PAN: Children

A REASSESSMENT OF THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY[1]

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Introduction

A person may be held responsible for their criminal actions only if the prosecution proves, beyond a reasonable doubt, that at the time that the crime was committed they possessed criminal capacity. The test applied by the courts in order to determine whether a person has criminal capacity is whether the accused had the capacity to appreciate the wrongfulness of his or her conduct, in other words the ability to discern from right and wrong, and the capacity to act in accordance with this appreciation.

The "two-tier" model of minimum age of criminal responsibility and criminal capacity

The Child Justice Act (Act 75 of 2008) differentiates between two separate and distinct categories of children in respect of whom criminal capacity may be excluded. The distinction is linked to the age at which the child is alleged to have committed the offence, namely children under the age of 10 years and children who are 10 years or older but under the age of 14 years.

Children under the age of 10 years are *irrebuttably* presumed to lack criminal capacity. This is also known as the minimum age of criminal responsibility. Children who fall into this category may not be prosecuted for infringing the criminal law. The reason for this is that children falling into this age bracket are 'generally' unable to evaluate and think in the abstract and therefore unable to act in accordance with their understanding of right and wrong.

Children who are 10 years or older but under the age of 14 years are *rebuttably* presumed to lack criminal capacity. This means that a child, over the age of 10 years but under the age of 14 years, is presumed to lack criminal capacity, unless the State proves, beyond reasonable doubt, that the child has the capacity to both appreciate the difference between right and wrong at the time of the commission of the alleged offence; and act in accordance with that appreciation.

This second tier entails a process of evaluating children in order to determine whether he/she has criminal capacity. The Child Justice Act provides, in this regard, that a probation officer must assess the child within 48 hours of his/her arrest and express a view on whether the child has, in their opinion, the requisite criminal capacity; and if so whether expert evidence would be required

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in order to prove it. The prosecutor tasked with deciding whether or not to prosecute the child must consider the following factors:

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

If the prosecutor is of the opinion that criminal capacity is not likely to be proved he/she must withdraw the charge and may cause the child to be referred to a probation officer for further *alternative* action. This *alternative* action is non-penal and takes place outside of the criminal justice system. If the prosecutor, however, is of the opinion that criminal capacity is likely to be proved he/she may either divert the matter before the preliminary inquiry, if the child is alleged to have committed a minor offence, or refer the matter to a preliminary inquiry. If the matter is referred to a preliminary inquiry the court must consider the report of the probation officer, particularly the view expressed therein in respect of criminal capacity, and whether an evaluation by a suitably qualified person (either a psychiatrist or psychologist) is necessary in the circumstances. This has an important bearing on whether the child may be diverted for a serious offence, and also the future prospects of the prosecuting authority securing a conviction against the child, should diversion not be appropriate.

The problem of the current "two-tier" model

There are a number of fundamental problems with the current two-tier model provided for in the Child Justice Act. These problems are located squarely within the second-tier and are as follows:

One, invariably a court tasked with determining whether or not a child has criminal capacity would have to refer the child for an evaluation by a suitably qualified person. The Department of Health has previously indicated that it has an acute shortage of forensic psychologists and psychiatrists with the necessary skill set to conduct these criminal capacity evaluations. Private psychologists and psychiatrists are appointed on an *ad hoc* basis in order to remedy this, however, they charge expert witness fees resulting in budgets allocated by the Department of Justice for this purpose being quickly exhausted. These shortages in both human resources and budgets result in undue delays in the finalisation of cases involving children 10 years or older but under the age of 14 years and who's criminal capacity is uncertain.

Two, there are no uniform tests to determine whether or not a child has criminal capacity. This results in clinicians being loath to express an absolute opinion on whether a child has criminal capacity, or not, thereby delaying and frustrating the finalisation of the matter.

Three, where a child is referred for evaluation they are usually detained in one of South Africa's psychiatric institutions on an in-patient basis. This 'detention' has serious knock-on effects on the child's life. The child will during this period be excluded from accessing education, deprived of any family life, and will also be subjected to the torment of being locked-up in an institution. This is not in keeping with either the values underpinning the Child Justice Act or the Constitution.

Lastly, the lack of certainty inherent in the two-tier model has deleterious consequences for the process of diversion (a cornerstone process of the Child Justice Act). Before a matter may be diverted the prosecution must be of the opinion that there is a *prima facie* case against the child (which includes criminal capacity). Children over 10 years but under 14 years are presumed to lack the requisite capacity. Therefore, in order for a child to in such age category to be diverted, he/she would need to be assessed resulting in the frustration of the speedy resolution of the matter. It would be unjust if this were not to occur, especially since the failure to comply with the diversion order may result in the prosecution of the child, in which case the acknowledgment of responsibility by the child may be recorded as an admission.

The solution

The solution to these problems lies in the abolishing of the two-tier model and replacing it with a single minimum age of criminal responsibility. The age most appropriate for this would be 12 years, as –

- It accords with the preliminary statistics of children found to have capacity;
- It is in keeping with the Committee on the Rights of the Child's concluding observation in its General Comment No. 10, which states that "*a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable*"; and
- It is the international median age for criminal responsibility.

The practical effect of this solution is that children under the age of 12 years will be dealt with in the same manner as children under 10 years are presently. In other words, they will be referred to the Department of Social Development in order to determine whether or not any remedial action need take place, outside of the formal criminal justice process. Children over 12 years may be diverted and/or prosecuted for any offences they commit. In the event that they lack criminal capacity due to their youthfulness they may nevertheless rely on the recognised procedures set-forth in the Criminal Procedure Act (Act 51 of 1977) in order to rebut this presumption.

The solution proffered is both practical and responsive to the present difficulties being faced by the child justice system. It further accords with South Africa's regional as well as international law duties in respect of dealing with child offenders.

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Any comments on this Opinion Piece can be sent to children.pan@hsrc.ac.za

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