



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

CHILDREN IN CONFLICT WITH THE LAW: PART 2

CONTEXT AND CRIMINAL CAPACITY

AUTHORS

Sean Whiting
Siyavuya Koyana
Crystal Levendale
Mpho Mathabathe
Mkhululi Molo
Gullian Nesbitt
Zubair Rahim
Nicolette van Zyl-Gous
Patricia Whittle

EDITORS

Nadia Dollie
Berenice Paulse
Lorenzo Wakefield
Carmine Rustin

Copyright: Research Unit, Parliament of the RSA

Publisher: Parliament of the RSA

May 2015

TABLE OF CONTENTS	PAGE
List of tables	
List of abbreviations	
Section A: Introduction and Summary of Key Points	4
1.1 Introduction	4
1.2 Recommendations and Way Forward	4
Section B: International and National Framework	6
2.1 International Instruments	6
2.2 Constitutional Framework	7
2.3 National Legislation and Policy	7
2.4 Intersectoral Coordinating Structures	12
Section C: Developing Case Law and Amending Legislation	13
3.1 Introduction	13
3.2 Case Law	13
3.3 Amendments to the Child Justice Act	14
Section D: Age of Criminal Capacity	16
4.1 Introduction	16
4.2 Criminal Capacity in South Africa	16
4.3 International Standards	17
4.4 Comparative Examples	18
4.5 Challenges and Recommendations	20
4.6 Summary of Key Points in terms of Criminal Capacity	22
References	23

LIST OF TABLES

Table 1:	Selective list of countries that increased their minimum age of criminal responsibility as per the UN Convention recommendations	19
----------	--	----

LIST OF ABBREVIATIONS

CICL:	Children in conflict with the law
CJA:	Child Justice Act, 75 of 2008
CRC:	United Nations Convention on the Rights of the Child
DG:	Director General
DOJ&CD:	Department of Justice and Constitutional Development
IJS:	Integrated Justice System
ISCCJ:	Intersectoral-Committee for Child Justice
IT:	Information Technology
JDL:	Juveniles Deprived of their Liberty
NPA:	National Prosecuting Authority
NPF:	National Policy Framework
NRSO:	National Register for Sex Offenders
PFMA:	Public Finance Management Act, 1 of 1999
SAPS:	South African Police Service
SOCA:	Sexual Offences and Community Affairs
UN:	United Nations
UNCRC:	United Nations Convention on the Rights of the Child

Section A | INTRODUCTION AND SUMMARY OF KEY POINTS

1.1 INTRODUCTION

This paper is Part 2 of two papers produced by the Research Unit of the Parliament of South Africa on Children in Conflict with the Law. Part 1 entitled 'Implementation of the Child Justice Act: Progress Report 2010/11 - 2013/14' highlighted progress by Government in implementing the Act during this period, based on analysis of the three annual Intersectoral Reports that have been tabled in Parliament to date, as well as an unconsolidated Report that was tabled for the 2013/14 financial year.

This paper, in contrast, provides a context to the Child Justice Act, 75 of 2008 ('the CJA') framing it in terms of the international and regional conventions and guidelines, and the Constitutional provisions pertaining to child justice. The paper also sets out the national framework governing children in conflict with the law including legislation, policies and structures and provides information on recent case law and amendments to this legislative framework. Lastly, the paper highlights information on the age of criminal capacity, which was set for review (in terms of the provisions of the CJA) by 1 April 2015.

The paper is divided into four broad sections. These are as follows:

Section A	This section provides an introduction to the paper.
Section B	This section provides an outline of the international and national framework governing child justice.
Section C	This section identifies selective case law as well as legislative amendments to the CJA.
Section D	The final section highlights international guidelines and good practice in terms of the age of criminal capacity.

1.2. RECOMMENDATIONS AND WAY FORWARD

The following are the key recommendations for consideration by Parliament, contained in the paper:

RECOMMENDATION 1:

Review of the National Policy Framework

In terms of the Act, the National Policy Framework must be reviewed within three years of its publication- i.e. by 1 August 2013 and at least once every five years thereafter- i.e. again by 1 August 2018.

The National Policy Framework had not been reviewed as per section 93 (2)(c) of the CJA by August 2013. This review should be completed by the Intersectoral Committee for Child Justice (ISCCJ) after taking into account any challenges in implementation and reporting.

The National Policy Framework has been used as the basis for reporting in the annual ISCCJ reports to Parliament.

It is recommended that:

1. The first review of the National Policy Framework should be completed, and tabled in Parliament as a matter of urgency as it is already overdue.
2. Parliament should be encouraged to interrogate the review or the amendments made, including through public hearings.

3. The Portfolio Committee on Justice and Correctional Services should lead this intersectoral process and invite members of the relevant committees to participate. Alternatively, an intersectoral *Ad Hoc* Committee could be established for this purpose.

RECOMMENDATION 2:

Review of the age of criminal capacity

Section 8 of the Act provides for a five year review of the age of criminal capacity. The deadline for the report on this review was 1 April 2015.

It is recommended that:

1. Parliament should ascertain when the ISCCJ will table the report on the five year review of criminal capacity, as the 1 April 2015 deadline has passed.
2. Parliament should ensure that future annual Reports include all the statistics required to undertake this review and that these statistics are accurate, disaggregated and analysed. All subsequent Reports after the review should also contain these statistics (in case the age of criminal capacity requires future amendment).
3. The Portfolio Committee on Justice and Correctional Services should coordinate parliamentary oversight over the review or alternatively an intersectoral *Ad Hoc* Committee could be established for this purpose.
4. Parliament should consider the recommendations in the criminal capacity review Report and conduct extensive public consultations on the feasibility of amending the minimum age of criminal capacity and raising it to at least 12 years of age, in line with international recommendations.
5. Parliament should consider arguments for and against the abolishment of the common law principle of *doli incapax* in line with international recommendations by the Committee on the Rights of the Child.¹

RECOMMENDATION 3:

Reporting on implementation of the Child Justice Act

The Judicial Matters Amendment Bill [B2-2015] seeks to change the manner in which the implementation of the Child Justice Act is reported to Parliament. The Bill proposes the removal of the requirement for the Minister of Justice and Correctional Services to submit annually to Parliament separate implementation reports from each of the respective role-players. Instead each Department/institution responsible for implementation must incorporate a separate section setting out their activities in respect of the Act as part of their regular Annual Reports submitted to Parliament in terms of section 40 of the Public Finance Management Act (PFMA) 1 of 1999.

The proposed amendment **should be rejected by Parliament**. The separate annual reporting requirement is a critical tool to monitoring intersectoral co-operation and effective implementation of the Act.

¹ *Doli Incapax* is the legal presumption that a child between certain ages is not criminally liable unless the prosecutor can prove otherwise.

Section B | INTERNATIONAL AND NATIONAL FRAMEWORK

2.1. INTERNATIONAL INSTRUMENTS

South Africa has ratified and acceded to a number of international instruments relating to child justice issues, thereby binding itself to establish law, procedures, and institutions specifically applicable to children in conflict with the law. These include the:

- United Nations Convention on the Rights of the Child (CRC), 1989
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985
- United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990 (Riyadh Guideline)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990
- African Charter on the Rights and Welfare of the Child, 1990

There are other guidelines and statements made in international forums that address child justice issues; however the above mentioned are the binding treaties and guidelines.²

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

The United Nations Convention on the Rights of the Child was adopted and opened for signature, ratification and accession in November 1989 and came into force in September 1990. It sets out the civil, political, economic, social and cultural rights of children.

The following Articles of the Convention address child justice issues:

- Article 40 of the Convention provides that a child in conflict with the law must be treated in a manner that is consistent with the promotion of a child's sense of dignity and worth; in a manner that reinforces the child's respect for the human rights and fundamental freedoms of others; which takes 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. This article emphasises that child justice should be focused on restorative justice, and result in rehabilitation and reintegration of the child in society.
- Article 40(2) places the universal accepted norms relating to the right to fair trial at the disposal of the child. These rights include presumption of innocence, and the rights to silence, legal representation, and to have access to an interpreter.
- Article 40(3) mandates State parties to the Convention to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the law; to determine the establishment of a minimum age below which children shall be presumed not to have criminal capacity; and (where appropriate and desirable) to establish measures for dealing with children in conflict with the law without resorting to judicial proceedings.
- This Article further provides for a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care to be made available to children, as to ensure that children are dealt with in a manner appropriate to their well-being and proportional both to their circumstances and the offence.

² For example, UN General Comments

- Article 37 directs State parties to ensure that children are not subjected to torture or cruel, inhumane or degrading treatment or punishment. It also prohibits against imposition of capital punishment and life imprisonment for offences committed by children. Article 37(b) further states that detention or imprisonment of children must be used as a last resort and for the shortest appropriate period.
- South Africa has ratified and acceded to the United Nations Convention on the Rights of the Child on 10 December 1998.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules)

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice urges Member States to further the well-being of children and their families, by developing conditions that will ensure for children a meaningful life in the community, and which, will foster a process of personal development and education that is as free from crime as possible. The Beijing Rules adopts a child rights and development-oriented approach, providing guidance for the protection of children's rights and respect for their needs in the development of separate and specialised systems of child justice.

Rule 5 provides that, the child justice system shall emphasize the well-being of the child and shall ensure that any reaction to child offenders shall always be in proportion to the circumstances of both offenders and the offence.

Rule 10, provides for initial contact, and provides that, upon apprehension of a child, parents or guardians shall be notified of such apprehension, and, where such immediate notification is not possible, the parents or guardians should be notified within the shortest possible time thereafter.

United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990 (Riyadh Guideline)

The fundamental principles of the United Nations Guidelines for the Prevention of Juvenile Delinquency, is to ensure the prevention of repeat offending by children. The Guidelines are therefore intended to promote and direct policy and programme development aimed at preventing repeat offending as part of the broader crime prevention strategy.³ The Guidelines stress that prevention plans need to be comprehensive, based on careful analysis and strong coordination, with well-defined roles for all parties involved.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL), 1990⁴

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs) focus on individuals whom are confined to correctional institutions. The Rules affirm that the placement of a child in an institution should always be a measure of last resort and for the minimum necessary period. The Rules provide that the child justice system should uphold the rights and safety and promote the physical and mental well-being of children.⁵

When read together, the Riyadh Guidelines, the Beijing Rules and the JDL Rules provide for a three-stage process: firstly, social policies should be applied to prevent and protect young people from offending; secondly, a progressive justice system should be established for young persons in conflict with the law; and

³ Resolution adopted by the General Assembly, 14 December 1990, UN GAOR A/RES/45/112, therefore requires no signature or accession.

⁴ The Rules are a UN General Assembly Resolution A/RES/45/113, therefore desires no signature or accession.

⁵ See Preamble and Article 1 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL).

finally, fundamental rights and measures should be established for social re-integration of young people once deprived of their liberty, whether in prison or in other institutions.

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

The African Charter on the Rights and Welfare of the Child recognises children's unique and privileged place in African society and their need for protection. The Charter is modelled on the provisions of the UN Convention on the Rights of the Child; however it takes a holistic approach in that it blends children's rights with respect for family and community.

Article 17 obliges State parties to ensure that no child who is detained or imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhumane or degrading treatment or punishment. The Article further provides the child with universally accepted norms relating to the right to a fair trial, including prohibition of the press and the public from a trial. South Africa signed this treaty in October 1997 and ratified it in January 2000.

2.2. CONSTITUTIONAL FRAMEWORK

The overarching framework for working with children in conflict with the law (CICL) in South Africa remains the Constitution of the Republic of South Africa Act 108 of 1996. The Constitution makes direct and specific provision for the protection of children including the rights of children in conflict with the law. In addition, all the due process rights applicable to arrested, detained and accused persons also apply to children.

Children's Rights

Section 28 of the Constitution defines a child as a person under the age of 18 years, and states that the best interests of the child are always of paramount importance. The section provides the State with constitutional requirements it has to meet when dispensing justice to children. It grants additional rights to children which include: the right not to be detained except as a measure of last resort and for the shortest appropriate period of time; the right, when detained, to be kept separately from persons over the age of 18; and the right, when detained, to be treated in a humane manner and kept in conditions that take account of the child's age.

Right of arrested, detained and accused persons

Section 35 guarantees specific rights to all arrested, detained and accused persons, including children. These include: the right to a fair and speedy trial; the right to legal representation at state expense if substantial injustice would otherwise result; the right to be released from detention subject to reasonable conditions if the interests of justice permit; and that conditions of detention must be consistent with human dignity, including at least exercise and the provision (at the State expense) of adequate accommodation, nutrition, reading material and medical treatment.

Right to freedom and security of person

Section 12 guarantees the right of all persons to freedom and security of person which includes, amongst others, the right not to be: deprived of freedom arbitrarily or without just cause; detained without a trial; tortured in any way; and treated or punished in a cruel, inhumane or degrading way.

2.3. NATIONAL LEGISLATION AND POLICY

Prior to 1 April 2010, there was no single piece of legislation that dealt comprehensively with children in conflict with the law. Instead, a number of different pieces of legislation including the Criminal Procedure Act 51 of 1977 and the Correctional Services Act 111 of 1998 dealt with children in a piecemeal manner.

The Child Justice Act, 2008 (Act No. 75 of 2008)

The Child Justice Act (CJA) is the result of more than 15 years of collaborative work by Government and activists in the children's rights and child justice fields. Over the years, a myriad of services, policies and interventions around child-related criminal justice have been initiated. The Child Justice Act was signed into law in May 2009 and became operational on 01 April 2010. The purpose of the Act is to establish a separate criminal justice system for children that are in conflict with the law in accordance with the values that underpin the Constitution and the international obligations of the State.

Therefore, when the Act was launched at the Walter Sisulu Child and Youth Care Centre in Soweto, on 01 April 2010, it was introduced into an environment which anticipated its implementation and one in which many of the obligations of the Act were already established as part of day to day service delivery to CICL.⁶

The aims of the CJA included establishing a criminal justice system for children that expands and entrenches the principles of restorative justice, while ensuring their responsibility and accountability for crimes committed. It places an increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending (recidivism); and balances the interests of children and those of society, with due regard to the rights of victims.⁷ The Act places a focus on how children are managed in the first 48 hours following the arrest of a child. Provisions encourage the avoidance of arrest, and where children are arrested, encourage their release as soon as possible into the care of their parents, guardians or other suitable adults – and this includes rehabilitative initiatives and programmes.⁸

In terms of section 4, the CJA applies to persons who were under the age of 10 years, at the time of the commission of the alleged offence, and are older than the age of 10 years, but under the age of 18 years. Notably, the CJA introduced a number of innovative procedural changes. Key amongst these is:⁹

- (1) Changing **the age of criminal capacity from 7 to 10** so that a child under the age of 10 is presumed to have no criminal capacity (the age children are presumed to know the difference between right and wrong and to act in accordance with that distinction) and cannot be arrested or prosecuted. Instead the South African Police Service (SAPS) must notify a probation officer and hand the child over to a parent, guardian or appropriate adult. The probation officer must assess such a child and can recommend various actions including referral to a children's court or counselling. A child who is older than 10 but younger than 14 is presumed not to have criminal capacity unless it can be proven beyond a reasonable doubt. In his or her assessment report of a child older than 10 but younger than 14, the probation officer must make recommendations on whether expert evidence is required to determine the possible criminal capacity of the child. The inquiry magistrate or judicial officer at the child justice court may also order, or the prosecutor or child legal representative may request an evaluation of criminal capacity. Additional protections included in the Act for a child older than 10 but younger than 14, are that a prosecutor can only prosecute once he or she has

⁶ DOJCD (2010)

⁷ Badenhorst (2012)

⁸ DOJCD (2010)

⁹ Badenhorst (2011)

considered a range of factors including, cognitive ability; education level; domestic circumstance; the nature and seriousness of the alleged offence; the probation officer's assessment report; the impact of the offence on the victim and the appropriateness of diversion.

Furthermore, the Act provides that the Minister of Justice and Constitutional Development¹⁰ must submit a report to Parliament, not later than 5 years after the commencement of the Act. This report must provide statistics of the children alleged to have committed an offence and the types of offences they have committed for ages 10 to 13.¹¹ The statistics should also include the sentences imposed on these children if they were convicted and the number of children who did not go to trial because the prosecutor was of the view that they did not have the necessary criminal capacity. Information should also be provided on the number of cases where expert evidence on the criminal capacity of the child was led and the outcome of those matters. An analysis of these statistics is required with a recommendation on whether the age of criminal capacity should remain at 10 or be raised.¹²

- (2) Providing that every arrested child must be **assessed** by a probation officer (within 48 hours after arrest) unless it is not in the best interests of the child and the prosecutor or presiding officer exempts a child from the assessment process.
- (3) The introduction of the **preliminary inquiry**, which is an informal pre-trial procedure which is inquisitorial in nature, that enables consensus between the role-players on how the child's case is to be managed. This may include an order by the inquiry magistrate that the child be referred to a children's court, or be diverted, or the matter to proceed to a child justice court.
- (4) Enabling the **diversion** of a child at almost every stage of the criminal justice process.
- (5) Providing for the establishment of **one stop child justice centres**.
- (6) Providing for **a wide range of sentencing options** other than imprisonment which is to be introduced only in the case of a child that is older than 14 and only as a measure of last resort and for the shortest possible time.

Section 3 of the Act establishes a number of guiding principles to be taken into account when dealing with children in conflict with the law. These include:

- All consequences arising from an offence by a child should be proportionate to the circumstances of the child, the nature of the offence, and the interests of society.
- A child must not be treated more severely than an adult would have been treated in the same circumstances.
- Every child should, as far as possible, be given an opportunity to participate in any proceeding where decisions affecting him or her might be taken, particularly in informal and inquisitorial proceedings.
- Every child should be addressed in a manner appropriate of his or her age and intellectual development. The child should be spoken to, and be allowed to speak in, his or her language of choice, through an interpreter, if necessary
- All procedures relating to the Act should be conducted and completed without unreasonable delay.
- Parents and appropriate adults should be able to assist children in proceedings, and wherever possible participate in decisions affecting them.
- A child lacking in family support or educational or employment opportunities must have equal access to available services as a child who has had these opportunities. Every effort should be made to ensure that children receive similar treatment after committing similar offences.

¹⁰ Now the Minister of Justice and Correctional Services.

¹¹ Skelton and Badenhorst (2011)

¹² Ibid

- The rights and obligations of children contained in international and regional instruments must be respected, particularly the United Nations Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

National Policy Framework

The Intersectoral Committee for Child Justice (ISCCJ) developed and drafted the National Policy Framework (NPF) which was tabled in Parliament in 2010. The NPF is intended to: ensure a uniform, co-ordinated and co-operative approach by all government departments, organs of state and institutions in dealing with matters relating to child justice; guide the implementation and administration of the CJA; promote cooperation and communication with the non-governmental sector and civil society in order to ensure effective partnerships for the strengthening of the child justice system; and, enhance service delivery as envisaged by the CJA.

The NPF must be reviewed within three years of its publication and at least once every five years there-after (i.e., by 1st August 2013; and 1st August 2018.) The NPF identifies ten key priorities of the CJA, namely:¹³

- Building capacity in the sector
- Ensuring assessment of children
- Preliminary inquiries
- Sentencing
- Provision of Diversion and Alternative Sentencing services
- Establishment of youth and child care centres
- Establishment of one stop child justice centres
- Resources and budget
- Public education and communication
- Development of the necessary Information Technology (IT) and Integrated Justice Systems (IJS) to support information management.

The NPF also proposes that one of the roles of civil society and the non-governmental organisations is to provide information and assistance through their experience and research activities to monitor the implementation of the CJA.

Regulations, Directives and Registers

Other policy directives to stakeholders working with CICA include the following:

- The **Regulations of the CJA** were approved by Parliament and published in *Government Gazette* No. 33067 on 31 March 2010.
- The **National Prosecuting Authority Directives** in terms of section 97(4) of the Act were approved by Parliament and were published on 31 March 2010. These directives include: Withdrawal of cases; Criminal capacity; The decision to prosecute a child who is 10 years or older but under the age of 14 years; Basic principles relating to diversion; Diversion of matters in respect of minor offences before a preliminary inquiry; Diversion of matters at a preliminary inquiry; Diversion of matters at a trial; Diversion of matters in respect of serious offences; The assessment; Categories of child offenders; Directives in respect of persons who were children at the time of commission of a crime but are 18 years and older, but under 21 years; Error regarding the age of a child or adult discovered after the

¹³National Policy Framework (2010)

matter is diverted; Categories of offences; The trial in a child justice court (section 63); Sentencing; Children used by adults to commit offences; Monitoring; and Failure to comply with any duty imposed by the Act or Directives.

- The final **National Instruction Children in Conflict with the Law** was approved by Parliament and published in the *Government Gazette* No. 33508, for general information, on 2 September 2010. The purpose of the National Instruction is to ensure that members of the South African Police Service treat children in conflict with the law appropriately and in accordance with the provisions of the Act and the Constitution.
- Following consultation between the Departments of Justice and Constitutional Development and Health, and civil society a **directive** was gazetted which identified the appropriate persons to evaluate criminal responsibility in terms of section 11 of the CJA

In terms of Section 97(3)(a) the Department of Justice and Constitutional Development had to determine the **category or class of persons who are competent to conduct the evaluation of the criminal capacity of children 10 years or older but under the age of 14 years**, accused of committing a crime. Notice No. R. 273 published on 1 April 2010 identifies the following categories or classes of persons as suitable to conduct such evaluations:

- A medical practitioner who is registered as such under the Health Professions Act, 1974 (Act 56 of 1974), and against whose name the speciality psychiatry is also registered;
 - A psychologist who is registered as a clinical psychologist under the Health Professions Act, 1974.
- The **Diversion Accreditation Framework** was tabled in Parliament in June 2010 and a notice in the *Gazette* inviting applications for the accreditation of diversion programmes and diversion service providers was published in August 2010.

2.4. INTERSECTORAL COORDINATING STRUCTURES

Governance structures were established, specifically a national monitoring body- the **Intersectoral Committee for Child Justice (ISCCJ)** - which is chaired by the Director General of the Department of Justice and Constitutional Development and consists of the National Commissioner of the South African Police Service, the National Director of Public Prosecutions, and Director Generals of Social Development, Correctional Services, Health and Basic Education. This body must, in terms of the CJA, meet a minimum of twice a year. The ISCCJ performs a high level strategic function and in 2011 membership was extended to include the Director General of the Department of Women, Children and People with Disabilities.

A **National Operational Intersectoral Committee on Child Justice** was set up by the ISCCJ to deal with the more practical, technical and operational issues around the CJAs implementation. This committee is chaired by an official from the Department of Justice and consists of senior representatives from the national departments represented on the ISCCJ, from provincial child justice fora and NGO's as well as senior representatives from Legal Aid South Africa, the Department of Home Affairs and the Chief Magistrates Forum. This body meets once a month to focus on coordinating and monitoring activities, identifying problem areas, receiving progress reports and reporting to the ISCCJ. In addition, **Provincial child justice fora** were established and these are now functioning (with various degrees of success) in all nine provinces.

Section C | **DEVELOPING CASE LAW AND AMENDING LEGISLATION**

3.1. INTRODUCTION

Clearly, the CJA sets standards for the protection of children outside of that ordinarily regarded in the traditional criminal justice system. Recent case law has emphasised the fact that the application of the CJA means it is no longer business as usual. The two cases discussed below highlight this change particularly in respect of sentencing. Both the North Gauteng High Court and the Western Cape High Court considered the issue of automatic review when a child has been sentenced in a regional court. A brief summary of the findings of the two courts and the courts comments on the overall impact of the CJA is set out in this section.

In addition to the case law, two amendment Acts have been promulgated to tighten up existing provisions and address various gaps in the Act. Moreover, the DOJ&CD has tabled a further Judicial Matters Amendment Bill [B2-2015] which proposes changes to the existing system of annual inter-sectoral reporting. These legislative amendments are briefly outlined in the section that follows.

3.2. CASE LAW

Significant judgements include:

S v FM 2013 (1) SACR 57 (GNP)

The judgment of the North Gauteng High Court in this matter determined that a legally represented child offender, who is sentenced by a regional court to any form of detention, has the right to have his or her case taken on automatic review. The court confirmed that, where there is a conflict between the Child Justice Act and the Criminal Procedure Act, the application of the Child Justice Act should take precedence. Apart from the automatic review of custodial sentences, the judgement also highlighted that the Criminal Procedure Act provisions relating to sentencing of children should not apply as the Child Justice Act codifies new provisions in this regard.

Significantly, the judgement in this case sent ‘a wider message to all disciplines operating in the child justice sector. The nuanced procedures and mechanisms of the CJA have truly set “new standards for the protection of children” outside of that ordinarily regarded in the traditional criminal justice system and to which a change in mind-set is needed at all levels of the system.’¹⁴

S v LM 2013 (1) SACR 188 (WCC)

The Western Cape High Court expressed similar views to the North Gauteng High Court in the S v LM judgement. The court found that all cases were subject to automatic review in terms of section 85 of the Child Justice Act in matters where a child was under 16 years (irrespective of the sentence) or was 16 years or older and had been sentenced to any form of detention (that was not wholly suspended) or was sentenced to a period of imprisonment after a suspended sentence had been put in operation in terms of the Criminal Procedure Act.

The court held that this was irrespective of; the length of the duration of the sentence and length of time the judicial officer had held the rank of magistrate; whether the child was legally represented or had been

¹⁴ S v FM 2013 (1) SACR 57 (GNP)

sentenced by a regional court. The court held that 'it could not have been the intention of the legislature to deny children in conflict with the law the right to automatic review in respect of sentences imposed by regional courts. This is in light of the fact that in regional courts generally more serious offences are heard and there is a higher likelihood a sentence of imprisonment, not wholly suspended would be imposed.'¹⁵ In light of statistics provided by the Department of Justice the court was dismissive of concerns that this would lead to the High Court being flooded with reviews.

Both these decisions of the full bench are binding in their respective provinces, namely Gauteng and the Western Cape. These judgments are also persuasive in the other provinces.

3.3. AMENDMENTS TO THE CHILD JUSTICE ACT

The implementation of the CJA and its interpretation by the courts have meant various inconsistencies and gaps have been identified in the Act. This has resulted in amendments to various sections of the Act. Key amendments contained in the **Judicial Matters Amendment Act 42 of 2013** include changes: to further regulate the reporting of any injury sustained or severe psychological trauma suffered by a child while in police custody; to regulate the holding of preliminary inquiries in district courts and to bring the Act in line with special review cases (discussed above) that have come before the courts which have held that matters emanating from regional courts should be subject to automatic review.

Subsequently, the **Judicial Matters Amendment Act 14 of 2014** introduced further amendments. Of particular interest are the amendments to sections 11 and 97 of the CJA which regulate the assessment of criminal capacity.

In terms of section 11 of the CJA, an inquiry magistrate or child justice court, when making a decision regarding the criminal capacity of a child, must consider the assessment report of the probation officer and all other evidence placed before the court. Prior to the amendments to this section this evidence could include a report of an evaluation done by a suitably qualified person which must include an assessment of the cognitive, moral, emotional, psychological and social development of the child. Although the Minister of Justice had determined that psychiatrists and clinical psychologists are competent to conduct these evaluations, the Department of Health indicated that psychiatrists and clinical psychologists **are not able to assess the moral development of a child** and are only equipped to assess the cognitive, emotional, psychological and social development of a child. In response to this concern the amendment provides that it is the responsibility of the inquiry magistrate/child justice court to consider the cognitive, moral, emotional, psychological and social development of the child on the basis of all evidence placed before the court, including the report of the person appointed to evaluate the criminal capacity of the child, if such a report is required. The corresponding amendment to section 97 of the CJA serves to expand the categories of persons who may conduct the evaluation on the basis that different categories of persons may be required for the purposes of the different aspects of development of a child. It also provides that the Minister may determine different allowances and tariffs of remuneration for the different categories or classes of persons who do the assessments.

Additional amendments have been proposed in the **Judicial Matters Amendment Bill [B2-2015]** which seek to change the manner in which the implementation of the Child Justice Act is reported to Parliament. The Bill proposes the removal of the requirement for the Minister of Justice and Correctional Services to submit annually to Parliament separate implementation reports from each of the respective role-players. Instead

¹⁵ S v LM 2013 (1) SACR 188 (WCC)

each Department/institution responsible for implementation must incorporate a separate section setting out their activities/role in respect of the Act as part of their regular Annual Reports submitted to Parliament in terms of section 40 of the PFMA.

The proposed amendment should be rejected by Parliament. The separate annual reporting requirement is critical to monitoring intersectoral co-operation and effective implementation of the Act.

There are also a number of proposed amendments dealing with child sex offenders and the National Register for Sex Offenders (NRSO), **contained in the Criminal Law (Sexual Offences and related Matters) Amendment Act Amendment Bill 18 of 2014**. In the case of *J v the National Director of Public Prosecutions and Others 2014 (2) SACR 1 (CC)* the Constitutional Court questioned the constitutional validity of section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, with specific reference to the “best interest of the child” principle, as reflected in section 28(2) of the Constitution. Section 50(2)(a) of the Act places an obligation on a court to order that the particulars of a convicted person or a person in respect of whom the court has given a direction, in terms of section 77(6) or 78(6) of the Criminal Procedure Act 51 of 1977, must be included in the NRSO.

The provisions of section 50(2)(a) are also applicable to persons who were children at the time of the commission of the sexual offences. The Court found that the limitation of the right of child offenders in section 50(2)(a) of the Act is not justified in an open and democratic society. In response to this judgment the Amendment Bill seeks to provide that if a child is convicted of a sexual offence against another child or a person who is mentally disabled then a court may not make an order to include the name of that child in the NRSO unless various elements are complied with (namely the prosecutor has made an application to the court for such an order; the court has considered a report by the probation officer referred to in section 71 of the CJA; the child has been given an opportunity to make representations to the court; and the court is satisfied that substantial and compelling circumstances exist which justify the making of such an order.) The Bill also provides for a person to apply to court for the removal of their particulars from the NRSO if at the time of the offence that person was a child and providing certain conditions are met. Proposals are also made for the automatic removal of particulars from the NRSO and expungement of certain criminal records of child offenders in respect of certain offences in terms of the Sexual Offences Act 23 of 1957. The Portfolio Committee on Justice and Correctional Services is currently deliberating on the Bill.

Section D | AGE OF CRIMINAL CAPACITY

4.1. INTRODUCTION

The minimum age of criminal capacity (or criminal responsibility) sets the age by which children are not criminally liable in terms of the law. In South Africa, children below the age of 10 years are not criminally liable and cannot be prosecuted. *Doli Incapax* is the legal presumption that a child between certain ages is not criminally liable unless the prosecutor can prove otherwise. In South Africa, children between the ages of 10 and 14 years are presumed not to have criminal capacity unless the prosecutor can prove otherwise.

Section 8 of the CJA provides that not later than 5 years (by 1 April 2015) after the commencement of the Act the Minister of Justice and Correctional Services must re-evaluate the issue of criminal capacity. A report must be submitted to Parliament with statistics of the children alleged to have committed an offence and the types of offences they have committed for ages 10 to 13.¹⁶ Information should also be provided on the sentences imposed on these children, the number of children whose matters did not go to trial because they lacked criminal capacity, the number of cases where expert evidence on the criminal capacity of the child was led and the outcome of those matters. An analysis of these statistics is required along with a recommendation on whether the age of criminal capacity should remain at 10 or be raised.¹⁷

In light of these requirements some consideration is given to international standards and trends in respect of the age of criminal capacity.

4.2. CRIMINAL CAPACITY IN SOUTH AFRICA

Current status in law: The CJA raised the age of criminal capacity from 7 to 10 years and provides for a rebuttable presumption of criminal incapacity between the ages of 10-14.

Children:

- Under 10 may not be arrested or prosecuted.
- Aged 10-14 may be arrested and prosecuted if proved by the prosecutor that the child had criminal capacity when he or she committed the crime.
- Under 14 may not be imprisoned.
- 14 years and older may only be imprisoned for serious offences.
- 14 years and older may not be imprisoned for more than 25 years.

Problems: There is very little information contained in the Reports that could be used to assist in the review of the age of criminal capacity. In addition, the statistics contained within the Reports are flawed.

This review should be based on the following statistics as stipulated in section 96(4) of the CJA (but which are not contained in the Reports tabled to date):

- Statistics of the children alleged to have committed offences and the types of offences that they have committed for ages 10-13.
- Sentences imposed on these children if they were convicted.
- The number of children who did not go to trial because the prosecutor was of the view that they did not have criminal capacity.

¹⁶ Section 96(4)(a)(i)-(iv) of the Child Justice Act

¹⁷ Section 96(4) of the Child Justice Act

- The number of cases where expert evidence on the criminal capacity of the child was led and the outcome of these matters.

In addition, other constraints in current data contained in the Reports include, for example, the absence of SAPS statistics for children under the age of 10; no breakdown of types of offences for which children were charged; and a focus on charges rather than arrests, written notices and summonses.

In addition to the problems with statistics, the following are key challenges that have arisen in applying the provisions of the CJA as they pertain to criminal capacity:¹⁸

- Shortages in number of psychologists and psychiatrists within the Department of Health to assess criminal capacity resulting in delays.
- Complex nature of the assessment and lack of training of mental health professionals.
- Discretionary role of the prosecutor.
- Relationship to diversion.
- Uncertainty by magistrates on their role.

Progress reported in 2012/13 and 2013/14: The 2012/13 consolidated Report notes that Government was in the process of developing a brief for research to inform its recommendations on the age of criminal capacity.¹⁹

The 2013/14 unconsolidated Report contains the following information:

- The DOJ&CD has noted that a key challenge is the lack of data required for the review of the minimum age of criminal capacity.
- The Department has initiated 'a robust research study at our courts which is expected to be finalised in 2014/15'.
- The NPA Sexual Offences and Community Affairs (SOCA) Unit was requested by the DGs ISCCJ to conduct research on:
 - What informed the previous and current age of criminal capacity for children in conflict with the law in SA?
 - What were the social and constitutional factors that were taken into consideration?
 - What are international trends with a focus on Columbia, Brazil, United States, Nigeria and Kenya?
 - What is the situation in countries including Mozambique, Zimbabwe, Nigeria, Botswana, Lesotho and Swaziland?
- According to the Report, the research was finalised during the third quarter of 2013/14 and submitted to the DG's ISCCJ meeting held in February 2014.
- In addition, this Report states that the NPA 'has recommended that the minimum age of criminal capacity remain at 10 years and the *doli incapax* presumption be retained for children 10 years or older but under the age of 14 years'.²⁰

4.3. INTERNATIONAL STANDARDS

United Nations Standard Minimum Rules for the Administration of Juvenile Justice

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) includes the principle that "the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of

¹⁸ Skelton and Badenhorst (2011)

¹⁹ DOJCD (2013)

²⁰ DOJCD (2014) Department of Justice section page 41

emotional, mental and intellectual maturity”.²¹ This does at least provide an indication that the grounds for deciding on the age should not be arbitrary.

United Nations Convention on the Rights of the Child

According to Article 40(3) of the Convention on the Rights of the Child, State parties are encouraged to establish a minimum age below which children are presumed not to have the capacity to infringe the criminal law. According to the United Nations Convention on the Rights of the Child “a child under the age of criminal responsibility lacks the capacity to commit a crime”.²² This simply means that they should be immune from criminal prosecution; they cannot be formally charged by authorities with an offence; nor be subjected to any criminal law procedures or measures. The significance of the minimum age of criminal responsibility is that it recognises that a child has attained the emotional, mental and intellectual maturity to be held responsible for their actions. The problem with the Convention is that it does not provide clear international standards regarding the age of criminal responsibility that should be set. However, the United Nations Convention on the Rights of the Child (CRC) simply requires State parties to the Convention to establish a “minimum age below at which children shall be presumed not to have the capacity to infringe the penal law.”²³

United Nations Committee on the Rights on the Child

In the General Comment No. 10, the Committee on the Rights on the Child concludes that “a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable”.²⁴ At the same time it stresses that State parties “should not lower their age of criminal responsibility to 12 where it has already been set higher and strongly encourages States to introduce a higher minimum age of criminal responsibility, for instance 14 or 16 years of age”.²⁵ In addition, it is stated that a system of two minimum ages (a lower and higher minimum age) “is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices.”²⁶

Even though the United Nations have standards for age of criminal responsibility, the minimum age of criminal responsibility set by different countries ranges considerably from as low as 6 up to 18 years of age. Nevertheless, the median age of criminal responsibility worldwide is 12 years of age.²⁷ This simply means that most countries take the UN recommendations seriously largely because treaties are binding in nature once ratified and the General Comments give guidance on how provisions of treaties should be interpreted.

4.4. COMPARATIVE EXAMPLES

The international average is not necessarily an automatic gauge of good practice, as many countries have outdated legislation based on minimum ages of criminal capacity determined by colonially-inherited law. It is therefore important to look at the minimum age in those countries that have reformed their legislation since 1989 when the United Nations Convention on the Rights of the Child came into operation. Some of these countries are listed in the table below.

²¹ United Nations (1985)

²² Article 40 of the Convention of the Rights of the Child

²³ Article 40(3) (a) - United Nations Convention on the Rights of the Child

²⁴ United Nations (2007)

²⁵ United Nations (2007)

²⁶ United Nations (2007)

²⁷ Don Cipriani (2009)

Table 1: Selective list of countries that increased their minimum age of criminal responsibility as per the UN Convention recommendations

Country	Legislation and date	Minimum age of criminal responsibility
Ireland	Children's Act, 2001.	Raised the minimum age from 7 to 12 and while abolished the rebuttable presumption of <i>doli incapax</i> , the consent of the Director of Public Prosecution is required between 12 and 14 years. ²⁸
Uganda	Uganda Children Act, 1996.	Minimum age was raised from 7 to 12 years and the <i>doli incapax</i> was repealed.
Australia	Crimes Amendment Act, 1995.	Minimum age was raised from 8 years to 10 years and <i>doli incapax</i> between 10 and 14.
New Zealand	Children, Young Persons and their Families Act, 1989.	14 years of age (except for murder/manslaughter where 10 years of age applies, with <i>doli incapax</i> presumption).
Sierra Leone	Children Rights Act, 2007 and Children and Young Person's Act, 1945.	Minimum age was raised from 10 to 14 years.

Source: Don Cipriani (2009): Children's Rights and the Minimum Age of Criminal Responsibility

In **Sierra Leone**, the adoption of the Child Rights Act of 2007 introduced several changes for children in conflict with the law. In 2000, the Committee on the Rights of the Child was concerned with Sierra Leone's extremely low age of criminal responsibility (set at 10 years) by domestic legislation. The Committee recommended that the Government review its current legislation and raise the minimum age according to the international standards.²⁹ Consequently, Sierra Leone raised the minimum age from 10 to 14 years as per the recommendations.

In addition, the Committee states that "there is nothing that prevents States from having 18 years as their minimum age of criminal responsibility and a number of countries have chosen to do so including **Brazil**".³⁰ On the other hand, **Ghana** abolished the *doli incapax* presumption but it fixed a much higher minimum age of criminal capacity even before the issuing of General Comment No.10 in 2007. It increased its minimum age of criminal capacity from 8 to 14 years of age.³¹

In **Australia**, since 2000 the statutory minimum age of criminal responsibility is 10 years in all Australian jurisdictions.³² However, between the ages 10 and under 14 years, a rebuttable presumption operates to deem a child incapable of committing a criminal act. For children between the ages of 10 and under 14 years to be held criminally responsible for their acts, the prosecution has to prove either that the child knew that his/her act was wrong or that he/she had the capacity to know that his act was wrong, depending on the jurisdiction. The Committee on the Rights of the Child has expressed concern that the age of criminal responsibility set at 10 years in Australia is too low.³³

In the case of **Uganda**, in compliance with the Convention on the Rights of the Child, the Children's Act of 2000 provides for the care, protection and maintenance of children. The age of criminal responsibility was raised from 8 to 12 years of age. The Act states that "where a child is arrested, the police shall under justifiable

²⁸ Skelton and Badenhorst (2011)

²⁹ Skelton and Badenhorst (2011)

³⁰ United Nations (2007)

³¹ Skelton and Badenhorst (2011)

³² Urbas (2000)

³³ Skelton and Badenhorst (2011)

circumstances caution and release the child” (Section 89 (1), that “No child shall be detained with an adult person” (Section 91 (8)) and that a child should be put in safe custody (Section 91(3)).

In **Ireland**, the minimum age of criminal responsibility is governed by the Children’s Act, 2001 as amended by the Criminal Justice Act, 2006. In the same year (2006), the minimum age of criminal responsibility was raised from 7 to 12 years for most offences. No child under the age of 12 years can be charged with a criminal offence. However, in the case of serious offences such as murder, rape or aggravated sexual assault, an exception to the aforesaid prohibition on prosecution is made for 10 and 11 year old children accused of such offences.

In **New Zealand**, Section 22 of the Crimes Act 1961³⁴ provides that no person shall be “convicted of an offence by reason of any act done or omitted by him when of the age of 10 but under the age of 14 years, unless he knew either that the act or omission was wrong or that it was contrary to law”. The age of criminal responsibility of children in New Zealand is therefore 10. For children age 10 to 14, there is “criminal responsibility” where the child knew either that the act or omission was wrong or that it was contrary to law.

4.5. CHALLENGES AND RECOMMENDATIONS ON THE APPLICATION OF THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

In 2007, the Committee on the Rights of the Child issued a report widely known as the General Comment No.10. In this report, the Committee identified a number of general challenges as well as recommendations around the application of the age of criminal responsibility.³⁵

The following are challenges identified by the Committee with regards to the application of the minimum age and selective recommendations that countries should adopt when reforming their national legislation regarding the minimum age of criminal responsibility.

Challenges with the age of criminal responsibility

The application of the minimum age of criminal responsibility varies across the world. It is argued that there are practical challenges in implementing the minimum age of criminal responsibility.³⁶ These include:

- **Setting the minimum age³⁷:** The Convention on the Rights of the Child and the Committee recommended that the minimum age should be raised as high as possible. However, it is recognised that there is much controversy about what should be the most appropriate age of criminal responsibility and there are no categorical international standards.³⁸ It is argued that in the international law, the issue of the minimum age of criminal responsibility has not been addressed. For example, the laws of international criminal tribunals of countries such as Rwanda and the former Yugoslavia³⁹ do not include any provisions governing the age of criminal responsibility, nor have they indicted anyone under 18.⁴⁰
- **Application of the age of criminal responsibility:⁴¹** The Penal Reform International states that some countries have age limits that vary according to the nature or severity of the offence.

³⁴ NZ Parliamentary Library, Bills Digest No. 1349

³⁵ International Committee on the Rights of the Child during the Forty-fourth session held in Geneva from 15 January to 2 February 2007

³⁶ Penal Reform International (2013)

³⁷ Penal Reform International (2013)

³⁸ Penal Reform International (2013)

³⁹After Slovenia, Croatia, Bosnia and Herzegovina and Macedonia broke away from the Socialist Federal Republic of Yugoslavia, and amid civil war, the remaining republics of Serbia and Montenegro reconstituted the Federal Republic of Yugoslavia on April 28, 1992.

⁴⁰ Penal Reform International (2013)

⁴¹ Penal Reform International (2013)

In this regard, the Committee identified that there are States that use two minimum ages for criminal responsibility. It states that children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but under the higher minimum age are assumed to be criminally responsible only if they have required maturity in that regard. The Committee argues that this maturity is left to the court or judge to determine, often without the requirement of involving psychological experts. This may result in discriminatory practices.⁴²

In addition, in many countries children are not registered at birth and do not have documentation proving their age. As a result police at times exploit this loophole and exaggerate a child's age so that they are above the age of criminal responsibility in order to avoid invoking additional protective safeguards, or may threaten to do so as means of extorting money.⁴³

- **Rehabilitation:**⁴⁴ The Penal Reform International states that the behaviour of children under the age of criminal responsibility should be addressed through appropriate and targeted interventions that are proven to be in their best interests. This simply means that children should not be treated through the same criminal justice process as adults. It recommends educational measures and supervision by social workers.⁴⁵

The Penal Reform International argues that there are challenges in how children below the minimum age of criminal responsibility who come into conflict with the law are treated. For example, it cites that in many countries local administrative bodies (often Commissions of Minors) can apply disciplinary measures to children under the minimum age of criminal responsibility which includes placing them in special educational institutions and depriving them of their liberty for long periods of time. In addition, the Penal Reform International argues that children under the minimum age of criminal responsibility may be at risk of being used by adults for criminal activities and this is sometimes proposed as a reason not to raise the age of criminal responsibility.⁴⁶

General recommendations on the age of criminal responsibility

Recommendations in terms of the application of the minimum age of criminal responsibility include:

- **State parties should set their minimum age to no lower than 12 years of age**⁴⁷: Even though the Convention and the Committee considers the minimum age of criminal responsibility should not be lower than 12 years, it encourages State parties with a current minimum age of higher than 12 years not to decrease this age but rather to work to raise it. Those countries with two minimum ages should increase their lower age to 12 and increase their higher age to 14 or 16 years.
- **Application of minimum age of criminal responsibility**⁴⁸: The Committee states that the system of two minimum ages (*doli incapax*) is often not only confusing but also leaves much to the discretion of the court or judge and may result in discriminatory practices. In this regard, the Committee recommends that there is a need to provide State parties with clear guidance and recommendations regarding the minimum age of criminal responsibility, which would

⁴² Penal Reform International (2013)

⁴³ Penal Reform International (2013)

⁴⁴ Penal Reform International (2013)

⁴⁵ Penal Reform International (2013)

⁴⁶ Penal Reform International (2013)

⁴⁷ United Nations (2007)

⁴⁸ United Nations (2007)

mean, in practice, the abolishment of the use of *doli incapax*. With regard to those children without birth certificates or whose age is unknown, the Convention and the Committee states that children whose age cannot be proven to be above the minimum age should not be formally charged in a penal law procedure.

- **Rehabilitation:**⁴⁹ One of the most important goals of the implementation of the Convention on the Rights of the Child is to promote the full and harmonious development of the child's personality, talents and mental and physical abilities (preamble, and articles 6 and 29 of the CRC). In light of this, the Committee, therefore, recommends a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. It states that these should include care, guidance and supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care.

Apart from children below the minimum age of criminal responsibility, the Penal Reform International argues that there will always be a need for secure accommodation for the small minority of children over the age of criminal responsibility who commit serious violent offences and who pose a significant risk to themselves or their communities.

- **Submission of periodic reports:** The Convention and the Committee recommends that State parties should submit detailed information with their periodic reports on the treatment of children who come in conflict with the law when they are below the minimum age along with what arrangements that have been made to ensure that their treatment is fair and just.

4.6. SUMMARY OF KEY POINTS IN TERMS OF CRIMINAL CAPACITY

A number of general conclusions can be drawn. In terms of the CRC, States are obliged (in line with General Comment No. 10) to establish a minimum age of criminal responsibility, which should be fixed and not determined on an individual basis by reference to an accused's personal characteristics. Although international law dictates that States have a minimum age of criminal responsibility, it does not purport to tell them what that age should be. It does, however, offer a number of guidelines. These include:

- Firstly, the age should not be so low as to result in the punishment of children for offences in respect of which, at the time of their commission, they were too young to understand the consequences. This would seem to be a general principle of law.
- Secondly, there may be a trend to standardise the minimum age of criminal responsibility somewhere in the low to mid-teens (twelve, thirteen, fourteen, or fifteen).
- Thirdly, it is suggested that there needs to be discussion on the pros and cons of stipulating a single minimum age rather than setting a lower and higher age, which allows for discretion.
- Fourthly, even children above the age of criminal responsibility should be treated differently from adults.

⁴⁹ United Nations (2007)

References

Badenhorst C. (2011). 'Overview of the Implementation of the Child Justice Act, 2008 – Good Intentions, Questionable Outcomes, Open Society Foundation of South Africa. Cape Town

Badenhorst, C. (2012). *Second Year of the Child Justice Act's Implementation: Dwindling Numbers. Published by the Child Justice Alliance.* [Internet] Available from: <http://www.childjustice.org.za/publications/BadenhorstCJAImplementation2_2012.pdf> [Accessed: 28 August 2012].

Child Justice Act (Act 75 of 2008) Pretoria, Government Printer.

Department of Justice and Constitutional Development. (2011) First Annual Report on the intersectoral implementation of the Child Justice Act, 75 of 2008 April 2010 – March 2011.

Department of Justice and Constitutional Development. (2012) Second Annual Report on the intersectoral implementation of the Child Justice Act, 75 of 2008 April 2011 – March 2012.

Department of Justice and Constitutional Development. (2013) Third Annual Report on the intersectoral implementation of the Child Justice Act, 75 of 2008 April 2012 – March 2013.

Department of Justice and Constitutional Development (2014) 2013/14 Annual Reports on the implementation of the Child Justice Act, 2008 (Act 75 of 2008).

Department of Justice and Constitutional Development (2010) Child Justice Act, 2008 (Act No 75 of 2008) National Policy Framework. DOJCD, Pretoria.

Don Cipriani (2009). Children's Rights and the Minimum Age of Criminal Responsibility.

Government Gazette (2010) No. 33092. Section 97(3) of the Child Justice Act, 2008: Determination of persons or category or class of persons competent to conduct the evaluation of criminal capacity of a child and the allowances and remuneration. [Accessed on-line: 11 February 2013]. Available from: <http://www.childjustice.org.za/downloads/Section_97-3.pdf>

National Prosecuting Authority. Directives issued in terms of section 97(4) of the Child Justice Act, 2008 (Act 75 of 2008).

New Zealand Parliamentary Library, Bills Digest No. 1349.

Parliament of South Africa (2010). African Peer Review Mechanism. Country Review Report, 2010. Parliament Report. Republic of South Africa.

Penal Reform International (2013). The minimum age of criminal responsibility: Justice for Children Briefing No.4.

Skelton A and Badenhorst C. (2011). 'The Criminal Capacity of Children in South Africa'. Child Justice Alliance.

Uganda Children's Act of 2000.

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

United Nations Committee on the Rights of the Child General Comment No.10 (2007) Forty-fourth session, Geneva, 15 January – 2 February 2007

United Nations Rules for Protection of Juveniles Deprived of Liberty.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985).

United Nations Standard Minimum Rules for the Treatment of Prisoners (1955).

Urbas G (2000); the Age of Criminal Responsibility: Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice.