



What are the issues around the age of a child?

The main issues around the age of a child are:

- The age until which children should fall under the provisions of the Bill;
- The minimum age for prosecution of a child;
- The age until which criminal incapacity is presumed but may be rebutted; and
- Problems around determining the age of a child.

The Child Justice Bill establishes a criminal justice process for children who are accused of committing offences so as to protect their rights as entrenched in the Constitution. The Bill therefore applies to all children who are under the age of 18 years who have allegedly committed a crime and they are to be treated differently as compared to adults.

The minimum age of prosecution set by the Bill is 10 years which means that no child under the age of 10 years can be held criminally liable for his or her actions. This is based on agreement among stakeholders. While international conventions do not specify a minimum age for criminal capacity, the UN has criticized countries that fix their minimum age of criminal capacity at less than 12 years. However, it should be noted that there are a number of countries which have set the age of criminal capacity higher than 12 years, like in Italy where the age of criminal capacity is 14 years and the Philippines where the age of criminal capacity is set at 15 years.

The Bill retains the common law rebuttable presumption that children under 14 years lack criminal capacity. Only if they are shown to appreciate the difference between right and wrong (part one of the test) and to act accordingly (part two of the test) is the presumption rebutted. This provides flexibility and protection for children aged 10 years but younger than 14 years who differ in emotional and intellectual understanding during those developmental years.

The Bill strengthens the practical operation of the presumption of incapacity. Magistrates at present tend to apply only part one of the capacity test. However, the Bill provides that a range of factors need to be considered when making a decision to prosecute a child under the age of 14 and the magistrate needs to consider all the evidence placed before the court before making a determination on such child's criminal capacity. The prosecution or the child's legal representative can request that a child be evaluated to determine cognitive development abilities. This will prevent indiscriminate prosecution and ensure the question of criminal capacity is appropriately evaluated.

Unfortunately there are some substantive difference between the 2002 version of the Child Justice Bill that was introduced to parliament and the revised 2007 Cabinet version of the Bill.

The 2002 version of the Child Justice Bill provided that such an evaluation must be conducted at STATE expense and by an suitably qualified professional. It is of concern that the 2007 Cabinet version of the Child Justice Bill changes this approach in three ways:

- Firstly, it provides that an evaluation of criminal capacity MUST be conducted by a probation officer;
- Secondly, an evaluation MAY be conducted by a suitably qualified person to assess the cognitive, emotional, psychological and social development of the child but only on application by a legal representative of the child or the state;
- Thirdly, no provision is made for this evaluation to be conducted at State expense.

These new changes to the Bill will prejudice children. Firstly, a probation officer is not trained to evaluate criminal capacity of children and therefore such a provision is inappropriate and incorrect. Secondly, criminal capacity is a core component of criminal liability and has to be proven beyond a reasonable doubt. This will only be achieved through a compulsory evaluation by a suitably qualified professional. Thirdly, because the onus of proof is on the State to prove criminal capacity, this must occur at State expense.

The Bill maintains the current situation that children over the age of 14 years have full criminal capacity and can be prosecuted.

Further, many children accused of crimes in South Africa do not know their exact age. The Bill therefore proposes certain measures for determining a child's age. For example, the probation officer must make an assessment on the available evidence, which may include statements from parents and an examination by a medical practitioner. However, the inquiry magistrate must make the final determination of the child's age. Nevertheless, the determination of a child's age is crucial as it will determine how the particular child is managed within the criminal justice system.