<sup>77</sup> State parties are advised by the Committee not to place their minimum age of criminal capacity to any age below 12 years.<sup>78</sup> Instead by placing it at 14 or 16 years adds to the establishment of a juvenile justice system that handles children who have infringed the law, thereby providing an alternative to judicial proceedings.<sup>79</sup>

This is provided for in Article 40 (3) (b) of the CRC and is aimed at imparting respect for children's rights and legal safeguards put in place to protect them.<sup>80</sup> Where a child under the minimum age of criminal capacity has committed a crime, State Parties are urged to notify the Committee in their reports on how such children are handled when they are alleged/ have come into conflict with penal law.<sup>81</sup> They are supposed to make known the legal protections that are offered to guarantee fair and just treatment for such children as that of children above the minimum age of criminal capacity.<sup>82</sup>

There is apprehension observed from the Committee regarding the exercise of exemptions of the minimum age of criminal capacity,<sup>83</sup> mainly towards allowing for instances where a lower minimum age of criminal capacity is used where a child is a suspect of a serious offence or where the child is believed to be sufficiently mature to

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<sup>75</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30.

<sup>76</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 32.

<sup>77</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 32.

<sup>78</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 33.

<sup>79</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 33.

<sup>80</sup> Article 40 (3) (b) of the CRC.

<sup>81</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 33.

<sup>82</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 33.

<sup>83</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 34.

be found criminally responsible.<sup>84</sup> State Parties are urged to establish a minimum age of criminal capacity that denies permission of the use of a lower age through exceptions.<sup>85</sup>

This General Comment 10 dispensed important principles fundamental for the establishment of a comprehensive policy relating to juvenile justice.<sup>86</sup> The General Comment 10 in its bid to institute a juvenile system that conforms to the CRC, was created to provide State parties with more elaborate guidance and recommendations for their efforts.<sup>87</sup>

### 2.2.3 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*

The Beijing Rules provide guidance for States on the establishment of a minimum age of criminal capacity. The Beijing Rules, despite having being written before the CRC, have a number of their essential principles incorporated into the CRC and there is also specific mention of them found in the preamble of the CRC.<sup>88</sup>

According to Van Bueren,<sup>89</sup> Rule 4 of the Beijing Rules associates the establishment of a minimum age of criminal capacity to a child's development and maturity while the minimum age of criminal capacity is said to differ widely owing to history and culture. The Beijing Rules stipulate and commend that the establishment of the minimum age of

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<sup>84</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 34.

<sup>85</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 34.

<sup>86</sup> The only real recognition afforded to it in SA was the National Crime Prevention Strategy (NCPS) which was published in 1996. This was hailed as an excellent example of social crime prevention policy, and it is unfortunate that it was overtaken by a crime control approach and is rarely referred to by Government.

<sup>87</sup> Article 3 of the United Nations Committee on the Rights of the Child General Comment No.10 (2007).

<sup>88</sup> Skelton *Developing a juvenile justice system for South Africa: International instruments and restorative justice* 1996 182.

<sup>89</sup> Van Bueren *the International Law on the Rights of the Child* 1995 173.

criminal capacity should not be pegged at a low age taking into consideration the emotional, mental and intellectual maturity capacity of the child.<sup>90</sup>

To ensure the implementation of Rule 4, the Committee suggested that State Parties not set their minimum age of criminal capacity at an extremely low age.<sup>91</sup> The present low minimum ages in place should be raised to an internationally acceptable level. These proposals put forward determine that an age below 12 years is not considered as being internationally acceptable by the Committee.<sup>92</sup> Hence State Parties are urged to raise their lower minimum age of criminal capacity to a complete 12-year minimum and constantly increase it to an even higher level.<sup>93</sup>

The commentary on the Beijing Rules suggests that where the age of criminal capacity is fixed too low or if removed totally it would mean that the concept of capacity would lose its significance as capacity for crime goes hand in hand with other social rights and responsibilities.<sup>94</sup> States in order to maintain this relationship have to then make efforts to agree on a reasonable lower age that is recognized and applicable internationally.<sup>95</sup>

#### 2.2.4 *African Charter on the Rights and Welfare of the Child, 1990*

The African Charter on the Rights and Welfare of the Child, 1990 shows no variance from the CRC when it comes to issues pertaining to juvenile justice.<sup>96</sup> Special provision is made for children in conflict with the law in the ACRWC. In its chapter 2, the African Charter describes a child as every human being that has not yet reached 18 years old.<sup>97</sup> Signatory

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<sup>90</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 32.

<sup>91</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 32.

<sup>92</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 32.

<sup>93</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 32.

<sup>94</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985.

<sup>95</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985.

<sup>96</sup> Skelton *Juvenile justice reform: children's rights and responsibilities versus crime control* in Davel CJ *Children's rights in a transitional society*.

<sup>97</sup> The African Charter on the Rights and Welfare of the Child, 1990.

countries are required to have a set upper age margin of 18 years for children. Article 4 (1) it stipulates that in all judicial proceedings affecting a child the best interests of the child should be of paramount importance.<sup>98</sup>

Signatory states are also to implement a rights-based approach when dealing with children with the aim of realizing the progression of the safety of children's rights and welfares in all circles and actions that affect children.<sup>99</sup> In its Article 17 (4) for the Administration of Juvenile Justice, it sets out that there shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.<sup>100</sup> However, these provisions fail to provide an exact age for the minimum age of criminal responsibility.<sup>101</sup> This gives a clear depiction of the lack of a fixed international standard on the age at which criminal capacity should be introduced and as a result problems arise regarding the criminal capacity of child offenders.<sup>102</sup>

### 2.3 *Conclusion*

The development of a child justice system in the early 1990s in South Africa gathered its driving force from the international instruments discussed in this chapter. These instruments provide a clear portrayal of the appearance of a critical child justice system. At the core of such a system's objectives should be the promotion of the well-being of the child and dealing with each child in an individualized way. When South Africa promulgated its first Constitution in 1994, it was these instruments that constituted the essential initiative in steering the constitutionalisation of certain rights.

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<sup>98</sup> Article 4 (1) of the African Charter on the Rights and Welfare of the Child, 1990.

<sup>99</sup> Article 4 (1) of the African Charter on the Rights and Welfare of the Child, 1990. The Convention enshrines the traditional human rights: civil, political, economic, social and cultural rights.

<sup>100</sup> Van Bueren *International documents on children* Save the Children 1993.

<sup>101</sup> Van Bueren *International documents on children* Save the Children 1993

<sup>102</sup> Odongo *the Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context* 2005.

## Chapter 3      Historical Background and the South African Position

### 3.1 *Introduction*

This chapter provides a brief history of the concept of criminal capacity from the present position in our criminal justice system regarding the minimum age for criminal capacity, the presumption of *doli incapax* applicable to the children between the ages of seven and 14 years and to illustrate how the Courts deal with this issue. It also deals with the issue of criminal capacity as provided for in the CJA and the provisions relating to the evaluation of criminal capacity in children, the deliberations and the present status and the developments that came about as a result of the introduction of the CJA with regard to criminal capacity.

### 3.2 *Historical overview*

Authority regarding the problem of responsibility of young children comes from Roman law.<sup>103</sup> It stipulated that before one was said to be at fault (*mens rea*), the capacity to be responsible for the actions first had to be reviewed.<sup>104</sup> Upon evaluation of the accused and criminal capacity was found to be lacking the matter was then terminated and no further inquiry was made.<sup>105</sup> However, this discrepancy between criminal capacity and culpability is not part of Anglo-American law,<sup>106</sup> but instead it is said to have been moulded from civil law specifically Roman law and some amount from German law.<sup>107</sup> It is clearly brought about by the foundational effects found in the growth of the concept of criminal capacity in South-Africa's criminal law and law of

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<sup>103</sup> JC de Wet & HL Swanepoel *Die Suid-Afrikaanse Strafgereg* 4<sup>th</sup> ed (1987).

<sup>104</sup> Burchell *Principles of Criminal Law* 2016 260.

<sup>105</sup> Burchell *Principles of Criminal Law* 2016 260.

<sup>106</sup> *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 389.

<sup>107</sup> *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 389.

delict.<sup>108</sup> In early criminal cases the distinction between capacity and culpability was not evident mostly in relation to criminal capacity of children but that was fixed by the courts and legislature that defined clearly the difference between capacity and culpability.<sup>109</sup>

The test for capacity was classified by the legislature while acting on the reference of the Rumpff Commission as the basis of criminal capacity for people suffering from a mental disease or defect.<sup>110</sup> This is provided for in Section 78(1) of the Criminal Procedure Act of 1977 which states that:

A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable- (a) of appreciating the wrongfulness of his or her act or omission; or (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.

The same general terms of capacity found in Section 78(1) of the CPA were set in the Appellate Division judgement of *Weber v Santam Versekeringsmaatsskappy Bpk*<sup>111</sup> (hereinafter referred to as *Weber's case*). A seven-year-old was alleged to be guilty of contributory negligence.<sup>112</sup> The issue at hand was whether the child was capable of appreciating the wrongfulness of the act and acting in line of this obligation?<sup>113</sup> Where a young person or people suffering from mental defects are involved in the commission of a crime, there was no need for a preliminary inquiry. This was later altered and resulted in the inquest of criminal capacity being found rationally as one of a preliminary one

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<sup>108</sup> Article 20 of German Penal Code (BCG).

<sup>109</sup> Pathological incapacity found in Section 78(1) of the Criminal Procedure Act 51 of 1977 and Section 11 of the CJA.

<sup>110</sup> Rumpff Commission RP 69/1976 para 9.97.2.

<sup>111</sup> *Weber v Santam Versekeringsmaatsskappy Bpk* 1983 (1) SA 389 (A).

<sup>112</sup> *Weber v Santam Versekeringsmaatsskappy Bpk* 1983 (1) SA 389 (A.)

<sup>113</sup> *Weber v Santam Versekeringsmaatsskappy Bpk* 1983 (1) SA 389 (A.)

where the accused is either intoxicated or provoked.<sup>114</sup> The definition of capacity was altered from the usual traditional term by Rumpff CJ in *S v Chretien* 1981 (1) SA 1097 (A) 1106 (hereinafter referred to as *Chretien*).<sup>115</sup> It seemed Rumpff CJ recognized voluntary intoxication as adequate enough to dismiss criminal capacity.<sup>116</sup>

The Appellate Division went on to consider other factors of provocation and emotional stress as being a reflection of criminal capacity soon after *Chretien* and soon the defence counsel benefitted from this foundation which saw emotional stress being used as a grounds for acquittal of a murder charge of an accused person.<sup>117</sup> It was after the legislature was urged by the Law Commission of the opposing policy implications that came about as a result of the general inquiry into criminal capacity along the lines of intoxication that it considered the safety of the community.<sup>118</sup> A special statutory offence was even formulated by The *Criminal Law Amendment Act of 1988*, of commission of an illegal offence while in a state of criminal incapacity that is brought about by voluntary consumption of alcohol.<sup>119</sup>

The Rumpff Commission cautioned about regarding severe emotional tension (impulsiveness) as eliminating volitional control resulting in non-responsibility and regardless of such diverse methods have been embraced by some courts and commentators in South Africa.<sup>120</sup> Provocation or emotional stress is not an issue of the

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<sup>114</sup> *S v Chretien* 1981 (1) SA 1097 (A) 1106 B-D (intoxicated persons), *S v Arnold* 1985 (3) SA 256 (C), *S v Campher* 1987 (1) SA 940 (A) 951 (provoked persons and persons suffering emotional stress), *S v Laubscher* 1988 (1) SA 163 (A) and *S v Wiid* 1990 (1) SACR 561 (A).

<sup>115</sup> *S v Chretien* 1981 (1) SA 1097 (A) 1106 B-D. Did the intoxicated person 'appreciate that what he was doing was wrongful or had his inhibitions substantially disintegrated'?

<sup>116</sup> *Badenhorst* (1981) 98 SALJ 148.

<sup>117</sup> *S v Arnold* 1985 (3) SA 256 (C).

<sup>118</sup> Criminal Law Amendment Act 1 of 1988.

<sup>119</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 256.

<sup>120</sup> Rumpff Commission para 9.19 and JC de Wet & HL Swanepoel *Die Suid-Afrikaanse Strafrecht* 3<sup>rd</sup> ed (1975) 127 have consistently debated that provocation on its own should not eliminate capacity. According to Roman-Dutch authorities provocation should not be used as a complete defence but should instead be taken as a mitigating or extenuating factor if the anger was reasonable and as such constant discussions have been made to this regard.

limitation of legislation that was put in place and as such they have been judicially accepted as defence's capacity to eliminate the voluntariness of conduct, criminal capacity or *mens rea* even though it applies only to some degree.<sup>121</sup> It is through this feature of criminal law that the clash between standard and procedure is clearly exposed.<sup>122</sup>

### 3.3 *Review of common law presumption*

An investigation was launched in 1997 on the order of the former Minister of Justice and Constitutional Development and the South African Law Reform Commission (SALRC) regarding the probability of forming a separate child justice system in South Africa.<sup>123</sup> Amongst the issues raised was the likelihood of raising the minimum age of criminal capacity and also revising the common law *doli incapax* presumption.<sup>124</sup>

Three possible options concerning the presumption were projected in an Issue paper which was issued for comment in 1997.<sup>125</sup> These options included:

- i) To retain the minimum age of criminal capacity of seven years as well as the rebuttable presumption but highlighting the need to rebut this presumption.
- ii) Raising the minimum age of criminal capacity from seven years to ten years while maintaining the rebuttable presumption for children ten years or older but under the age of 14 years.
- iii) Removing the rebuttable presumption of *doli incapax* and then raising the minimum age of criminal capacity to 12 or 14 years.<sup>126</sup>

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<sup>121</sup> S v Arnold 1985 (3) SA 256 (C).

<sup>122</sup> Snyman *Is there such a defence in our Criminal Law as Emotional Stress?* SALJ.

<sup>123</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 15.

<sup>124</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 15.

<sup>125</sup> South African Law Reform Commission (1997) Juvenile Justice Project 106 Issue Paper 9 101.

Discussions ensued between governments and civil society role-players regarding the Issue Paper and in 1998 an inclusive Discussion Paper was issued by the SALRC which was complemented by a draft Child Justice Bill, 2002.<sup>127</sup> Consultations were held and comments requested from appropriate government and non-government departments and organizations that offer facilities aimed at juvenile justice.<sup>128</sup> Three main approaches were acknowledged in the Discussion Paper by the SALRC on the minimum age and criminal capacity matter:

- i. Firstly, the common law rule that a child of seven or ten years old but under the age of 14 is assumed to be *doli incapax* was to be retained as well as a guarantee that extra procedures to ensure improved safeguard of such children be put in place.
- ii. Furthermore, the *doli incapax* presumption was to be eliminated and a minimum age of prosecution put up instead although not connected to the actual criminal capacity of the child.
- iii. Lastly a dual level of minimum age of prosecution was proposed, which set up an overall minimum age whilst affording exemptions for crimes such as murder and rape.<sup>129</sup>

The Centre for Child Law held a two-day seminar at the University of Pretoria where the subject of the minimum age of criminal capacity and the issue of whether or not South African Law should continue with the use of presumption of *doli incapax* were deliberated upon.<sup>130</sup> Sponsors for this initiative were chosen from various disciplines

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<sup>126</sup> South African Law Reform Commission (1997) Juvenile Justice Project 106 Issue Paper 9 101.

<sup>127</sup> South African Law Reform Commission (1997) Juvenile Justice Project 106 Issue Paper 9 102.

<sup>128</sup> South African Law Reform Commission (1997) Juvenile Justice Project 106 Issue Paper 9 102.

<sup>129</sup> South African Law Reform Commission (1997) Juvenile Justice Project 106 Issue Paper 9 102.

<sup>130</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 16.

comprising psychology, education, the judiciary and other divisions of the legal profession, social anthropology and criminology.<sup>131</sup> Unwillingness amongst participants was mostly evident for the removal of the *doli incapax* presumption whilst the majority approved the raising of the minimum age of criminal capacity to ten years.<sup>132</sup>

The SALRC prepared a report on Juvenile Justice in which they suggested the raising of the minimum age of criminal capacity from seven to ten years old.<sup>133</sup> Codification was to be set for the rebuttable presumption of *doli incapax* for children ten years and older but below the age of 14 years.<sup>134</sup> The Committee also suggested a minimum age of prosecution of 14 years as long as a certificate was produced by a prosecutor from the Director of Public Prosecutions providing reasons for the prosecution for a child under 14 years.<sup>135</sup>

Consequences of removing the presumption were deliberated upon by the SALRC as they were determined by setting the minimum age at too low an age, there was a possibility of young children facing indiscriminate prosecution devoid of any selectivity.<sup>136</sup> The most resilient opinion that reinforced the retention of the presumption of incapacity for younger children was that the presumption provided a cover that safeguarded young children by providing a reasonably low minimum age of criminal capacity deliberately resulting in only the most developed and mature children being found to possess criminal capacity after having undergone the screening

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<sup>131</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 16.

<sup>132</sup> Sloth-Nielsen *Report on the SA Law Commission Seminar on Age and Capacity* 1999 See also Davel *The Delictual Accountability and Criminal Capacity of a Child: How big can the Gap Be?* (2001) De Jure.

<sup>133</sup> South African Law Commission (2000) Juvenile Justice Report Project 106. See also Burchell *Principles of Criminal Law* 3<sup>rd</sup> ed 2005 364.

<sup>134</sup> South African Law Commission (2000) Juvenile Justice Report Project 106. See also Burchell *Principles of Criminal Law* 3<sup>rd</sup> ed 2005 364.

<sup>135</sup> South African Law Commission (2000) Juvenile Justice Report Project 106. See also Burchell *Principles of Criminal Law* 3<sup>rd</sup> ed 2005 364.

<sup>136</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 17.

process.<sup>137</sup>

The United Nations Committee on the Rights of the Child in 2000 communicated about the drafting of legislation by South Africa aimed at raising the minimum age of criminal capacity from seven years to a lawful ten years.<sup>138</sup> Concern, however, was still raised by the Committee on the proposed age of ten years as the minimum age of criminal capacity as they were worried that it was still fairly low.<sup>139</sup> The Committee suggested re-evaluation of the draft legislation on criminal capacity by South Africa with the aim of having the recommended minimum age increased.<sup>140</sup>

### 3.4 *The South African position before the Child Justice Act*

South Africa ratified the CRC in 1995 and during that period its minimum age of criminal capacity was at seven years and it was regarded as being the lowest in the world.<sup>141</sup> The criminal capacity of children was governed by common law presumptions and it was from there that this age came from.<sup>142</sup> These common law presumptions provided that every child below the age of seven was irrebuttably presumed to be *doli incapax*,<sup>143</sup> and such a child could never be prosecuted.<sup>144</sup> For children between the

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<sup>137</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 17.

<sup>138</sup> United Nations Committee on the Rights of the Child (2000) Concluding Observations of the Committee on the Rights of the Child, South Africa (2000) Article 17.

<sup>139</sup> United Nations Committee on the Rights of the Child (2000) Concluding Observations of the Committee on the Rights of the Child, South Africa (2000) Article 17.

<sup>140</sup> United Nations Committee on the Rights of the Child (2000) Concluding Observations of the Committee on the Rights of the Child, South Africa (2000) Article 17.

<sup>141</sup> It has been pointed out that this is one of the lowest ages of commencement of criminal capacity in the world. Skelton; *Acta Juridica*; 1996 180-186.

<sup>142</sup> It had to be identified whether, at the time of his or her unlawful conduct, the accused in question was capable, firstly, of appreciating the wrongfulness of that conduct commonly referred to as the 'insight' leg of the test and was capable, secondly, of acting in accordance with that appreciation commonly referred to as the 'self-control' leg of the test.

<sup>143</sup> Deemed incapable of forming the intent to commit a crime or tort, especially by reason of age (under seven years old).

<sup>144</sup> Burchell *Principles of Criminal Law* 3<sup>rd</sup> ed 2005 358.

ages of seven and 14 years, they were rebuttably presumed to be *doli incapax*.<sup>145</sup>

Where prosecution was to take place for a child between the ages of seven and 14 years, it was up to the prosecution to prove that at the time of the commission of the offence, the child had the required criminal capacity.<sup>146</sup> Thus, the onus rests on the prosecution to rebut the *doli incapax* presumption.<sup>147</sup> This onus involved the prosecution having to prove that a child, seven years or older but under the age of 14, at the time of the commission of the offence was capable of appreciating the wrongfulness of his/her actions; and conduct him/herself in accordance with such appreciation.<sup>148</sup> If by any chance the prosecution failed to satisfy this onus, the child was then considered not criminally liable for the alleged offence.<sup>149</sup>

This presumption, although certainly rebutted, was put into place so as to protect children as it proved not to display any shield when it came to prosecution and conviction of young people.<sup>150</sup> It was the mother of the child who pointed out whether their child comprehended the difference between right and wrong and if the response was in the affirmative, this was then considered appropriate enough to be able to rebut the presumption of *doli incapax*.<sup>151</sup> Restraint is, however, required by the courts where an illiterate, uncivilized child with some degree of understanding of the proceedings is the accused.<sup>152</sup>

Evidence that was given by the mother of the child for comprehension of the difference

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<sup>145</sup> Gallinetti "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" 2009 650. Who briefly sets out the common-law position that existed prior to the Child Justice Act which came into operation on 1 April 2010.

<sup>146</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance, 2009 18.

<sup>147</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance, 2009 18.

<sup>148</sup> Section 11(1) of CJA.

<sup>149</sup> The common law presumptions were amended with the implementation of the *Child Justice Act*, 2008 (Act 75 of 2008) on 1 April 2010.

<sup>150</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 15.

<sup>151</sup> *S v M* 1982 (1) SA 240 (N).

<sup>152</sup> *S v M* 1982 (1) SA 240 (N).

between right and wrong was often led in evidence by prosecutors and thus fashioned the first part of the inquiry.<sup>153</sup> For the second leg of this inquiry, they had to then determine whether the accused child had the ability to use such information and act as such when committing the offence.<sup>154</sup>

The mother of the child was, however, not perceived as being skilful in areas of child development according to Van Oosten and Louw.<sup>155</sup> They detected that courts usually do not follow the criminal capacity test but instead focus the inquiry more on the child's understanding and obligation of the unlawful conduct in precise situations, when they committed the act or where there exists or lacks a hate-driven purpose leading to the commission of an act.<sup>156</sup>

A "Child Law Manual for Judicial Officers" issued in 2004 by the Justice College,<sup>157</sup> recommended that it would be convenient if a suitably qualified professional should be used to compile a report that would be used at trial that would testify about the criminal capacity of the child.<sup>158</sup> This proved to be useful in the instance where the child was facing serious charges and where a custodial sentence could be executed.<sup>159</sup>

### **3.5 *The Child Justice Act 75 of 2008***

The advent of the CJA brought about many changes in South Africa. It came into operation on 1 April 2010 and with it came a criminal justice system for children and

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<sup>153</sup> Van Oosten and Louw *Children, Young Persons and the Criminal Law* (1997) 125.

<sup>154</sup> Van Oosten and Louw *Children, Young Persons and the Criminal Law* (1997) 125.

<sup>155</sup> Van Oosten and Louw *Children, Young Persons and the Criminal Law* (1997) 125.

<sup>156</sup> Van Oosten and Louw *Children, Young Persons and the Criminal Law* (1997) 125.

<sup>157</sup> Brink *The Child Accused in the Criminal Justice System* 2010.

<sup>158</sup> A medical practitioner who is registered as a medical practitioner under the Health Professions Act, 1974 (Act 56 of 1974), and against whose name the specialty psychiatry is also registered as well as a psychologist who is registered as a clinical psychologist under the Health Professions Act, 1974 is deemed a suitably qualified person.

<sup>159</sup> *Child Law Matters* Issue 14 (April 2007).

new standards for protecting child offenders.<sup>160</sup> In its section 7, the CJA amended the existing common law age demarcation thereby raising the minimum age of criminal capacity from seven to ten years.<sup>161</sup> The upper age of 14 years for the rebuttable presumption of *doli incapax* was retained.<sup>162</sup> Section 7(2) of the CJA states:

A child who is ten 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 s/he has criminal capacity in accordance with section 11 of the CJA.

A substantial change is observed in relation to criminal liability by raising this minimum age of criminal capacity from seven to ten years.<sup>163</sup> Larger adjustments were achieved by the CJA in relation to the handling of young offenders in South Africa.<sup>164</sup> Diversion was offered for offenders who are below the age of 18 (or 21 in some instances) from the severity of the criminal justice system into a more indulgent system based on restorative justice principles.<sup>165</sup> These principles are directed at providing assistance to child offenders to help them take responsibility for their conduct, making amends and being reintegrated back into society.<sup>166</sup>

### 3.5.1 *Children under ten years old*

For a child that has not yet reached its tenth year, he/she is irrebuttably presumed to lack criminal capacity and as such cannot be said to be criminally responsible.<sup>167</sup> This

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<sup>160</sup> Mukwende 2014 33.

<sup>161</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 19.

<sup>162</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 19.

<sup>163</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 260.

<sup>164</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 260.

<sup>165</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 260.

<sup>166</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 260.

<sup>167</sup> For children under the age of ten, there have been no reports made of a charge against them but reference has been made to the under-seven category where there have been certain cases dealing with older children for example the *Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421. Section 5(1) of the Child Justice Act 75 of 2008 provides that every child who is alleged to have committed an offence whilst being under ten years old, has to be referred to a probation officer.

applies regardless of whether the child is adequately mature to be able to appreciate the wrongfulness of the behaviour and act in agreement with such an obligation as such a child is presumed to be criminally unaccountable by the CJA. Although this rule is occasionally observed as being one of evidence, it is actually one of substantive law and currently integrated into the CJA in section 7.<sup>168</sup>

### 3.5.2 *Children between ten and 14 years*

Children between the ages of ten and 14 years are presumed to be criminally unaccountable and as such lack criminal capacity.<sup>169</sup> The difference, however, lies in the fact that this presumption is rebuttable and as the child reaches the age of 14 it fades.<sup>170</sup> This concept of *doli incapax* for children between ten and 14 years was also relied upon by English law but not without reservations.<sup>171</sup> Disapproval was established with regard to this presumption of lack of capacity as it was recognized that it exempted children who were in greatest need of reformative or corrective measures.<sup>172</sup>

In the South African context, the presumption of lack of criminal capacity where a child has concluded its tenth year but before having attained 14 years, can be rebutted

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<sup>168</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 260.

<sup>169</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 260.

<sup>170</sup> This is a common law presumption but it is found in Section 7(2) of the Child Justice Act. In [107] F 1989 (1) *SA 460 (Z)* the acting attorney-general was strongly criticized by the courts of Zimbabwe for charging a boy aged ten years with indecent assault while the magistrate got reprimanded for convicting and sentencing him to four cuts. The court went on to discover later after the child had received the cuts that the presumption of incapacity had not been rebutted.

<sup>171</sup> The English House of Lords in *C v DPP [1995] 2 Cr AppR 166 (HL)* held that under the system of law, the rebuttable presumption that from ages 10-14 years a child is *doli incapax* was still part of the common law of England and change could only be effected by statute. Law Lords have expressed deepest concern judicially and academically over this presumption as evidenced by their various judgements.

<sup>172</sup> The same criticism is comparable to that of South Africa's rebuttable presumption of lack of capacity for an alleged child between ten and 14 years old. The difference lies in the fact that in South Africa if children under ten years who are irrebuttably presumed to lack capacity are given the chance for rehabilitative programmes then why should the same not be accorded to children between the ages of ten and 14 years who are found innocent as a result of raising the rebuttable presumption of incapacity.

where proof exists that the child retained the capability of insight and self-control.<sup>173</sup> The test for criminal capacity for defining criminal responsibility for such an instance would be: did the child in question in the situation possess the capacity to appreciate the wrongfulness of the conduct? If the child did, did they have the capacity to act in harmony with this obligation?<sup>174</sup>

Previously there has been no clear distinction in criminal courts between the capacity and the fault that is required of the child.<sup>175</sup> However it has been established that criminal liability for children between the ages of ten and 14 years comprise a two-stage analysis: i) if the child retained criminal capacity and if the child had the necessary *mens rea* needed for the crime they are accused and can be convicted.<sup>176</sup> The primary examination of capacity goes before the analysis of fault or *mens rea* regardless of whether the fault necessary is intention or negligence.<sup>177</sup>

For children who are aged ten years but under 14 years there are further protections that are accessible to them and found in Section 10 of the CJA.<sup>178</sup> It provides that the prosecution of a child can only be effected where the prosecutor has deliberated on numerous factors which include:

... the educational level, cognitive ability, domestic and environmental circumstances and the age and maturity of the child; the nature and seriousness of the alleged offence; the probation officer's assessment report; the impact of the alleged offence on any victim; the interests of

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<sup>173</sup> [103]K 1956 (3) SA 353 (A) 356. Usage of the phrase *militia supplet aetatem* (evil disposition supplies age) is evident among the old authorities.

<sup>174</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 261.

<sup>175</sup> This essential difference was not drawn and as such the court had to needlessly apply a test of the 'reasonable sixteen-year-old schoolboy' although factors such as age, ability for self-control and judgement could have been lodged in the subjective test of capacity: [106] T 1986 (2) SA 112 (O).

<sup>176</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 261.

<sup>177</sup> Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 261.

<sup>178</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 18.

the community; the prospects of establishing criminal capacity; the appropriateness of diversion; and any other relevant factor.<sup>179</sup>

By so doing it avoids the discrepancy that arises when prosecutors prosecute a child as an automatic procedure with the aim of proving criminal capacity during the progression of the matter.<sup>180</sup> Before deciding to prosecute, deliberation on the above facts should have been made by the prosecutor and the probability of success should have been determined.<sup>181</sup>

### 3.5.3 *Children over 14 years of age*

The position, however, does not change for children who are 14 years but under the age of 18 years for the common law presumption is retained.<sup>182</sup> They continue to remain with full criminal capacity they had before the CJA and can be arrested.<sup>183</sup>

### 3.6 *Proof of criminal capacity*

Evidence of the criminal capacity of the child that is in conflict with the law is provided for in the CJA in sections 11 and 40.<sup>184</sup> These statutory provisions are authoritative in nature and offer additional means in which criminal capacity of a child can be evaluated and placed before the court.<sup>185</sup> Section 11 provides for proof of criminal capacity which should be determined beyond a reasonable doubt.<sup>186</sup> After hearing a matter the decision lies with the inquiry magistrate or the child justice court to deliberate whether criminal capacity has been proved or not.<sup>187</sup>

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<sup>179</sup> Section 10 of the CJA.

<sup>180</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 19.

<sup>181</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 19.

<sup>182</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 18.

<sup>183</sup> Child Justice Alliance: Fact sheet on Age and criminal capacity.

<sup>184</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 20.

<sup>185</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 20.

<sup>186</sup> Section 11(1) of the CJA.

<sup>187</sup> Section 11(2) of the CJA.

The probation officer's assessment report plays an essential role in the decision-making as stipulated in 11(2) as well as any other information which can consist of an evaluation as stated in 11(3).<sup>188</sup>The Act in its Section 40(1) (f) provides for the assessment report prepared by the probation officer to include a recommendation providing for the likelihood of criminal capacity of the child if the child is ten years and older but under 14 years.<sup>189</sup> More so it should include measures that should be taken to ensure that criminal capacity is proved.

The inquiry magistrate or child justice court in their own capacity or upon request from the prosecutor or the child's legal representative is provided by Section 11(3) to issue a directive for an assessment of the child's criminal capacity.<sup>190</sup> When conducting an assessment for criminal capacity, Section 11(3) of the CJA provides that an evaluation of the cognitive, moral, emotional, psychological and social development of the child should be incorporated.<sup>191</sup> In order for such an evaluation to be possible, it requires that a full, detailed and comprehensive assessment of the psychosocial development and functioning of the child be conducted.<sup>192</sup>

Criminal capacity of a child can be influenced by the intricate relationship that exists between biological and environmental factors hence the need for noting down such information.<sup>193</sup> Studies have shown that when conducting an evaluation into the criminal capacity of a child, focus should not only be restricted to specific essentials related to the child's development or functioning which include cognitive ability or emotional maturity.<sup>194</sup> It should also include a comprehensive assessment and clinical enquiry of the risk factors and how these aspects may influence the capability of the

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<sup>188</sup> Section 11(3) of the CJA.

<sup>189</sup> Section 40(1) (f) found in Section 11(2) (b) of the CJA.

<sup>190</sup> Section 11(3) of the CJA.

<sup>191</sup> Section 11(3) of the CJA.

<sup>192</sup> Pillay and Willows *Assessing the criminal capacity of children*.

<sup>193</sup> Pillay and Willows *Assessing the criminal capacity of children*.

<sup>194</sup> Child Welfare Information Gateway *Long-term consequences of child abuse and neglect* 2013.

child to be able to separate right from wrong and act according to this obligation.<sup>195</sup> The assessment is to be conducted by an appropriately skilled person.<sup>196</sup> It should be conducted within 30 days while the probation officer's evaluation is generally concluded within merely 48 hours.<sup>197</sup>

In the event that the inquiry magistrate establishes that the criminal capacity has not been proved beyond a reasonable doubt and it is in the best interests of the child, Section 11(5) provides that they have the capacity to have the child taken for further action that is found in Section 9 with a probation officer.<sup>198</sup> Cases where the prosecutor chooses to put a child who is ten years and older but under 14 years on trial and case has not been diverted, it should be directed to the child justice court for plea and trial.<sup>199</sup>

The obligation lies on the prosecution during trial in the Juvenile justice court to prove beyond reasonable doubt the capacity of the child who is ten years or older but under the age of 14 to be able to comprehend the difference between right and wrong during commission of the alleged offence and to act according to such appreciation.<sup>200</sup> Although the obligation is on the Prosecutor, there is no legitimate responsibility to ascertain it preceding putting charges on the child or any precise stage throughout the prosecution.<sup>201</sup>

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<sup>195</sup> Child Welfare Information Gateway *Long-term consequences of child abuse and neglect* 2013.

<sup>196</sup> A medical practitioner who is registered as a medical practitioner under the Health Professions Act, 1974 (Act 56 of 1974), and against whose name the specialty psychiatry is also registered as well as a psychologist who is registered as a clinical psychologist under the Health Professions Act, 1974 is deemed a suitably qualified person.

<sup>197</sup> Section 11(3) and (4) of the CJA.

<sup>198</sup> Section 11(5) of the CJA.

<sup>199</sup> Section 11(5) of the CJA.

<sup>200</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 21.

<sup>201</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 21.

### 3.7 Conclusion

The *doli capax* (child has criminal capacity) and *doli incapax* (child does not have criminal capacity) presumptions are retained. It is only the minimum age of criminal capacity that has been amended.<sup>202</sup> It was the Commission's Report on Juvenile Justice that instituted the underlying principle for this rationale where it is articulated that with this norm children of the ages of ten to 14 years are instantly protected according to their level of maturity and development.<sup>203</sup> It is flexible and acts as a shield as children throughout these developmental years vary in emotional and intellectual maturity understanding.<sup>204</sup>

The basis of this understanding from the standing of the South African Law Commission was that the presumption is inevitably automatic because of the child's age and once in place, the State had the onus to present evidence to rebut this presumption.<sup>205</sup> Secondly the flexibility of the presumption was also underlined by the Commission.<sup>206</sup> If the child was younger the "greater the cloak of the presumption" which meant more evidence that the State has to rebut.<sup>207</sup> With regard to flexibility, the Commission established that the fundamental element was the actual age of the child regardless of not being final.

The *De Vos N.O and Others v Minister of Justice and Constitutional Development and Others* (hereinafter referred to as the *De Vos case*),<sup>208</sup> in its judgement confirmed the constitutional validity of the two provisions found in the CPA that made provision for compulsory hospitalisation, imprisonment or institutionalisation for an accused person

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<sup>202</sup> South African Law Commission Report on Juvenile Justice (2000) 28.

<sup>203</sup> South African Law Commission Report on Juvenile Justice (2000) 28.

<sup>204</sup> South African Law Commission Report on Juvenile Justice (2000) 28.

<sup>205</sup> South African Law Commission Report on Juvenile Justice (2000) 28.

<sup>206</sup> South African Law Commission Report on Juvenile Justice (2000) 28.

<sup>207</sup> South African Law Commission Report on Juvenile Justice (2000) 28.

<sup>208</sup> *De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others* [2015] ZACC 21.

who was found to be mentally unfit to stand trial.<sup>209</sup> The High Court found that by consenting to such provisions would unreasonably violate the persons and the child's constitutional rights to freedom and security provided by Section 28 of the Constitution because the presiding officer is not given the required discretion to provide a remedy fitting an accused person with a mental illness or intellectual disability.<sup>210</sup>

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<sup>209</sup> Section 77(6) (a) (i) and 77(6)(a)(ii) of the CPA.

<sup>210</sup> De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others [2015] ZACC 21. Section 28(1) Every child has the right—  
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time,  
(2) A child's best interests are of paramount importance in every matter concerning the child."

## Chapter 4      **Determining the Criminal Capacity of Child Offenders**

### 4.1 *Introduction*

The Law Commission has encountered and dealt with proposals regarding the minimum age of criminal capacity since they started developing in 2000.<sup>211</sup> Fixing the age of criminal capacity below the age of 12 years is regarded as being not internationally acceptable as it does not conform to international standards.<sup>212</sup> There has been a progression in the expansion of medical science and international law in relation to the age of criminal capacity.<sup>213</sup> This has led to a number of suggestions being proposed by civil society organisations advocating for a higher minimum age of criminal responsibility.<sup>214</sup>

The fifth year since the implementation of the CJA in South Africa came to pass in 2015.<sup>215</sup> A fundamental section is provided in the Act and it stipulates that after five years of the implementation of the CJA, the South African parliament is required to:

In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the administration of justice must, not later than five years after the commencement of this section, submit a report to Parliament, as provided for in section 96(4) and (5).<sup>216</sup>

Legislative amendments made by South Africa have moved it from its prior undesirable position held in the world of having one of the lowest minimum ages of criminal

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<sup>211</sup> In order for the Justice Portfolio Committee to be pursuant to international developments it was urged to raise its minimum age by civil society organizations from 10 to 12 years.

<sup>212</sup> United Nations Committee on the Rights of the Child General Comment No.10 2007.

<sup>213</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* 2011 32.

<sup>214</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* 2011 32.

<sup>215</sup> Pillay *Deliberating the minimum age of criminal responsibility* 2015 143–146.

<sup>216</sup> Section 8 of the CJA.

capacity.<sup>217</sup> Regardless of such adjustments the current South African minimum age of criminal capacity still does not meet international benchmarks.<sup>218</sup>

The Beijing Rules provide that when setting a minimum age for criminal responsibility, the age should not be fixed too low bearing in mind the facts of different emotional, mental and intellectual maturity.<sup>219</sup> Article 40(3) of the CRC goes on to corroborate this and requires signatory states to:

seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Focus has been directed more on the rules central to the minimum age of criminal capacity and the enforcement of criminal capacity to children above that age subject to the young offender's appreciation of the wrongness of his or her act.<sup>220</sup> As a result of such there is a need and it is substantial to make an inquiry on the assessment and establishment of criminal capacity of juvenile offenders between the ages of ten to 14 years.<sup>221</sup>

The application and operation of the *doli incapax* has been riddled with many practical problems and challenges.<sup>222</sup> Hence in order to meet the requirements of international law, standards and practice, the minimum age of criminal capacity has to be raised and the *doli incapax* presumption abandoned.<sup>223</sup> By doing so there is a guarantee that the issue of criminal capacity will be simplified whilst also doing away with the challenges that are faced by the application of the *doli incapax* presumption. This should also give

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<sup>217</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009.

<sup>218</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009.

<sup>219</sup> Rule 4.1 of the *Beijing Rules*.

<sup>220</sup> Pillay *Deliberating the minimum age of criminal responsibility* 2015 143–146.

<sup>221</sup> Pillay *Deliberating the minimum age of criminal responsibility* 2015 143–146.

<sup>222</sup> Child Justice Alliance Workshop Report on Criminal Capacity of Children 2011.

<sup>223</sup> Child Justice Alliance Workshop Report on Criminal Capacity of Children 2011.

rise to more probable outcomes due to legal certainty. What this will entail is that a strict model of age capacity will be implemented whereby a child will by virtue of age be deemed either to be criminally capable or to lack criminal capacity.<sup>224</sup> The project committee has identified the subjective nature of the application of the setting of a minimum age as children mature at different paces.<sup>225</sup> Although children might be of the same age, their understandings and perceptions differ from one child to another.<sup>226</sup>

Section 8 of the CJA affords powers upon the Minister of Justice and Constitutional Development that allow him to submit a report to parliament to regulate whether the minimum age of criminal capacity should be raised or not.<sup>227</sup> Such a report should be submitted before five years have lapsed after the commencing of section 8. Section 8 was inserted into the CJA as a result of proposals made to parliament regarding the age of criminal capacity by civil society organizations.<sup>228</sup>

The Commission first encountered these proposals for age of criminal capacity since 2000 and great improvements have been detected with advances being made in international law and the field of medical sciences with regard to this issue.<sup>229</sup> Civil society organizations conducted debates on the Act which promoted a higher minimum age of criminal capacity and this led to parliament receiving a number of proposals to this end.<sup>230</sup> The international law perspective was based on General Comment 10 which fixed a minimum age of 12 years old.

Another aspect that focused on setting the age at 12 years old was that of the dispute regarding developments in medical science and the development of the human brain.<sup>231</sup>

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<sup>224</sup> Child Justice Alliance Workshop Report on Criminal Capacity of Children 2011.

<sup>225</sup> Child Justice Alliance Workshop Report on Criminal Capacity of Children 2011.

<sup>226</sup> Child Justice Alliance Workshop Report on Criminal Capacity of Children 2011.

<sup>227</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 20.

<sup>228</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 21.

<sup>229</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 21.

<sup>230</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 21.

<sup>231</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 21.

These arguments won over parliament but not, however, to the extent of raising the minimum age of criminal capacity to 12 years.<sup>232</sup> It instead endorsed a five-year evaluation to allow for investigation on:

(a) The statistics of children who are suspected to have committed an offence and the offences they are alleged to have committed for children aged ten, 11, 12 and 13 years at the time of the commission of the alleged offence;

(b) If the children in (a) above were convicted, what were the sentences imposed?

(c) the number of matters concerning the children in (a) which did not go to trial as provided for in section 10(2)(b) on the grounds that the prosecutor was of the view that criminal capacity would not be proved and reasons for that decision in each case;

(d) The use of expert evidence and result of each matter with regards to establishing criminal capacity of the number of children referred to in paragraph (a) whose matters were dealt with in accordance with section 11.

(e) Examination of the statistics referred to in paragraphs (a) to (d); and

(f) A reference should be established from the investigation in which it is to be determined whether the minimum age of criminal capacity should remain at ten years as provided for in section 7(1) or rather instead raise the minimum age of criminal capacity.<sup>233</sup>

Upon receipt of the report by the Cabinet member responsible for the administration of justice it must then be submitted to the Cabinet for approval, and afterwards to Parliament for deliberation. Parliament at this point then has the authority to raise the minimum age if content that the results of the research provide as such.

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<sup>232</sup> Gallinetti *Getting to know the Child Justice Act* Child Justice Alliance 2009 21.

<sup>233</sup> Section 96(4) and (5) of the CJA.

## 4.2 *Problems in the Application of the Provisions of Criminal Capacity in the CJA*

### 4.2.1 *Lack of precise, consistent and comprehensive statistics*

The CJA arranges for an evaluation of the minimum age of criminal capacity before five years have lapsed.<sup>234</sup> The section was incorporated as a way of cooperating with the Portfolio Committee for setting the minimum age of criminal capacity at ten years regardless of the substantial opinions put forward to raise the minimum age to 12 years.<sup>235</sup> The CJA came into operation on 1 April 2010 hence the evaluation had to be concluded before 31 March 2015.

The aim of the legislature was to afford flexibility to this section and to offer the probability of an earlier assessment as seen from its wording.<sup>236</sup> Among the key causes identified as to why the Portfolio Committee failed to raise the minimum age of criminal capacity to 12 years was the lack of consistent and precise statistics providing the figures of children between ten and 13 years suspected of committing crimes or the crimes they are supposedly to have committed.<sup>237</sup> At the appearance of the Annual Report on the Implementation of the Act in Parliament as provided for by section 96(3), the Portfolio Committee was disappointed to note that precise and consistent statistics on children in conflict with the law had still not been made available.<sup>238</sup>

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<sup>234</sup> Before five years have passed after commencement of this section the Cabinet member responsible for the administration of justice should submit a report to Parliament as provided for in section 96 (4) and (5) so as to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised.

<sup>235</sup> Parliamentary Monitoring Group (2008) Child Justice Bill: Department Briefing & Public Hearings.

<sup>236</sup> Skelton and Badenhorst *the Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 21.

<sup>237</sup> Parliamentary Monitoring Group (2008) Child Justice Bill: Departmental Briefing and Public Hearings.

<sup>238</sup> The Cabinet member responsible for the administration of justice must, after consultation with the Cabinet members responsible for safety and security, correctional services, social development, education and health - within one year after the commencement of this Act, submit reports to Parliament, by each Department or institution referred to in section 94(2), on the implementation of this Act; and (b) Every year thereafter submit those reports to Parliament.

In order for the assessment of the minimum age of criminal capacity to be conducted it is necessary for reliable data relating to the number of children between ten and 13 years old in conflict with the law, nature of the supposedly committed offence as well as an inquiry into the data to be available. However, this information is still not readily accessible even after application of the CJA therefore proving unfortunate.<sup>239</sup>

#### 4.2.2 *Forensic mental health assessment of criminal capacity of children*

Advanced expansion in the department of neuroscience has established the relative neural immaturity of adolescents in their decision-making processes and mental control during emotionally charged situations.<sup>240</sup> Queries have been raised regarding the subjection of children between the ages of ten to 14 years old to the same legal process as that of adults which has led to suggestions of raising the minimum age of criminal capacity.<sup>241</sup>

More-so, recommendations were made regarding the principle of the rebuttable presumption of *doli incapax* that it should not be maintained and instead be abolished totally.<sup>242</sup> In order for the assessment of the criminal capacity of a child to be comprehensive it should comprise an evaluation of the child's cognitive, moral, emotional, psychological and social development as provided for by section 11(3) of the

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<sup>239</sup> Skelton and Badenhorst *the Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 22.

<sup>240</sup> Kramers-Olen *South African Journal of Psychology* 2015 476.

<sup>241</sup> Midson *Psychiatry, Psychology and Law* 2012 694.

<sup>242</sup> Skelton and Badenhorst *the Criminal Capacity of Children in South Africa: International Developments & Considerations for a Review* (2011) 16. The SALCR recommended the increasing of the minimum age of criminal responsibility to ten years while codification be effected for the rebuttable presumption of *doli incapax* for children ten years and older. A minimum age of 14 years was suggested only if a certificate providing reasons for prosecution of child under 14 years by the DPP is produced by the prosecutor. Retention of presumption of incapacity should be effected because of the cloak of protection that it provides for children with the low minimum age of criminal responsibility.

CJA.<sup>243</sup> From the perspective of forensic mental health evaluation, the *doli incapax* presumption is an intricate matter, even the response into the inquiry as to whether a child of ten years and older but under the age of 14 possesses the necessary criminal capacity has proved to be multi-faceted.<sup>244</sup>

It incorporates challenging amounts of human development, human behaviour, individual variation and non-specific models such as intelligence, moral development and others therefore causing problems with undertaking the assessment as the psychometric measuring instruments for local use are insufficient.<sup>245</sup> The role played by mental health professionals in relation to the forensic evaluation of children is not acknowledged fully hence a need for advancement and alteration is required for the undertaking to be effected with transparency and accuracy.<sup>246</sup>

This attaches added liability towards the child mental health sector that is already strained as an outcome of the lack of psychologists and psychiatrists who specialize in the forensic assessment of criminal capacity of children leading to interruptions on the settlement of cases.<sup>247</sup>

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<sup>243</sup> Section 11(3) provides that: An evaluation into the criminal capacity of a child as referred to in subsection (1) can be made available on order of an inquiry magistrate or the child justice court of its own accord, or on the request of the prosecutor or the child's legal representative. Such evaluation should be in the prescribed manner and performed by a suitably qualified person and it should include an assessment of the cognitive, moral, emotional, psychological and social development of the child.

<sup>244</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 22.

<sup>245</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 22.

<sup>246</sup> Pillay *Criminal Capacity in children accused of murder: challenges in the forensic mental health assessment* 2006 17-22.

<sup>247</sup> Child Justice Alliance (2011) Workshop Report on Criminal Capacity of Children 30.

#### 4.2.3 *Criminal capacity and sections 77 and 78 of the Criminal Procedure Act 51 of 1977*

When determining the prosecution of child offenders or when deciding whether to monitor what is transpiring during the course of attendance in a child justice court it is imperative to make use of Sections 77 and 78 of the *Criminal Procedure Act 51 of 1977* (hereinafter referred to as the CPA) that deals with the "Capacity to Understand Proceedings: Mental Illness and Criminal Responsibility".<sup>248</sup> These sections remain related to children and children in conflict with the law, and the coming into operation of the CJA did not abolish or amend them.<sup>249</sup>

In the CJA these sections are only mentioned in section 48(5) (b) where they offer a delay regulated by the magistrate of the preliminary enquiry where ambiguity lies on the child's capability to comprehend the proceedings or where there is a likelihood that the child does not possess the required criminal capacity as a result of mental illness or defect.<sup>250</sup> No mention of section 77 or 78 of the CPA is found in the CJA in line with the trial in the child justice court although without doubt these sections are still integral to children regardless of the processes to be followed or the period of delay of a referral for an evaluation which has not been addressed in the CJA.<sup>251</sup>

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<sup>248</sup> Section 77 provides that the accused must be capable of understanding the proceedings so as to present a proper defence. Section 78 provides that if by any chance the accused suffers a mental illness or defect that does not allow them to fully appreciate the wrongfulness of his act or makes them unable to act in accordance with such appreciation, he or she shall not be criminally responsible for such act.

<sup>249</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 23.

<sup>250</sup> Section 48 (5) of the CJA: A preliminary enquiry proceedings are allowed a postponement period that can be determined by the inquiry magistrate in the case where -  
(a) the child is in need of medical treatment for illness, injury or severe psychological trauma; or  
(b) the child has been referred for a decision relating to mental illness or defect in terms of sections 77 and 78 of the Criminal Procedure Act.

<sup>251</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 23.

The difficulty this poses is that the magistrate in the child justice court will be of the opinion that any uncertainty of a child's capacity in relation to sections 77 and 78 of the CPA have already been deliberated upon given the deliberation that is assumed to be provided to the evaluation of the child and resolution of whether to prosecute the child or not.<sup>252</sup>

More so the CJA proves to be a bit vague on the issue of the need of a probation officer's consideration on reference of the child for a referral for an assessment stipulated in sections 77 and 78 of the CPA. The same relates to the elements that are to be weighed up before diversion by a prosecutor or inquiry magistrate.<sup>253</sup> Reporting of the lack of criminal capacity of a child that is not as a result of a mental illness or defect seems to be a problem among mental health professionals who are piloting assessments on children in terms of sections 77 and 78 of the CPA.<sup>254</sup> This ambiguity stems from the question as to whether they are obligated to report such absence where the referral was implemented in line with sections 77 and 78 of the CPA.<sup>255</sup>

#### 4.2.4 *Unavailability of resources to conduct the criminal capacity evaluations*

Where a court is commissioned to decide whether a child has criminal capacity or not, an assessment with a properly skilled person is required hence the child has to go for evaluation.<sup>256</sup> There has been a severe scarcity of forensic psychologists and psychiatrists equipped with the required expertise needed to conduct these assessments.<sup>257</sup> In order to control this private psychologists and psychiatrists are selected on an *ad hoc* basis but these, however, charge expert witness fees causing the

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<sup>252</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 23.

<sup>253</sup> Child Justice Alliance (2011) Workshop Report on Criminal Capacity of Children 18.

<sup>254</sup> Child Justice Alliance (2011) Workshop Report on Criminal Capacity of Children 18.

<sup>255</sup> Child Justice Alliance (2011) Workshop Report on Criminal Capacity of Children 18.

<sup>256</sup> Badenhorst *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* 2011 29-30.

<sup>257</sup> Badenhorst *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* 2011 29-30.

rapid depletion of the allocated resources from the Department of Justice made available for such purposes.<sup>258</sup>

This consequently leads to undue postponements with settling cases concerning children ten years and older but under the age of 14 years who have an unclear criminal capacity.<sup>259</sup> More so, the absence of constant tests available to establish whether a child has criminal capacity or not leads to an unwillingness by clinicians to out rightly express a view on whether a child has criminal capacity or not thus leading to postponements in concluding the matter.<sup>260</sup>

Furthermore, referring a child for assessment with a professional, results in the child being detained in a psychiatric institution on an in-patient basis while being evaluated.<sup>261</sup> This detention does not, however, conform to the principles set out in the CJA nor in the Constitution by means of being a hindrance to the child's life as it interrupts for the duration of this period, a child's education, leads to deprivation of family life and exposes children to the torments that come from being institutionalized.<sup>262</sup>

#### 4.2.5 *Criminal capacity and diversion*

This two-tier model minimum age of criminal responsibility and criminal capacity lacks conviction and is said to have harmful drawbacks when it comes to the progression of diversion which is a founding principle of the CJA.<sup>263</sup> Prior diversion, a *prima facie* case

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<sup>258</sup> Badenhorst *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* 2011 29-30.

<sup>259</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 22.

<sup>260</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 22.

<sup>261</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 22.

<sup>262</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 22.

<sup>263</sup> Pan Africa *a Reassessment of the minimum age of criminal responsibility*.

comprising criminal capacity should be established against the child by the prosecution.<sup>264</sup> For children over ten years but under the age of 14, it is presumed that they lack the necessary capacity hence in order for diversion to be effected for this age group, an evaluation needs to be done resulting in the hindrance of achieving a fast resolution on the case.<sup>265</sup> It would be irregular if an evaluation did not take place mainly because of a failure to observe a diversion order might lead to the child being prosecuted with acceptance of accountability being noted as admission of the crime.<sup>266</sup>

#### 4.2.6 *Criminal capacity and guilty pleas*

Before the application of the CJA, a challenge developed in case law concerning establishing criminal capacity of children ten years or older but under the age of 14 years who had legal representation and had pleaded guilty with a written statement dispensed in terms of section 112(2) of the CPA.<sup>267</sup> In these cases the criminal capacity of these children was ignored by the court *a quo*. Under common law an accused can be sentenced for a crime without any need of a review by the court where an accused provides a written statement in terms of section 112(2) of the CPA.<sup>268</sup> However, the onus lies on the State to satisfy that the accused is guilty of the offence. To elucidate, in terms of any issues advanced in the statement or any other issues arising from the statement, the court is allowed to make enquiries.<sup>269</sup>

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<sup>264</sup> Badenhorst *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* 2011 28.

<sup>265</sup> Badenhorst *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* 2011 28.

<sup>266</sup> Badenhorst *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* 2011 28.

<sup>267</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 24.

<sup>268</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 24 in Kriegler and Kruger Hiemstra Suid-Afrikaanse Strafprosesreg (Sesde uitgawe) Butterworths 2002.

<sup>269</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 24 in Kriegler and Kruger Hiemstra Suid-Afrikaanse Strafprosesreg (Sesde uitgawe) Butterworths 2002.

There are instances where the gravity of the offence is so severe that it is possible that the child's criminal capacity will not be ascertained regardless of the real age of the child.<sup>270</sup> Instances where a child has a legal representative or where they plead guilty gives rise to such instances.<sup>271</sup> In *S v Mshengu* 2009 (2) SACR 316 (SCA), the child's admission of guilt drafted by their legal representative was used to determine responsibility instead of criminal capacity.<sup>272</sup> Most likely in instances as such it is the legal representative's language and terminologies that are used by the child instead of his/her own words to express themselves.

South African courts are believed to be dealing with this issue in an unproductive, disorganized way without any guidance and it is evident through the above cases where the courts did not use the chance they had to convey guidelines on how an investigation on the rebuttal of the presumption of criminal capacity of a child ten years and older but under the age of 14 years can be completed.<sup>273</sup> Although the cases mentioned were settled before the commencement of the CJA, there is no provision made in the CJA to lessen the risk of the continuation of this practice.<sup>274</sup> This then poses a problem in the handling of the *doli incapax* presumption in circumstances where children make a guilty plea by courts.

#### 4.2.7 Prosecutors' deliberation of criminal capacity

Amid other aspects when a prosecutor decides to either prosecute or not to prosecute a child ten years and older but under 14 they should deliberate on the possibility of

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<sup>270</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 25.

<sup>271</sup> *Obakeng v S* CA11/2009 North West High Court. Unreported.

<sup>272</sup> 2009 (2) SACR 316 (SCA) para 9 and 10. After a quarrel a 13-year-old boy stabbed a 14-year-old with a knife, once in the chest and the victim died as a result of the injury inflicted by the accused. He made a plea of guilty and was convicted on it and sentenced to eight years' imprisonment.

<sup>273</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 25.

<sup>274</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 24.

having to establish criminal capacity for matters that would have been referred for preliminary enquiry.<sup>275</sup> There is no precise position provided for in this instance where diversion is deliberated on. Where the prosecutor is of the view that criminal capacity is unlikely to be ascertained, withdrawal of the case is obligatory and the child is to be referred for further action with a probation officer if any is required.<sup>276</sup>

However, if the prosecutor is of the view that there is a possibility of criminal capacity being substantiated then the matter can be diverted before the preliminary enquiry where the crime the child is alleged to have committed falls under offences found in Schedule 1 or the matter is referred to a preliminary enquiry.<sup>277</sup> Deliberation of criminal capacity on conditions arising from the prosecutor's resolution causes apprehension resulting from phrases such as 'prospects of establishing criminal capacity' and 'criminal capacity is likely to be proven' which are deemed to be unclear and lacking extensive and tangible material and not suitable to form the foundation of a resolution.<sup>278</sup>

More so the furnishing or recording of the decisions centred on 'prospects' or 'likelihood' are not provided for which exposes random claims and biased practices in implementation of the decision as to whether or not a child ten years and older but under 14 years should be prosecuted.<sup>279</sup> Inquiries are then made into the efficiency of the 'protective mantle' that is proposed to be afforded by the *doli incapax* presumption and the legislation.<sup>280</sup>

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<sup>275</sup> Section 10 of the CJA.

<sup>276</sup> Section 9 of the CJA.

<sup>277</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 24.

<sup>278</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 24.

<sup>279</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 24.

<sup>280</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 24.

#### 4.2.8 *Decisions on criminal capacity by magistrates*

Since the commencement into of the CJA, uncertainty has escalated amongst magistrates as to whether a resolution of the criminal capacity of children can be decided upon by them without having to inevitably direct the child for assessment to a psychiatrist or psychologist.<sup>281</sup> The reason for such doubt is because these magistrates are of the view that adequate training has not been received that allows them to determine the criminal capacity of children leading to an increase in referrals of children for evaluation of criminal capacity.<sup>282</sup> This essential notion was not subjected to alterations even by the inclusion of criminal capacity in the CJA and as such values, procedures and aspects that originate from case law still apply when establishing criminal capacity.<sup>283</sup>

Magistrates are unsure of the probability of child justice court magistrates in determining criminal capacity of a child relying on evidence given during trial, facts of a case and conditions' relating to the commission of the offence as the Act is vague on the subject.<sup>284</sup> More deliberation is needed on the magistrate's capability to consider the criminal capacity of a child offender where the matter is up for diversion or where a guilty plea is made by the child or where there is need for extra contemplation.<sup>285</sup> Deliberating the criminal capacity of a child is essential before diversion and guilty pleas although it is hard to attain.

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<sup>281</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 26.

<sup>282</sup> Badenhorst *Overview of the Implementation of the Child Justice Act, Good Intention, Questionable Outcomes* 2011 28.

<sup>283</sup> Badenhorst *Overview of the Implementation of the Child Justice Act, Good Intention, Questionable Outcomes* 2011 28.

<sup>284</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 26.

<sup>285</sup> Arises especially in the case of a child who is unrepresented and has been accused of the commission of a serious offence.

No abundant material is provided to inquiry magistrates for the deliberation of diversion during preliminary inquiries particularly where the child has been subjected to arrest and has been detained.<sup>286</sup> Before a preliminary inquiry is conducted, the evaluation of the child should be effected and for an arrested and detained child, a preliminary inquiry has to be prompted before 48 hours has lapsed after arrest.<sup>287</sup>

Magistrates are not content about the criminal capacity of the child as they find it challenging to determine it without evidence, whereas on the other hand furnishing evidence is costly and overwhelming given the expense that arises from referral to a psychologist's or psychiatrist's for a report especially instances where the child has committed a minor offence and is to be diverted.<sup>288</sup> The Act lacks sufficient regulation in cases where a child is either unrepresented or represented but takes guilty pleas as the child justice court magistrates are left in the dark as to whether they can be content with the basis of asking the child questions or there is a need to acquire evidence.<sup>289</sup>

#### **4.3 *Proposals for the review of the minimum age of criminal capacity***

There has been a significant change in children's rights in the last decade.<sup>290</sup> Child justice encompasses the minimum age of criminal capacity which has been recognized as being one of the elements that makes up a child rights-centred juvenile justice system.<sup>291</sup> A minimum age of criminal capacity is created to avoid the entering of

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<sup>286</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 26.

<sup>287</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 26.

<sup>288</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 26.

<sup>289</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 26.

<sup>290</sup> Acknowledgement has been done for the need of a separate justice system for children since the early 1990s. The Project Committee released the Child Justice Bill in 2000 intended to safeguard children's rights accused of having committed crimes, modifying the current system that handles children and making sure clear description of duties and functions of those involved with handling children who have committed crimes are prepared to ensure effective application.

<sup>291</sup> Pillay *Deliberating the minimum age of criminal responsibility* 2015 143–146.

children into the criminal justice system as it has an undisputable negative effect on adolescents.<sup>292</sup> The problem, however, hinges on instituting this minimum age where state parties differ as to what the required minimum age should be.<sup>293</sup>

State parties are in dispute as to whether there should be any recommended age set by international instruments as to when a child is said to lack or possess criminal capacity or would it be more practical to rather conduct an analysis in respect of each child individually to determine criminal capacity.<sup>294</sup>

#### 4.3.1 *Arguments against raising the minimum age of criminal capacity and maintaining the doli incapax presumption*

Amongst the arguments made in support of maintaining the minimum age of criminal capacity, the one that is said to provide the sturdiest argument is that of the cloak of protection provided by the presumption.<sup>295</sup> This cloak excludes younger children from being considered able to commit crimes by conducting a screening process leaving responsibility to the more mature and developed children.<sup>296</sup> By virtue of a child being of a specific age, protection is automatically afforded by the presumption.<sup>297</sup> Upon reaching the age specified by the presumption of a child not being criminally capable, the presumption automatically shifts and the onus then lies on the state to prove otherwise.<sup>298</sup>

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<sup>292</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* 2011 5.

<sup>293</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* 2011 5.

<sup>294</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* 2011 5.

<sup>295</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>296</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>297</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>298</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

By maintaining the *doli incapax* presumption, the safeguard it provides emanates spontaneously as it is triggered by the child having reached a certain age.<sup>299</sup> The position is from a practical point of view for when the child is assumed to have reached the applicable ages, instantly the “protective mantle” that provides that capacity for such a child is non-existent is applied to the child.<sup>300</sup> Also of significance is that once the presumption is generated, this “protective mantle” can only be reversed by the State as the onus transfers to the State to provide evidence to reverse it.<sup>301</sup>

There is a flexible method that comes with the *doli incapax* presumption in relation to children ten years and older but under 14 years. Although not definite, the actual age of a child is a vital issue that should be deliberated upon although the details and conditions of the case and the child’s upbringing are also imperative.<sup>302</sup> For a country like South Africa that encompasses a culturally and ethnically varied population, such flexibility is favourable and valuable.<sup>303</sup>

This method contains flexibility in two ways specifically flexibility amongst children of different ages mainly ten years till 13 years and flexibility of children who have different levels of maturity but of the same age group.<sup>304</sup> In order to determine the criminal capacity of a child, it is equally essential to look at the facts and circumstances of a specific case as well as the background of the child individually as these factors go hand in hand with a child’s age.<sup>305</sup> There is a belief that adults take advantage of children

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<sup>299</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>300</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>301</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>302</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>303</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>304</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>305</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 29

and use them to commit crimes. It is as a result of such fears that arguments were made regarding the retaining of the minimum age of criminal capacity.<sup>306</sup>

Children are able to be provided with protection from adult manipulation because by being under the age of being capable of committing a crime, they are exempted from any liability.<sup>307</sup> If the lower age of minimum age of criminal capacity is to be removed there is a possibility that the minimum age would now be set at too low an age.<sup>308</sup> By so doing a risk is placed on young children who might end up being victims of disorganized prosecution as no form of screening would be in existence linked to proof of maturity.<sup>309</sup>

#### 4.3.2 *Arguments in support of raising the minimum age of criminal capacity and abandoning the *doli incapax* presumption*

The CRC does not provide a precise minimum age of criminal capacity but instead there have been criticisms made by the United Nations Committee responsible for monitoring compliance where States have a minimum age of 12 or less.<sup>310</sup> A General Comment on Juvenile Justice was issued in 2009 by the United Nations Committee on the Rights of the Child,<sup>311</sup> in which states were advised to at least raise the minimum age of criminal capacity to 12 years and to abandon 'dual' minimum age thresholds like the *doli incapax* presumption.<sup>312</sup>

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<sup>306</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 29

<sup>307</sup> The CJA in its section 92 deals with such issues as it provides for the reporting of such an adult to the South African Police Service and the prosecution of the adult in terms of Section 141(1) (d) which goes hand in hand with section 305(1) (c) of the Children's Act 38 of 2005.

<sup>308</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>309</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>310</sup> Justice 1996 7.

<sup>311</sup> United Nations Committee on the Rights of the Child General Comment no.10: Children's Rights in Juvenile Justice (2007).

<sup>312</sup> Skelton and Gallinetti *A long and winding road: The Child Justice Bill and civil society advocacy* 2008 SA Crime Q 1 at 8.

There has been uneasiness communicated by the UN Committee towards State parties with regards to the observance of two minimum ages of criminal capacity.<sup>313</sup> The Committee is of the opinion that having two minimum ages is not only confusing but it might also lead to issues of a discriminatory nature to be raised as the determination is now left to the discretion of the court.<sup>314</sup> The Committee is of the opinion that for children who are above or at the lower minimum age but below the higher minimum age at the time of committing a crime they can only be presumed criminally responsible if the required maturity is present (*doli incapax* presumption).<sup>315</sup>

Section 11(1) provides the test for criminal capacity.<sup>316</sup> However this test is considered to be too vague and not specific as it provides for knowledge of the appreciation of the difference between wrong or right which is a bit too broad and generalized.<sup>317</sup> No mention is made to the importance of amending the common law or the child's ability to appreciate the wrongfulness of his/her act or omission.<sup>318</sup>

Walker argues that as it stands, section 11(1) is possibly in conflict with subsection 28(2) of the Constitution.<sup>319</sup> The best interests of the child should be of paramount importance in every matter affecting him or her which is not being evident in Section 11(1) as it is not only seen as contradictory but also somewhat constitutionally

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<sup>313</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 29.

<sup>314</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 29.

<sup>315</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 29.

<sup>316</sup> Section 11. Proof of criminal capacity: (1) 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.

<sup>317</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 29.

<sup>318</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 29.

<sup>319</sup> Walker *the requirements of criminal capacity in section 11(1) of the new Child Justice Act 2008: A step in the wrong direction* (2011) 38.

invalid.<sup>320</sup> What this entails is that evaluation of maturity is then left to the discretion of the court which failed to meet the condition of providing a psychological expert.<sup>321</sup>

Although there are many numerous legal considerations taking place to help rectify the situation of minimum age of criminal capacity, there are still also several practical problems and challenges that are being experienced in the application and operation of the *doli incapax* presumption.<sup>322</sup>

The absence of a uniform model to be used for the assessment and evaluation of criminal capacity is amongst the problems being experienced in the application and operation of the *doli incapax* presumption.<sup>323</sup> This lack thereof is said to result in sub-standardized outcomes, insufficient resources resulting in uncertainties about the competency of presiding officers and the lack of psychiatric facilities amongst other issues.<sup>324</sup> As such to ensure that state parties are in line with international law, practice and standards, the *doli incapax* presumption has to then be abandoned and alternatively raise the minimum age of criminal capacity.

Therefore to be in line with international law, practice and standards the *doli incapax* presumption has to be abandoned and the minimum age of criminal capacity raised.<sup>325</sup> In 2003 the parliament conducted debates on the Bill and amongst the proposals that were made, the majority were in favour of increasing the minimum age of criminal capacity from ten years and continue with the *doli incapax* presumption.<sup>326</sup> The aim of

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<sup>320</sup> Section 28(2) of the Constitution of the Republic of South Africa, 1996.

<sup>321</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 28.

<sup>322</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 28.

<sup>323</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 28.

<sup>324</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 28.

<sup>325</sup> Child Justice Alliance (2011) Workshop Report on Criminal Capacity of Children.

<sup>326</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 27.

this was the 2002 Bill that advocated more prominence on the issue of having the presumption rebutted.<sup>327</sup> There was a need to highlight the issue of expert assessment for the criminal capacity of a child ten years and older but under 14 years and on the certificate that has to be supplied which contains an authorisation by the Director of Public Prosecutions of the goal of prosecuting the child.<sup>328</sup>

The 2007 version of the Bill took out these requirements which caused the support of the preservation of the *doli incapax* presumption to be removed.<sup>329</sup> The exclusion of these defensive procedures and precautions when instituting the criminal capacity of a child resulted in restoring the practice of having the parent rebutting the presumption which had been extensively disapproved.<sup>330</sup> The current law stipulates that where a serious offence has been committed by the child the possibility of deliberating on the child's criminal capacity, even though the child might be of a young age, is very low especially in cases where a guilty plea is made by the child under legal representation.<sup>331</sup>

Regardless of the cases aforementioned being resolved before the commencement of the CJA, no reference is found in the CJA providing for the same issue so as to avoid the carrying on of such a practice.<sup>332</sup> The bulk of unreported cases on criminal capacity comprise ten and 11-year-olds who unfortunately could not be safeguarded as

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<sup>327</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 27.

<sup>328</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 27.

<sup>329</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 27.

<sup>330</sup> Sloth-Nielsen *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill, 2007 version*.

<sup>331</sup> *S v Obakeng* CA11/2009 North West High Court Unreported and *S v Mshengu* 2009(2) SACR 316 SCA.

<sup>332</sup> Sloth-Nielsen *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill, 2007 version*.

projected by the *doli incapax* presumption.<sup>333</sup> It was only after an evaluation had been made that the child's criminal capacity or lack thereof was contemplated.

It is considered that by setting the age of criminal capacity to an internationally set standard and eliminating the *doli incapax* presumption it would make things easier when dealing with the issue thereby leading to anticipated results.<sup>334</sup> Furthermore it would also remove complications that come about as a result of applying the *doli incapax* presumption, adding to legal certainty on the subject of the presumption while also moderating the danger that arises from discriminatory and arbitrary practices that develop from the option of either deciding to prosecute a child ten years and older but under 14 years or not to prosecute.<sup>335</sup>

An increase in availability of restricted resources needed for children who suffer from mental illnesses or mental defects will also materialize.<sup>336</sup> A steadiness in responsibility will be realized for children in this age group if the minimum age of criminal capacity is increased to 12 years and the *doli incapax* presumption eliminated.<sup>337</sup>

Liability for criminal crimes for children below the age of 12 years will no longer be in place although for those children aged 12 years and under 14 who have the requirements needed for responsibility, likelihood for being criminally responsible for criminal acts exists.<sup>338</sup> What this then entails is that children between 12 years and under 14 are treated similarly to those aged between 14 but under 17 years thus

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<sup>333</sup> S v Kholi 1914 CDP 840; S v Van Dyk and Others 1969 (1) SA 601(CPD); S v Mbanda and others 1986 (2) PHH 108 (T); S v Khubeka and others 1980 (4) SA 221 (OPD).

<sup>334</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 28.

<sup>335</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 28.

<sup>336</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 28.

<sup>337</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>338</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

leading to an increase of both the minimum age of criminal capacity and the lowering of it which would most probably contribute to the political purpose of the proposal.<sup>339</sup>

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<sup>339</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

## Chapter 5 Conclusion

### 5.1 *Summary and conclusion*

The grounds of the principles in the development of a distinct child justice system are initiated by establishing a minimum age under which a child could be accepted as not having the required ability to infringe the penal law.<sup>340</sup> Regardless of this being a significant standard, there has been a lot of improbability with regard to setting a minimum age of criminal capacity that is satisfactory given the fact that the CRC and the Beijing Rules only provide general recommendations when it comes to the issue of a minimum age of criminal capacity.<sup>341</sup> The onus was then left up to the State Parties to deliberate on a minimum age of criminal capacity encompassing the child's level of emotional, mental and intellectual maturity.<sup>342</sup>

Since its coming into force, the CRC has been adopted and ratified by many State Parties leading to the altering and enacting of domestic legislation so that it conforms to the set standards in the CRC.<sup>343</sup> Amongst these modifications was the need for the review of the minimum age of criminal capacity and deliberation on the continued practice of the *doli incapax* presumption.<sup>344</sup> On 16 June 1995, South Africa ratified the CRC and in 1997 it commenced its course of instituting a detached child justice system beginning with an enquiry into the possibility of such a system that was conducted by the SALRC.<sup>345</sup>

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<sup>340</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30-35.

<sup>341</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30-35.

<sup>342</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30-35.

<sup>343</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 31.

<sup>344</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 31.

<sup>345</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 32.

The minimum age of criminal capacity of children in South Africa is set at ten years. This was connected to the Commission's need to maintain the rebuttable presumption for children between ten and 14 years as he considered the doctrine as a "protective mantle" for these children hence the need for support for its retention.<sup>346</sup>

South Africa's setting of the minimum age of criminal capacity at ten years goes against the responsibilities it acquired upon ratification of the CRC.<sup>347</sup>

State parties to recognize the right of every child alleged as, accused of or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.<sup>348</sup>

In 2000 before the CJA was passed anxiety was expressed by the United Nations Committee on the Rights of the Child with regard to South Africa's objective of raising the minimum age of criminal capacity to ten years and maintaining the *doli incapax* presumption.<sup>349</sup> The Committee advised South Africa to increase their minimum age of criminal capacity to an internationally accepted standard.<sup>350</sup>

On 1 April 2010 the CJA came into action and its provisions revised the common law presumptions that were in place and controlled the minimum age of criminal capacity and the *doli incapax* presumption.<sup>351</sup> The CJA clarified the procedures and deliberations that are to be followed by numerous role players that exist in the child justice system when deliberating on the criminal capacity of children, ten years and older but under

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<sup>346</sup> South African Law Commission (2000) Juvenile Justice Report Project 106 at 29.

<sup>347</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30-35.

<sup>348</sup> Section 8 of the CRC.

<sup>349</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30-35.

<sup>350</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30-35.

<sup>351</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 32.

14.<sup>352</sup> An evaluation of the minimum age of criminal capacity is offered in the Act and it stipulates that such evaluation should be effected no later than five years after the Act had been in operation.<sup>353</sup>

The resolution that the Commission came up with for dealing with the issue of deliberating on the minimum age of criminal capacity was to firstly eliminate the two-tier model of having two minimum ages.<sup>354</sup> It is to be substituted with an applicable single minimum age of criminal capacity of 12 years which not only coincides with the initial statistics of children recognized to have capacity but is in line with the concluding observation made by the Committee on the Rights of the Child in its General Comment No. 10 which provides that "*the Committee does not internationally accept a minimum age of criminal responsibility that is below the age of 12 years as this is the international average age for criminal capacity.*"<sup>355</sup>

This resolution will result in children under the age of 12 years being dealt with in the same fashion as that of the one currently in use for children under ten years.<sup>356</sup> In order to decide whether remedial action is a prerequisite or not that is separate from the formal criminal justice process these children are to be referred to the Department of Social Development.<sup>357</sup> More so diversion or prosecution can be achieved in terms of crimes committed by children over the age of 12 years.<sup>358</sup> However, if their youthfulness results in their criminal capacity being absent, then the standard measures found in the CPA are to be used to rebut this assumption.<sup>359</sup>

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<sup>352</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 32.

<sup>353</sup> Section 8 of the CJA.

<sup>354</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30.

<sup>355</sup> United Nations Committee on the Rights of the Child General Comment No.10 (2007) Para 30.

<sup>356</sup> Pan Africa *a Reassessment of the minimum age of criminal responsibility.*

<sup>357</sup> Pan Africa *a Reassessment of the minimum age of criminal responsibility.*

<sup>358</sup> Pan Africa *a Reassessment of the minimum age of criminal responsibility.*

<sup>359</sup> Pan Africa *a Reassessment of the minimum age of criminal responsibility.*

This offered approach is concrete and receptive to the challenges that are existing in the child justice system while being compatible with the regional and international law obligations set out for South Africa on how to handle child offenders.<sup>360</sup> The CJA provides for the minimum age of criminal capacity but it is, however, not as advanced as other jurisdictions that have set their minimum age at 12 years old. The CJA acts as a safeguard, is child-centred and provides for restorative justice methods carrying out completely the standards set out in the CRC.<sup>361</sup>

After the Act had been in force for over a year in 2011, an Annual Report was submitted to the Portfolio Committee for Justice and Constitutional Development and it was there that it was observed that there was a lack of accessible statistics and data on children ten years and older but under 14 that are in opposition to the law.<sup>362</sup> More complications that are being faced in the use of the *doli incapax* presumption since the application of the Act include unavailability of resources needed for conducting assessments on criminal capacity, inadequate preparation by mental health experts and lack of unanimity on tests to be used.<sup>363</sup>

Furthermore, disputes arise in terms of the deliberation of criminal capacity in instances of diversion or where a guilty plea has been made and reservations made by magistrates on their abilities to decide on criminal capacity.<sup>364</sup> Many substantial opinions exist which back up the increasing of the minimum age of criminal capacity to

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<sup>360</sup> Pan Africa *a Reassessment of the minimum age of criminal responsibility*.

<sup>361</sup> McGregor *An evaluation of the Child Justice Act* 30.

<sup>362</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 30.

<sup>363</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 30.

<sup>364</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 33.

an internationally recognized standard while also eliminating the *doli incapax* presumption.<sup>365</sup>

Likewise substantial options also exist that are in contradiction with raising the minimum age of criminal capacity and stopping the *doli incapax* presumption.<sup>366</sup> As a result of such observations it is imperative to investigate and conduct a debate on these concerns so as to determine the merits of these opinions before an evaluation into the minimum age of criminal capacity is commenced by the Parliament so as to contribute to the knowledgeable resolution that works in the best interests of children disturbed by such.<sup>367</sup>

Usually when one mentions the debate about the age of criminal capacity, the assumption is that it is mainly focused on determining the age at which children are supposed to be able to appreciate the nature and impact of their actions, while possessing the required ability and maturity and the capacity to take up responsibility for those actions.<sup>368</sup> However this debate is actually intricate and poses problems as decisions usually end up being debatable where procedural mechanisms and structures available prove to be insufficient in order to execute the decision provided.<sup>369</sup>

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<sup>365</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 33.

<sup>366</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 33.

<sup>367</sup> Skelton and Badenhorst *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 33.

<sup>368</sup> Schoeman M *Determining the age of criminal capacity: Acting in the best interest of children in conflict with the law* 2016 35.

<sup>369</sup> Schoeman M *Determining the age of criminal capacity: Acting in the best interest of children in conflict with the law* 2016 35.

## BIBLIOGRAPHY

### *Literature*

Badenhorst *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes* 2011

Badenhorst C (2011) 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 Occasional Paper 10

Badenhorst (1981) 98 *SALJ* 148

Badenhorst 'Vrywillige Dronkenenskap as Verweer teen Aanspreeklikheid in die Strafreë -'n Suiwer Regwetenskaplike Benadering' (1981) 98 *SALJ* 148

Brink *The Child Accused in the Criminal Justice System* 2010.

Ronelle Bonita Brink *The Child Accused in the Criminal Justice System* 2010. (Dissertation submitted in partial fulfilment of the requirements for the degree of Magister Legum Criminal Justice)

Burchell *Principles of Criminal Law* 3<sup>rd</sup> ed 2005 358

Burchell J and Milton J "*Principles of Criminal Law*" 3<sup>rd</sup> ed Juta & Co Ltd 2005

Burchell *Principles of Criminal Law* 5<sup>th</sup> ed 2016 251-262

Burchell Jonathan "*Principles of Criminal Law*" 5<sup>th</sup> ed Juta & Co Ltd 2016 *Child Law Matters* Issue 14 (April 2007)

Davel; *Introduction to Child Law in South Africa*; 2000; 199

Davel C J; *Introduction to Child Law in South Africa*; Juta and Co Ltd; 2000; 199

Gallinetti "*Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime*" 2009 650

Gallinetti "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart *Child Law in South Africa* 2009 56

Gallinetti; *Getting to know the Child Justice Act*; Child Justice Alliance, 2009

Gallinetti Jacqui "*Getting to know the Child Justice Act*" The Child Justice Alliance c/o The children's Rights Project Community Law Centre (University of the Western Cape) 2009

JC de Wet & HL Swanepoel (1987) 109-10

JC de Wet & HL Swanepoel *Die Suid-Afrikaanse Strafbeg* 4<sup>th</sup> ed (1987) 109-10

Kramers-Olen 2015 *South African Journal of Psychology*

Kramers-Olen AL *Neuroscience, moral development, criminal capacity and the Child Justice Act: justice or injustice?* 2015 *South African Journal of Psychology* 466-479

Kriegler and Kruger *Hiemstra Suid-Afrikaanse Strafproses (Sesde uitgawe)* Butterworths 2002.

Kriegler J & Kruger A (2002) *Hiemstra Suid-Afrikaanse Strafproses (Sesde uitgawe)* Durban: Butterworths 302-19. See also Du Toit, E et al (2005). *Commentary on the Criminal Procedure Act (Revision Service 34)* Cape Town: Juta & Co, Ltd: 17-1 – - 12C and *S v Moya* 2004 (2) SACR 257 (W)

Lyons *Dying to be responsible: Adolescence, autonomy and responsibility* (2010)

Lyons B "*Dying to be responsible: Adolescence, autonomy and responsibility*" (2010) *Legal Studies* 257

McClain *Problems Relating to Age and Criminal Capacity South African Juvenile Justice: Law Practice and Policy*

McClain *Problems Relating to Age and Criminal Capacity* in Sloth-Nielsen (ed) *South African Juvenile Justice: Law Practice and Policy* (forthcoming).

McGregor *An evaluation of the Child Justice Act.*

Melissa McGregor *Criminal capacity* (chapter in LLM thesis entitled *an evaluation of the Child Justice Act 2010* NMMU)

Midson 2012 *Psychiatry, Psychology and Law*

Midson B 2012 *Risky Business: Developmental Neuroscience and the Culpability of Young killers* *Psychiatry, Psychology and Law* 692-710 Mukwende 2014

Mukwende T "*Balancing restorative justice and juvenile offender rehabilitation*" *De Rebus* 2014

Odongo; *the Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context*, 2005

Odongo; '*Age and capacity*' (chapter in unpublished LLD thesis entitled *The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context*, 2005, UWC)

Pillay *Criminal Capacity in children accused of murder: challenges in the forensic mental health assessment* (2006)

Pillay A L '*Criminal Capacity in children accused of murder: challenges in the forensic mental health assessment*' (2006) 18(1) *Journal of Child and Adolescent Mental Health* 17-22

Pillay *deliberating the minimum age of criminal responsibility* 143–146 (2015)

Anthony L Pillay " *Deliberating the minimum age of criminal responsibility*" South African Journal of Psychology 2015, Vol. 45(2) 143–146

Pillay and Willows *Assessing the criminal capacity of children*.

Pillay and Willows *Assessing the criminal capacity of children* 91–101.

Ramages *The minimum age of criminal responsibility in selected African states*

Kelly Anne Ramages "The minimum age of criminal responsibility in selected African states" unpublished LLM thesis " *Investigating the Minimum Age of Criminal Responsibility in African Legal Systems*" (2008)

Schoeman M *Determining the age of criminal capacity: Acting in the best interest of children in conflict with the law* 2016 35

Marelize Isabel Schoeman *Determining the age of criminal capacity: Acting in the best interest of children in conflict with the law* SA Crime Quarterly No. 57 2016 35

Skelton 1996 Acta Juridica 180-186

Skelton Ann " *Developing a juvenile justice system for South Africa: international instruments and restorative justice*" Acta Juridica (1996) 180-186

Skelton and Badenhorst 2011

Skelton Ann and Badenhorst Charmain " *The Criminal Capacity of Children in South Africa International Developments & Considerations for a Review*" The Child Justice Alliance c/o The Children's Rights Project Community Law Centre (University of the Western Cape) 2011 28

Skelton; *Juvenile justice reform: children's rights and responsibilities versus crime control* in Davel CJ (ed) *Children's rights in a transitional society*

Skelton A; *Juvenile justice reform: children's rights and responsibilities versus*

*crime control* in Davel CJ (ed) (1999) *Children's rights in a transitional society*. Proceedings of a conference hosted by the Centre for Child Law in Pretoria on 30 October 1998 Protea Book House: Menlo Park

Skelton and Badenhorst; *the Criminal Capacity of Children in South Africa*: International Developments & Considerations for Review (2012); 31

Skelton A & Badenhorst C; *the Criminal Capacity of Children in South Africa: International Developments & Considerations for Review* (2012) A Report by the Child Justice Alliance; available at [www.childjustice.org.za](http://www.childjustice.org.za); 31

Skelton and Tshehla; *International Instruments pertaining to child justice in South Africa*; Monograph No 150, 2008

Ann Skelton & Boyane Tshehla; *International Instruments pertaining to child justice in South Africa*; Monograph No 150, September 2008; Institute for security studies

Sloth-Nielsen Report on the SA Law Commission Seminar on Age and Capacity 1999  
See also Davel the Delictual Accountability and Criminal Capacity of a Child: How big can the Gap Be? (2001) De Jure

Sloth-Nielsen J 'Report on the SA Law Commission Seminar on Age and Capacity' 1999 (2) Article 40. See also Davel CJ 'The Delictual Accountability and Criminal Capacity of a Child: How big can the Gap Be?' (2001) 34(3) De Jure 604 – 609

*Simester and Sullivan's Criminal Law*

Simester AP, Spencer JR, Sullivan GR and Virgo GJ *Simester and Sullivan's Criminal Law: Theory and Doctrine* 4<sup>th</sup> ed 2010 723

Snyman (1985) 102 SALJ 240

Snyman *Is there such a defence in our Criminal Law as Emotional Stress?* (1985)  
102 SALJ 240

Snyman; *Criminal Law*; Butterworths; 158 – 179; 2002.

Snyman CR *Criminal Law* 3<sup>rd</sup> ed (LexisNexis Butterworths Durban 2002)

Van Bueren; *the International Law on the Rights of the Child*; 1995; 172

Geraldine Van Bueren; *the International Law on the Rights of the Child*;  
Dordrecht: Kluwer Academic Publishers; 1995 172

Van Bueren; *International documents on children*; Save the Children; 1993

Geraldine Van Bueren; *International documents on children*; Save the Children;  
Martinus Nijhoff; Netherlands; 1993

*Van Oosten and Louw "Children, Young Persons and the Criminal Law" (1997) 125*

*Van Oosten and Louw "Children, Young Persons and the Criminal Law" in Robinson  
(ed) The Law of Children and Young Persons in South Africa (1997) 125*

Walker " *The requirements of criminal capacity in section 11(1) of the new Child Justice Act, 2008: A step in the wrong direction*" (2011)

Walker " *The Requirements for Criminal Capacity in Section 11(1) of the new  
Child Justice Act 2008: A Step in the Wrong Direction*" 2011 1 SACJ 33 32

## **Legislation**

*Constitution of the Republic of South Africa, 1996*

*Child Justice Act 75 of 2008*

*Crime and Disorder Act 1998*

*Criminal Law Amendment Act 1 of 1988*

*Criminal Procedure Act 51 of 1977*

*Health Professions Act 56 of 1974*

**Case Law**

*Arnold 1985 (3) SA 256 (C)*

*C v DPP [1995] 2 Cr AppR 166 (HL)*

*Campher 1987 (1) SA 940 (A) 951*

*Chretien 1981 (1) SA 1097 (A) 1106 B-D*

*De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others [2015] ZACC 21*

*JTB [2009] UKHL 20*

*Laubscher 1988 (1) SA 163 (A)*

*Obakeng v S CA11/2009 North West High Court*

*S v Kholi 1914 CDP 840*

*S v Khubeka and others 1980 (4) SA 221 (OPD).*

*S v M 1982 (1) SA 240 (N)*

*S v Mbanda and others 1986 (2) PHH 108 (T)*

*S v Mshengu 2009 (2) SACR 316 (SCA)*

*S v Van Dyk and Others 1969 (1) SA 601(CPD)*

*Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A) 389*

*Wiid 1990 (1) SACR 561 (A)*

[103] K 1956 (3) SA 353 (A) 356

[106] T 1986 (2) SA 112 (O)

[107] F 1989 (1) SA 460 (Z)

### ***International Instruments***

*African Charter on the Rights and Welfare of the Child, 1990*

*German Penal Code*

*United Nations Convention on the Rights of the Child, 1989*

*United Nations Committee on the Rights of the Child, Forty-fourth session, Geneva, 15 January – 2 February 2007 General Comment No. 10 'Children's Rights In Juvenile Justice' Un Doc. Crc/C/Gc/10 (2007)*

*United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985*

### ***Internet Sources***

Child Justice Alliance: Fact sheet on 'Age and criminal capacity' available at [www.childjustice.org.za](http://www.childjustice.org.za)

Child Justice Alliance (2011) Workshop Report on Criminal Capacity of Children

Child Welfare Information Gateway, Long-term consequences of child abuse and neglect, July 2013, [https://www.childwelfare.gov/pubPDFs/long\\_term\\_consequences.pdf](https://www.childwelfare.gov/pubPDFs/long_term_consequences.pdf)

<http://www.experiment-resources.com/different-research-methods.html>

<http://www.google.com>: *Research methods- Some notes to Orient you.*

Parliamentary Monitoring Group (2008) Child Justice Bill: Department Briefing & Public Hearings. 5 February 2008. Available at <http://www.pmg.org.za/node/10170>

Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters. RP69/1967. para 9.97.2 Republic of South Africa (Rumpff Commission)

Sloth-Nielsen J (2008) *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill, 2007 version*. Available at <http://www.childjustice.org.za/submissions/2008Submissions/Julia%20Sloth-Nielsen.pdf>

South African Law Commission Issue Paper 9 Van Bueren *The International Law on the Rights of the Child* (1995)172 [http://www.saflii.org/za/other/zalc/ip/9/9-3\\_.html](http://www.saflii.org/za/other/zalc/ip/9/9-3_.html)

South African Law Reform Commission (1997) Juvenile Justice Project 106 Issue Paper 9

South African Law Commission (2000) Juvenile Justice Report Project 106 at 29 Available at [http://salawreform.justice.gov.za/reports/r\\_prj63\\_insolv\\_2000apr.pdf](http://salawreform.justice.gov.za/reports/r_prj63_insolv_2000apr.pdf)

Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) Adopted by General Assembly resolution 40/33 of 29 November 1985 <http://www2.ohchr.org/>

*United Nations Committee on the Rights of the Child General Comment No. 10 (2007)*

*United Nations Committee on the Rights of the Child, Forty-fourth session, Geneva, 15 January – 2 February 2007 General Comment No. 10 'Children's Rights In Juvenile Justice' Un Doc. Crc/C/Gc/10 (2007) Para 32*

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>