

## CHILD LAW MATTERS

ISSUE 14

THURSDAY 10 APRIL 2007

In this issue, we are going to look at the existing legal framework on **minimum age of criminal responsibility**, some practice issues, and the changes proposed by the Child Justice Bill.

Under the existing legal framework, a child's criminal responsibility is divided into three categories according to the age of the child.

Age	Criminal capacity	Comment
Under 7	Irrebuttably presumed to be <i>doli incapax</i> (to lack criminal responsibility).	A child under seven years is presumed to lack criminal responsibility, and this presumption cannot be challenged. Such a child cannot be criminally responsible for any act committed.
Between 7 & 14	Rebuttably presumed to be <i>doli incapax</i> (to lack criminal responsibility)	A child who is 7 years or older but not yet 14 years is presumed to lack criminal responsibility. However, the presumption can be rebutted by evidence. In other words, the Prosecution has to prove beyond a reasonable doubt that the child possesses the required criminal capacity. To do so, the Prosecution has to prove two elements. Firstly, the cognitive element that the child appreciates wrongfulness of the conduct and the consequences. Secondly, the conative element that the child acted in accordance with that knowledge at the time of the act. The presumption weakens the closer the child gets to the age of 14 years.
14 & above	Full criminal responsibility	Can be held fully responsible for their criminal acts, and there is no need to lead evidence regarding criminal responsibility.

## Child Justice Bill 49 of 2002

The Child Justice Bill is currently before Parliament, and there is an expectation that it might be passed before the end of 2008. The Bill proposes an increase in of the minimum age of criminal responsibility from 7 to 10 years. Children below 10 will not be prosecuted, whilst children who are 10 years or older but not yet 14 years of age will be presumed to lack criminal responsibility.

<b>Age</b>	<b>Criminal capacity</b>	<b>Comment</b>
Under 10	Irrebuttably presumed to lack criminal responsibility ( <i>doli incapax</i> )	Section 6(1) A child who commits an offence while below the age of 10 years does not have criminal capacity and cannot be prosecuted...  Section 7 provides for guidelines on the manner in which a child who is under 10 and suspected of having committed an offence should be treated.
Between 10 & 14	Rebuttably presumed to lack criminal responsibility ( <i>doli incapax</i> )	Section 9(1)(a) A child who is 10 years of age or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless he or she is proved to have such criminal capacity... Under section 10(1) of the Child Justice Bill, the State has to prove, beyond a reasonable doubt, that the child has the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation at the time of the commission of an alleged offence.
14 & above	Full criminal responsibility	Can be held fully responsible for their criminal acts.

The Child Justice Bill also proposes that the child's legal representative or the prosecutor can request the court to order that a full psychological report regarding criminal responsibility be obtained, at state expense where the child's parents are indigent.

## International Law

Although the United National Convention on the Rights of the Child does not recommend any particular minimum age, article 40(a) requires states to establish a minimum age below which children should be presumed not to have criminal capacity. Also, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing rules) discourages states from setting their minimum age 'too

low'. More concrete guidelines comes from the CRC General Comment on Children's Rights in Juvenile Justice in which the Committee on the Rights of the Child recommends that the internationally acceptable minimal age of criminal responsibility is 12. It further urges state parties to the Convention to increase the minimum age to 12 and discourages the states from lowering of their minimum age if their standard is already above 12. Considering the international standard set by the CRC Committee, the South African standard still falls short. Some NGOs have called for the age to be increased to 12 at the Portfolio Committee on the Child Justice Bill, so it is still possible that Parliament may decide on that option.

### **The procedure for proving criminal capacity.**

There is an unfortunate practice of the prosecutor putting the mother of the child on the witness stand and leading evidence from her to prove that the child understands the difference between right and wrong. This is only part of the inquiry, the second part is whether the child could act in accordance with that knowledge at the time and in the circumstances of the offence. Van Oosten and Louw<sup>1</sup> have observed that "In practice ... the courts have more often than not paid mere lip service to the criminal capacity test by making the inquiry turn on the child's actual knowledge and appreciation of the wrongfulness of his or her conduct in specific circumstances and at the time of his or her act, or on the presence or absence of malicious intent or evil motive." The mother of a child is also unlikely to be an expert in child development. If for example, the child is suffering from developmental delay as a result of foetal alcohol syndrome, this is hardly something one could expect the mother to pronounce a valuable view on.

Justice College has issued a "Child Law Manual for Judicial Officers" (2004) which points out that it is very useful to have a report of a suitably qualified professional who should testify on the criminal responsibility of the child at the trial. This is particularly important where the child is facing a serious charge and may be facing a custodial sentence.

### **Criminal responsibility and guilty pleas**

What if a child below 14 admits responsibility for the offence? Is it appropriate to allow a child to plead guilty? It must be remembered that the onus for proving that the child has criminal responsibility rests on the prosecution. It is therefore considered undesirable to allow a child offender to plead guilty in terms of section 112(2), because to do so is to concede that the child has criminal responsibility, thereby abandoning a legal rule that aims to protect children.

In *S v Van Dyk and Others* 1969 (1) SA 601 (C), the court found that the presiding officer must be satisfied that the presumption has been rebutted before convicting a child on a plea..

In ***S v N* 1992 (1) SACR 67 (Ck) 69 I-J**, Heath J held as follows:

*The question whether the accused had the right to assault the complainant does not necessarily imply unlawfulness and particularly in view of the accused's age*

---

<sup>1</sup> F Van Oosten and A Louw "Children, Young Persons and the Criminal Law" in J Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) Butterworths: Durban, at 125.

*of 13 years, the magistrate should have satisfied himself that the accused had the necessary insight to understand the element of unlawfulness and the knowledge of unlawfulness, that he understood what it means to admit such an element and what the consequences thereof would be. Particularly in view of the age of the accused, I am of the view that the magistrate should have established his criminal capacity through questioning.*