

**AN EXPLORATION ON THE CRIMINAL CAPACITY OF CHILD OFFENDERS
WITH PSYCHIATRIC DISORDERS**

by

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I declare that '**An exploration on the criminal capacity of child offenders with psychiatric disorders**' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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DEDICATION

“Children are our greatest treasure. They are our future” (Mandela, 1997).

This dissertation is dedicated to those children of South Africa who find themselves in conflict with the law and who are also affected by the burden of psychiatric disorders. May we, as a country and as service providers, aim to uphold their best interest by improving the procedures used and services available to this vulnerable group.

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ABSTRACT

The aim of this explorative study is to establish if psychiatric disorders influence the criminal capacity of child offenders. A qualitative approach was adopted in the study to develop an in-depth understanding of the issues pertaining to criminal capacity assessments for child offenders with psychiatric disorders. The risks associated with various psychiatric disorders in relation to childhood criminality, and the methods that are used to deal with child offenders who suffer from psychiatric disorders, were also explored.

The data collection tool for this study was a semi-structured interview schedule. Telephonic and face-to-face interviews were conducted with child justice and mental health experts from four provinces in South Africa, namely, KwaZulu-Natal, Gauteng, Eastern Cape and Western Cape. These experts included psychiatrists, psychologists, social workers, academic professors of law, a criminologist and an advocate. Snowball sampling was employed and although this is a pure qualitative study, the open coding, axial coding and selective coding process from the grounded theory was applied to analyse and interpret the data.

The findings from this study indicate that psychiatric disorders are a risk factor associated with the causation of criminal behaviour. A high prevalence of psychiatric disorders, such as intellectual disability, learning disorder, attention deficit hyperactivity disorder, oppositional defiant disorder and conduct disorder, were generally found in children in conflict with the law. The influence and consequences of these psychiatric disorders, in conjunction with environmental and societal factors, were found to influence criminal behaviour and were highlighted as factors that ought to be taken into consideration when determining the criminal capacity of a child who is in conflict with the law.

Findings from the study identified that adequate recognition was not granted to the influence of a psychiatric disorder in the assessment of a child's criminal capacity. It was established that, in the criminal capacity assessment, the emphasis should not be on the psychiatric disorder per se, but on the effect that the disorder and associated symptoms may have on the child's ability to distinguish between the wrongfulness of their actions and to act in accordance with this understanding.

Operational challenges and ambiguities identified in the legislative framework pertaining to child offenders with psychiatric disorders were found to negatively influence criminal capacity assessments for children in conflict with the law. The lack of services available to child offenders with psychiatric disorders, as well as child offenders without psychiatric disorders, was found to hamper the best interest of the children in conflict with the law. Lastly, legislative and service recommendations for good practice to deal with child offenders with psychiatric disorder were identified by the experts.

Key terms: Child justice; criminal capacity; criminal capacity assessment; criminality; psychiatric disorders; mental disorders; child offenders; children in conflict with the law

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Acronyms

Attention deficit disorder	ADHD
Attention deficit hyperactivity disorder South Africa	ADHDSA
Autism spectrum disorder	ASD
Child and youth care centre	CYCC
Conduct disorder	CD
Department of Correctional Services	DCS
Department of Education	DoE
Department of Health	DoH
Department of Justice and Constitutional Development	DJCD
Department of Social Development	DSD
Diagnostic and Statistical Manual of Mental Disorders	DSM
National Institute for Crime Prevention and the Reintegration of Offenders	NICRO
Non-governmental organisation	NGO
Oppositional defiant disorder	ODD
South African Police Services	SAPS
United Nations	UN
United Nations on the Convention on the Rights of Children	UNCRC
University of South Africa	UNISA

CHAPTER 1

GENERAL OVERVIEW AND INTRODUCTION TO THE STUDY

“There can be no keener revelation of a society than the way in which it treats its children” (Mandela, 1995).

1.1 INTRODUCTION

Children are the most vulnerable members of society. Despite this vulnerability, crime committed by South African children and adolescents is not a new phenomenon. Exposure to trauma, neglect, child-maltreatment due to poverty and substance abuse are factors that not only predispose children to criminal involvement, but also contribute to the development of anti-social behaviour and various learning and behavioural disorders (Pelser, 2008:4; World Health Organisation, 2015:10).

The topical issue of children in conflict with the law – and children with mental disorders who come into conflict with the law – has attracted a great deal of attention (Breen, 2011:6; Department of Justice & Constitutional Development [DJCD], 2015:1). The Annual Departmental Report on the Implementation of the Child Justice Act (DJCD, 2014a:34) reflects that between 2013 and 2014, a total of 7 946 children were in conflict with the law in South Africa. According to the acting National Commissioner of Correctional Services, Mr Modise (Department of Correctional Services [DCS], 2015:1), there has been a 74 per cent reduction in the number of children awaiting trial in South Africa’s remand detention facilities and a significant decrease of 62.1 per cent noted in the number of sentenced children between 2009-2010 and 2014-2015. However, despite this reduction, comments by Skelton in an article (*The Witness*, 2015:1) emphasise that the issue regarding children in conflict with the law is still a major area for concern in South Africa.

The appropriateness and effectiveness of methods used to assess the criminal capacity of children in conflict with the law are vital in order to ensure that adequate

consideration is given to the special needs of these vulnerable children. Before the implementation of the Child Justice Act 75 of 2008 (DJCD, 2010a) (hereafter referred to as the Child Justice Act), a child accused of committing an offence was dealt with under the same legislative framework as an adult offender, namely the Criminal Procedure Act 51 of 1977 (DJCD, 1977) (hereafter referred to as the Criminal Procedure Act). South African legislation has since made provision to protect the rights of children who are in conflict with the law, as well as the rights of children with mental disorders who come into conflict with the law. These legislations include the Children's Act no 38 of 2005 (DJCD, 2005) (hereafter referred to as the Children's Act), the Child Justice Act and the Criminal Procedure Act.

The Children's Act (S11 (ss1-3)), stipulates that children who suffer from disabilities, such as mental and chronic illnesses, have the right to receive specialised care and appropriate parental/familial care. Disabled and chronically ill children have the right to practise religious, cultural, social and educational activities that recognise their special needs, experience conditions that promote and uphold dignity, self-reliance, and support systems for the child and caregiver pertaining to the special needs of the child (Children's Act, S11(ss1-3)).

Since the implementation of the Child Justice Act, a new 'rights-based' justice system has been created that is grounded on the protection of children, who are the most vulnerable members of society. The preamble of the Child Justice Act acknowledges the special needs of children and stipulates that in all matters, the best interest of the child is paramount. The Child Justice Act provides separate justice procedures that cater to and uphold the needs and rights of children, including the rights of children with mental disorders. Section 48 (ss5b) of the Child Justice Act refers to sections 77 to 79 of the Criminal Procedure Act, in terms of how to deal with a child offender who presents symptoms of a mental disorder. Here, section 77 of the Criminal Procedure Act stipulates that if the accused is not able to understand the legal proceedings and make a viable defence, due to the influence of a mental illness, such a case ought to be investigated in terms of section 79 of the Criminal Procedure Act. Furthermore, section 78 of the Criminal Procedure Act determines that if the influence of a mental illness or disability renders the accused incapable of appreciating the wrongfulness of his or her actions and incapable of

acting in accordance with that understanding, the accused shall not be held criminally responsible for the misconduct.

The matter regarding children with mental disorders, who are in conflict with the law, is complex. This study firstly considered the influence a mental disorder will have on the child's criminal capacity, and secondly considered the risk factors that can be associated with mental disorders in childhood criminality. Lastly, the legal procedures were explored to see if procedures are sufficient to deal with children suffering from mental disorders who come into conflict with the law. In the context of the study, the terminologies 'mental illness', 'mental disorders' and 'psychiatric disorders' will be referred to interchangeably. The terminologies 'children in conflict with the law' and 'child offenders' will also be referred to interchangeably.

There are various bodies of national and international research which support the fact that psychiatric disorders increase the likelihood of criminal and delinquent behaviour in children (Classel & Burstein, 2007; Fazel, Doll & Langstrom, 2008; Koning, Webbink, Vujic & Martin, 2010; Pillay & Willows, 2014; Skelton & Badenhorst, 2011; Tromp, Dolley, Laganparsad & Govender, 2014). In light of the gap in South African research conducted in this area, the purpose of this study was to explore the influence of childhood and adolescent mental disorders on the criminal capacity of children in conflict with the law.

There are four areas of focus in the study, namely: (1) the present position of the South African legislative framework on how to deal with children who have mental disorders and are in conflict with the law; (2) the assessment procedures utilised to determine the criminal capacity of child offenders with psychiatric disorders; (3) the issues regarding childhood psychiatric disorders and their influence on behaviour and criminal capacity; and (4) the current methods used to deal with child offenders who have psychiatric disorders. Against this background, the aim of the present study is to provide an explorative analysis on the criminal capacity of child offenders with psychiatric disorders.

In order to create context, the legislative provisions and procedures used to determine the criminal capacity of children in conflict with the law will be discussed

below. This will be followed by a discussion of the rationale and research problem of the study. The chapter concludes with a discussion on the research methodology and the content of the research report.

1.2 DETERMINING THE CRIMINAL CAPACITY OF CHILDREN IN CONFLICT WITH THE LAW

Issues pertaining to a minimum age demarcation to determine criminal capacity have been grappled with on a national and international level (Skelton & Badenhorst, 2011:15). Prior to the enactment of the Child Justice Act, South African common law legislature for questioning criminal capacity was one of the lowest in the world, namely seven years old (Skelton & Badenhorst, 2011:14-15). This law was later reviewed and with the implementation of the Child Justice Act in 2008, a decision was taken to retain the rebuttable presumption of *doli incapax* (a lack of criminal capacity due to a minimum age) and only increase the minimum age of criminal capacity from seven to 10 years of age. Although this decision was a step in the right direction, this age is still debatable since it is lower than the minimum age of criminal capacity proposed in the General Comment No 10 of the United Nations Convention on the Rights of the Child (UN, 2007b). According to section 8 and 96(ss4) of the Child Justice Act, the cabinet member responsible for the administration of justice, namely the Minister of Justice and Constitutional Development, is obliged to submit a report to parliament, no later than five years after the implementation of the Act, to review the minimum age of criminal capacity. The Child Justice Act has since celebrated just over seven years of its application in South Africa and the minimum age of criminal capacity is currently being reviewed.

The Child Justice Act provides a separate legislative framework that acknowledges the rights of children within the various age categories, who are in conflict with the law. In this light, the Child Justice Act (S11) functions on a system of a minimum age and a rebuttable age of criminal capacity.

In accordance with section 7 of the Child Justice Act, a child who is below the age of 10, at the time of the alleged offence, is presumed to lack criminal capacity (referred

to as *doli incapax*) and therefore cannot be prosecuted. Such children are dealt with in terms of section 9 of the Child Justice Act and are referred to a children's court, counselling, therapy and/or appropriate programmes after an assessment has been conducted by a probation officer.

A child between the age of 10 and 14 is also presumed to lack criminal capacity (*doli incapax*); unless the state can prove beyond reasonable doubt that, at the time of the alleged offence, the child in question did possess the capacity to appreciate the wrongfulness of his/her actions and to act in cognisance (Child Justice Act, S7). According to Gallinetti (2009:18), this stipulation prevents the process of an "automatic prosecution" and provides a level of protection for child offenders who are within the aforementioned age bracket.

A child between the age of 14 and 18, at the time of the alleged offence, is presumed to have full criminal capacity (*doli capax*) and therefore can be held liable for his/her misconduct in terms of section 5 of the Child Justice Act.

Aspects pertaining to the determination of age for a child who is in conflict with the law is of relevance in this study, since this will dictate the manner, procedure and legislative framework under which the child will be dealt with. According to section 34 of the Child Justice Act, every child who is alleged to have committed an offence must be assessed by a probation officer.

In the case of a child between 10 and 14 years of age, the assessment conducted by the probation officer, amongst other functions, is to provide an opinion on the criminal capacity of the child; in other words, if the child is deemed to have had the ability to differentiate between right and wrong at the time of the alleged offence and to act in accordance with that appreciation (Child Justice Act, S7 & 10-11). If the probation officer is of the opinion that the child in question has the capacity to be held criminally liable; the state is obliged to investigate and prove criminal capacity beyond reasonable doubt (Child Justice Act, S11 (ss1)). In proving such, the inquiry magistrate may order an evaluation of the cognitive, moral, emotional, psychological and social development of the child, pertaining to the determination of his/her

criminal capacity, by a suitably qualified person, in terms of section 11(ss3) of the Child Justice Act.

An assessment of criminal capacity should in essence determine if the child had the knowledge that his/her behaviour was wrong, why it constituted as a wrongdoing and furthermore if the child had the ability to act in accordance with that appreciation (McDiarmord, 2013:151). According to Schoeman (2016:6), a criminal capacity assessment is a detailed evaluation that ought to holistically demonstrate the complexities which exist between the biological and environmental factors that influence the child offender. It is, therefore, necessary that there should be an understanding regarding the concept or social meaning behind behaviour that violates the law or behaviour that constitutes as a wrongdoing. In light of this, the child should be able to demonstrate his/her ability to exercise free-will and control over actions by means of choice (McDiarmord, 2013:151).

Snyman (2008:162-169) stipulates that the determination of criminal capacity is established by evaluating certain cognitive and conative functions. If one or both of these functions are lacking, such a person cannot be held liable for his/her misconduct. When the criminal capacity of a child is questioned, the same cognitive and conative functions, as referenced by Snyman (2008:162-169), ought to be considered, with particular emphasis placed on the cognitive, moral, emotional, psychological and social development, educational level, domestic and environmental circumstances and the age and maturity of the child, as per section 11 of the Child Justice Act. The aforementioned factors, in addition to reference made to sections 77 to 79 of the Criminal Procedure Act, are also the criteria used to assess the criminal capacity of child offenders with psychiatric disorders.

Breen (2011:6-7) emphasises the effect that psychiatric disorders have on the criminal capacity of children in conflict with the law and indicates that in any event, when a child presents symptoms of a psychiatric disorder, the presumption of criminal capacity must be challenged and the influence of the psychiatric disorder ought to be considered as a factor that could affect the criminal capacity. This is because the psychiatric disorder influences and impairs the cognitive, emotional,

psychological and social development of the child (Papalia & Feldman, 2011:428). This will be discussed further in chapter 3.

The primary function of investigating and challenging the criminal capacity of a child who suffers from a psychiatric disorder, is intended so that the child may receive appropriate care, protection and treatment (Child Justice Act, S2 & 35; Children's Act, S156). As mentioned, the impairments in the cognitive and conative development, caused by a psychiatric disorder, would influence the ability for self-control, reason and rational choice process, thereby influencing the ability to appreciate the wrongfulness of an act and ultimately, to act in accordance with that appreciation. Therefore, in determining criminal capacity one might avoid negative exposure to the criminal justice system for a child who does not possess criminal capacity due to the influence of a psychiatric disorder (Breen, 2011:6-7; Skelton & Badenhorst, 2011:18-20).

1.3 RATIONALE FOR THE STUDY

The motivation for the study stemmed from both a personal and professional interest in children with psychiatric disorders and the influence of psychiatric disorders on criminal capacity. The task of determining criminal capacity becomes exceedingly challenging when predisposing factors, such as psychiatric disorders, are identified and the influence that these disorders may have on the criminal capacity of such a child, is questioned.

This study explores if a psychiatric disorder influences the criminal capacity of children in conflict with the law. Research conducted on the causative factors associated with criminal behaviour in children, by Fazel et al (2008:7) as well as Classel and Burstein (2007:2); found a high incidence of neurodevelopmental and behavioural psychiatric disorders in child offenders. The influence of these disorders caused various developmental challenges that predispose this group of children to criminal behaviour. Children who suffer from psychiatric disorders are particularly at risk of having criminal charges brought against them, as they manifest uncontrolled, aggressive and defiant behaviour due to a lack of impulse control and impaired cognitive and conative functioning (Classel & Burstein, 2007:2; Fazel et al, 2008:7).

Breen (2011:6-7) concurs with the aforementioned literature documented by Fazel et al (2008:7) as well as Classel and Burstein (2007:2), and emphasises that child offenders with psychiatric disorders are a vulnerable group who require adequate treatment and support services when they come into conflict with the justice systems. It is not only important to consider, but also to challenge the influence of psychiatric disorders on children who are accused of committing crimes, in respect to the motive, criminal liability and ultimately the criminal capacity, as per section 48(ss5) of the Child Justice Act and sections 77 to 79 of the Criminal Procedure Act. The process of challenging and investigating the influence of a psychiatric disorder on the child's behaviour and criminal capacity will provide for a child to be dealt with in a fair manner by recognising his/her special needs and best interests.

In addition, based on literature reviews, the researcher had also observed that the issue regarding the criminal capacity of child offenders with psychiatric disorders is topical in South Africa. As highlighted above, although youth offending in South Africa is high, statistics show that there has been a significant reduction (DCS, 2015:1). Skelton (*The Witness*, 2015:1) however, is of the opinion that despite the fact that attention has been drawn to child justice issues, it is still a major area of concern, as there has been little to no development regarding the facilities and services made available for child offenders. While research recognises the relationship between psychiatric disorders and delinquency, there exists a gap in South African research that explores the influence of psychiatric disorders on the criminal capacity of a child who is in conflict with the law.

With this study, the researcher aims to add to the existing knowledge about the influence that psychiatric disorders have on child offenders. It is believed that the findings from this study will highlight the influence and risks associated with psychiatric disorders and the effect these disorders have on the child offender's cognitive and conative functioning. Furthermore, the findings from the study will provide recommendations to improve on services and methods used to deal with children who are in conflict with the law, as well as children with special needs, such as psychiatric disorders, who are in conflict with the law.

1.4 PROBLEM STATEMENT

Research indicated that children who struggle with the regulation of social behaviour often suffer from the impact of psychiatric disorders and have a heightened tendency to engage in risk taking, impulsive and aggressive behaviour which brings them into conflict with the law (Hill & Maughan, 2001:2). Psychiatric disorders, such as attention deficit hyperactivity disorder (ADHD), autism spectrum disorder (ASD), oppositional defiant disorder (ODD) and conduct disorder (CD), negatively influence the cognitive and conative development of children. Subsequently, this impaired development will affect the child's intellect, ability to reason and perceive information and to control one's behaviour. Of importance in this study is to explore if, psychiatric disorders may deny this group of children the ability to fully appreciate the wrongfulness of their actions and to act in accordance. The process of challenging and investigating the influence of the psychiatric disorder on the child offender's behaviour, and ultimately criminal capacity, is therefore of utmost importance.

As mentioned, this study addresses the gap in South African research that explores the influence of psychiatric disorders on the criminal capacity of a child who is in conflict with the law. The various facets that will be explored in the study include the influence of the psychiatric disorder on the child's behaviour and criminal capacity. The various psychiatric disorders that are prevalent in child offenders were identified and the risks associated with these disorders, in respect of child offenders' behaviour and criminal capacity, will be discussed. The current processes used to determine the criminal capacity of a child offender with a psychiatric disorder and the services available that pertain to the special needs of children with psychiatric disorders, will be highlighted.

1.5 RESEARCH AIMS AND OBJECTIVES

The primary focus of a study encompasses the research aim, objectives and problems (De Vos, Strydom, Fouché & Delpont, 2011:108). According to De Vos et al (2011:89) the aim of an investigation is reflected as a statement of intent and it

highlights what the researcher hopes to achieve. On the other hand, the objectives of a study reflect specific measurable outcomes which outline the steps taken to achieve the result (Leedy & Ormrod, 2010:56-59).

The aim of this study is to explore the criminal capacity of children with psychiatric disorders, who are in conflict with the law. In order to achieve the research aim, four objectives were identified.

- The first objective explored if psychiatric disorders influenced criminal behaviour and the criminal capacity of a child who is in conflict with the law.
- The second objective explored the influence (impact and risks) of psychiatric disorders, such as ADHD, ASD, ODD and CDD on the child offender and criminal capacity.
- The third objective analysed current methods used to determine the criminal capacity of child offenders with psychiatric disorders.
- The fourth and final objective aimed to identify good practice and make recommendations on how to improve procedures in dealing with children who have psychiatric disorders and are in conflict with the law.

In order to meet the research aim and objectives outlined above, research questions were identified. The role of a research question is to form direction and guidance for the intended study (Hofstee, 2006:85). The answers to these carefully formulated questions will be in support of the research objectives and ultimately the research aim. The following research questions were formulated:

- 1.5.1** What influence do psychiatric disorders, such as ADHD, ASD, ODD and CD, have on the criminal capacity of child offenders?
- 1.5.2** What are the impacts and risks associated with the aforementioned psychiatric disorders in relation to criminality in children?
- 1.5.3** Does a child with a psychiatric disorder possess the capacity to know the difference between right and wrong and have the ability to act accordingly?

- 1.5.4** Do the current methods used to determine criminal capacity give adequate recognition to psychiatric disorders as a factor that could influence the criminal capacity of children in conflict with the law?
- 1.5.5** What services are available for child offenders with psychiatric disorders, who were found to have and not to have criminal capacity?
- 1.5.6** What are the recommendations regarding appropriate methods of dealing with children who have psychiatric disorders and are in conflict with the law?

Based on the formulation of the research aims and objectives, the defining key concepts and the methodological foundation relevant to this study will be discussed.

1.6 DEFINITION OF KEY CONCEPTS

In this section, key concepts relevant to the study will be discussed. The purpose of defining key concepts is to provide a detailed explanation of the relevant terms used in a study (Leedy & Ormrod, 2010:58). Emphasis was placed on the key concepts that delineate the study. For the purpose of the study, the Child Justice Act served as the primary source for the definition of the key concepts.

1.6.1 Criminal capacity

The concept of determining criminal capacity for a child who is in conflict with the law involves determining, through the means of an assessment, if a child has the requisite degree of appreciation to distinguish between right and wrong and the ability to act in accordance with this understanding, at the time the offence was committed (Child Justice Act, S11).

1.6.2 Child

The Child Justice Act (S1) defines a child as a person 18 years and younger, and in certain circumstances persons older than 18 but younger than 21 years of age, as per section 4 (ss2) of the Child Justice Act.

1.6.3 Children in conflict with the law

“A child in conflict with the law means a child suspected of having committed an offence” (DJCD, 2010b) (National Instruction 2 of 2010, Children in conflict with the law, 2010, S2). According to Badenhorst (2011:1), in many international laws the terminology used to refer to a child who is in conflict with the law is ‘juvenile’ or ‘juvenile delinquent’. In South African practices these terminologies, namely ‘juvenile’ or ‘juvenile delinquent’, have been identified as having a negative connotation and are therefore not used.

The preferred terminology used to refer to a child who has been accused of a criminal offence is ‘child in conflict with the law’ or ‘child offender’ (Badenhorst (2011:1). As mentioned above, the terminologies ‘children in conflict with the law’ or ‘child offender’ will be used interchangeably in the context of the study.

1.6.4 Psychiatric disorder

A psychiatric disorder is described as “...clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom” (Stein, Phillips, Bolton, Fulford, Sadler & Kendler, 2010:1762-1763).

A psychological disorder, also referred to as a mental disorder, is characterised as “An ongoing dysfunctional pattern of thought, emotion, and behaviour that causes significant distress, and that is considered deviant in that person’s culture or society” (Butcher, Mineka & Hooley, 2013:4). Persistent cognitive, mood or behavioural problems are symptomatic of a psychological disorder (William, 2016:1). The risks associated with untreated psychological disorders include poor academic performance, difficulty in social interactions and conflict with the law (William, 2016:1).

According to the Diagnostic and Statistical Manual of Mental Disorders-5 (DSM-5) (2013: 20), a mental disorder is characterised by a significant impairment in one's cognitive and emotional regulation that is reflected as a dysfunction in the psychological, biological and/or developmental process of the mental functioning.

The Council for Children with Behavioural Disorders (Anon, 2016a:1) defines behavioural and emotional disorders as the inability to learn, build and/or maintain interpersonal relationships, inappropriate behaviour or feelings under normal circumstances, a persistent mood of unhappiness and a tendency to develop physical symptoms which can be associated with personal, school and/or environmental issues. The manifestations of the aforementioned characteristics, exhibited by a child with a behavioural and/or emotional disorder, are unexplainable by intellectual, sensory and/or health factors (Anon, 2016a:1). These characteristics are found to occur over a long period of time, to a degree that negatively affects the child's daily functioning. According to the DSM-5 (2013:55-56, 62-65, 461) ADHD, ASD, ODD and CD are classified as behavioural disorders.

As mentioned above, the terminologies 'mental disorder', 'mental illness' and 'psychiatric disorder' are also referred to interchangeably in this study. Within the study, symptoms or behavioural patterns of a mental disorder should be considered as a reflection of behavioural, psychological and/or biological dysfunction that is associated with a psychiatric disorder and not a manifestation of an 'expectable and culturally sanctioned response'; such as the reaction to a death of a loved one or political, religious and/or sexually deviant behaviour (Stein et al, 2010:1763). For the purpose of the study, emphasis will be placed on the casual relationship and the influence of ADHD, ASD, ODD and CD on the criminal capacity of children in conflict with the law. Each one of these disorders, namely ADHD, ASD, ODD and CD is found to co-occur with other psychiatric disorder symptoms which may exacerbate the impact of the disorder, as highlighted in chapter 3. This 'co-occurrence' of different psychiatric disorder symptoms manifesting simultaneously, is also referred to as a co-morbidity (Benjamin & Walker, 2011:2).

1.7 METHODOLOGICAL FOUNDATION FOR THE STUDY

Leedy and Ormrod (2010:87) define the methodological foundation of a study as an outline of the procedures and instruments used during the execution of a research investigation. It links the research aims, objectives and questions to the data and provides validation for the research instruments and techniques used.

The function of a research design is to outline the methodology for a study. This includes the research purpose, goal and approach used in the study to strategically achieve the expected outcome (Mason, 2002:24-25). The vital question to ask when planning research is: What is the desired outcome hoped to achieve by conducting this research? According to De Vos et al (2011:109) the answer to this question will determine the type of research approach that is followed. Creswell (2014:32) highlights three research approaches that can be applied in scientific research; namely, the qualitative, quantitative or mixed methodology approach.. In light of the fact that the desired outcome of this study was to conduct an in-depth exploration on the relationship between psychiatric disorders and the criminal capacity of child offenders, a qualitative approach was employed. The type of data required in this study, therefore, covered qualitative elements in the development of the data collection tool and data analysis process.

1.7.1 Research approach

Qualitative research adopts a naturalistic approach and focuses on investigating social issues, attitudes, experiences and behaviour (Creswell, 2014:32). The inductive and idiographic nature of this research approach provides an insider's view on the research phenomenon. This implies that qualitative research is grounded on the experiences of individuals, communities and/or groups with the intent of developing a pattern or theory on a specific phenomenon (Creswell, 2007:37).

According to an article in the *Journal of Qualitative Criminal Justice and Criminology* (Olivier, 2013:1-3), qualitative research creates the opportunity to gain a detailed understanding of crime and criminals, through the process of observation and

interviews, which was of relevance to the study. The purpose of qualitative research enables the “development of an understanding of the meaning that people ascribe to their experiences” (Sutton & Austin, 2015: 227). Creswell (2014:249) as well as Sutton and Austin (2015: 242-243) are of the opinion that narratives or verbatim quotes form an integrative and effective method to convey the true feelings and experiences of individuals in qualitative research.. In an attempt to gain an ‘insider’s view’ on issues pertaining to criminal capacity in the child justice system, and the influence of psychiatric disorders on child offenders, a qualitative approach was viewed to be the most appropriate approach to achieve the aim and objectives of the study. In addition, due to limited literature on this topic expert narratives formed an important part of the study since it not only provided valuable insight in the procedures followed during criminal capacity assessments but also to contribute to expanding the knowledge base in this under researched field on child justice and mental health issues for children in conflict with the law.

1.7.2 Research purpose

Research can be either basic or applied in nature. Applied research provides the applications and resolutions to research problems (De Vos et al, 2011:94). According to Dantzker and Hunter (2011:10) applied research is particularly useful in the field of criminal justice, as it is evaluative in nature and provides practical solutions to ineffective policy and procedural frameworks.

Basic research, on the other hand, is the expansion and production of new knowledge (De Vos et al, 2011:94). Dantzker and Hunter (2010:11) elaborate that although basic research offers “little promise or expectation of immediate direct relevance”, it is more consistent with criminological inquiries and scholarly development in the field of study.

Exploring if psychiatric disorders influence the criminal capacity of children in conflict with the law is applied in nature, as it aims to holistically explore the phenomenon by focusing on legislative and procedural challenges experienced by experts in the child justice and mental health system. As mentioned, an exploration of these challenges could be beneficial as it will firstly add to the knowledge base on child justice issues. In addition, recommendations made in the study aimed at improving legislative

frameworks, criminal capacity assessment procedures and services available to child offenders with psychiatric disorders.

1.7.3 Research goal

In addition to determining the research purpose and approach, it is also necessary to identify the research goal. There are different means by which a research problem can be researched, namely by using an exploratory, explanatory, descriptive or evaluative research goal (De Vos et al, 2011:95).

Since limited research has been conducted to explore the causal relationship and influence that psychiatric disorders have on the criminal capacity of children in conflict with the law, as mentioned above, the exploratory research goal was identified as the appropriate design to follow. The purpose of exploratory research is to gather insight into a new area of interest or to become informed on a topic that lacks basic information (De Vos et al, 2011:95). Exploratory research is used to gain insight into a situation, community, phenomenon or individual and aims to explain a particular phenomenon that has already been explored and described. This research goal was applied to this study as its principles most appropriately suited and enhanced the functions of the study.

1.7.4 Unit of analysis for the study

Creswell (2007:38-39) is of the opinion that the unit of analysis refers to the features of specific objects or units on which the data are collected, defined and explained. As such, the unit of analysis can be described as the 'what', 'who' and 'where' of the study (De Vos et al, 2011:93). The identification and selection of the unit of analysis must be deemed as vital, because it determines the particular entities that will be explored within a study.

In this study, the unit of analysis consisted of experts in child justice and mental health issues from governmental, non-governmental and private sectors, who

portrayed the desired research characteristics; namely a level of expertise in child justice and mental health issues pertaining to children in conflict with the law.

These experts included: psychiatrists and psychologists, who are viewed as suitably qualified persons to conduct criminal capacity and psychiatric assessments, as per section 11(ss3) of the Child Justice Act; social workers, who are responsible for conducting preliminary criminal capacity assessments, in terms of section 34 of the Child Justice Act; academics, who are experts in the field of child justice and mental health issues pertaining to child offenders with psychiatric disorders; a criminologist, who is also an academic expert in the field of child justice; and lastly, an advocate, who specialises in child justice matters for children with psychiatric disorders who come into conflict with the law. Interview participants (hereafter referred to as participants) were recruited nationally; thus the sample included experts from four provinces in South Africa, namely, KwaZulu-Natal, Gauteng, Eastern Cape and Western Cape.

Research that will be discussed in more detail in the literature review of the study (chapter 3), identified ADHD, ASD, ODD and CD as the psychiatric disorders most frequently linked to anti-social and delinquent behaviour in child offenders (Bishop 2008:3; Grisso, 2008:147-149; Koning et al, 2010:1; Teplin, Abraham, McClelland, Dulcan & Mercile, 2002:1134).

There are various other psychiatric disorders that may influence the criminal capacity of child offenders. However, based on the research, that will be discussed in more detail in chapter 3, ADHD, ASD, ODD and CD will serve as a point of departure in this study. This focus was not intended to, and did not limit the study in so far that findings from this study resulted in other relevant disorders being included, as reflected in chapter 4 of the study.

1.7.5 Sample design and strategy

The ideology behind sampling is that an observation of a reduced portion or unit is able to reflect what can be expected in the total population (Mason, 2002:120-122).

The two main sampling methods are probability and non-probability sampling. Quantitative research is more reliant on probability sampling, whereas in the qualitative paradigm, as in this study, non-probability sampling is the preferred sampling method (De Vos et al, 2011:228).

Sampling in qualitative research is focused on exploring the background and universal experiences of fewer individuals or communities, and it investigates the attitudes, behaviour and experiences associated with a specific phenomenon (Mason, 2002:134). The different non-probability sampling techniques that are frequently used in qualitative research include: purposive, theoretical, deviant case, sequential, snowball, key informant, and volunteer sampling (Rossouw, 2003:113-114). These sampling techniques aim to collect evidence rich data and the chosen technique must, therefore, provide for the most effective method of sampling for the investigation.

In this study, non-probability sampling, more specifically snowball sampling, was used. The process of recruiting research participants in snowball sampling entails identifying and approaching a single case that is involved in the research phenomenon for the purpose of acquiring information that will lead to other research participants (Rossouw, 2003:113-114). The snowball sampling technique was best suited to the study because the sample was recruited from experts that are hard-to-reach. Referrals from experts ensured that a representative opinion was obtained from practitioners and academics working in the field of child justice.

According to Leedy and Ormrod (2010:145-146) this process of recruiting participants is followed until the desired or adequate amount of data has been reached and until no new data emerge; which is also referred to as 'reaching a point of saturation'. As illustrated in table 1.1 below, the sample consisted of 12 experts and the aforementioned process of recruiting participants was followed until a point of saturation was reached and until there were no further participants identified through referral, who met the desired research characteristics. Participants were given the choice to remain anonymous or to waive their right to anonymity. The identity of the participants who chose to waive their right to anonymity is included in the table and discussion of the findings

Table 1.1: Research sample

PARTICIPANT	PROFESSION	INVOLVEMENT IN CRIMINAL CAPACITY ASSESSMENT	YEARS OF EXPERIENCE IN CRIMINAL CAPACITY	YEARS OF EXPERIENCE WITH CHILD OFFENDERS WITH PSYCHIATRIC DISORDERS
Participant 1	Psychiatrist Western Cape	✓	10-15	10-15
Participant 2	Social worker KwaZulu-Natal	✓	16	16
Participant 3	Psychologist Western Cape	✓	3	5
Participant 4	Psychologist KwaZulu-Natal	✓	30 +	30+
Participant 5	A Smith Social worker & Programme Design & Development Manager at NICRO Western Cape	✓	18	6
Participant 6	Prof. A Skelton Professor of Law & Director of Child Law Centre at the University of Pretoria	✓	25	10
Participant 7	M Human Criminologist Academic- presently completing PhD in Criminology & Security Sciences		3 (Academic)	3 (Academic)
Participant 8	Psychologist Eastern Cape	✓	11	16
Participant 9	Social worker Western Cape	✓	7	7
Participant 10	Advocate Pretoria	✓	8	5
Participant 11	Psychiatrist Western Cape	✓	20	20
Participant 12	Professor of Law Pretoria		6 (Academic)	6 (Academic)

The majority of participants were involved in conducting criminal capacity assessments, while the rest of the participants have academic expertise in the field

of study. As mentioned previously, participants were recruited nationally and the sample included experts from KwaZulu-Natal, Gauteng, Eastern Cape and Western Cape.

1.7.6 Data collection

Data collection is a “systematic approach to gathering information from a variety of sources to get a complete and accurate picture of an area of interest” (Rouse, 2013:1). There are various methods of collecting data in qualitative research; these include participant observation, interviewing and documentation collection methods (Creswell, 2007:118-120).

Semi-structured individual interviews were employed as the method of data collection in the study. According to Creswell (2007:129) and Mason (2002:62-63) the semi-structured interviewing method provides a level of flexibility and informality for the researcher and participants. Semi-structured interviews were deemed most appropriate for the study, as it allowed the researcher to steer the interview in the area of interest while still allowing the participants freedom to journey into unmentioned themes, creating the flexibility and level of informality highlighted by Creswell (2007:129) and Mason (2002:62-63).

Data were collected from 11 telephonic interviews and one face-to-face interview. All interviews were audio recorded, after permission had been obtained from the participants. Conducting telephonic interviews provided a feasible means of collecting data nationally. The process of audio recording the interviews allowed the researcher to review each interview during the data analysis and interpretation process. Each participant was interviewed once and the interview was guided by an interview schedule (Annexure B). Complexities regarding the availability of participants are discussed in chapter 5 under the limitations of the study.

Leedy and Ormrod (2010:148-150) highlight that although the process of interviewing in qualitative research is informal and promotes that participants speak freely on the selected topic, the duration of an interview should not exceed 120

minutes. In the study, the stipulated period per interview was 30 minutes. However, the participants were not restricted to this timeframe and the researcher found that because of the interest in the topic, some of the interviews took longer than the anticipated 30 minutes.

1.7.6.1 Pilot study

The purpose of a pilot study investigates if the research methodology, data collection instruments, sampling and analysis techniques were adequately selected and appropriately applied in order to achieve the research aim (Dawson, 2009:92). Leedy and Ormrod (2010:111) state that "...a brief pilot study is an excellent way to determine the feasibility of your study".

The four pillars of a pilot study, in qualitative research, include the review of literature, discussion with experts, assessing the feasibility of the study and testing the measuring instrument (De Vos et al, 2011:395). In this investigation, the pilot study was two-fold. Firstly, a literature review was conducted, as reflected in the discussion of literature review chapters for this study. Information from the literature review was used for the development of the interview schedule (Annexure B), which consisted of four main categories, focusing on: the prevalence and risks associated with psychiatric disorders for children; the methods used to deal with child offenders with psychiatric disorders; the services available to children with psychiatric disorders who come into conflict with the law; and recommendations for improvements of the methods used to deal with this vulnerable group of children.

Secondly, the interview schedule (Annexure B) was tested during interviews with two experts to determine if the data collection instrument enabled the collection of data relevant to the study. Adjustments were made to the interview schedule in accordance with the flaws that became known during the pilot study. The pilot study furthermore highlighted potential challenges such as generalised information from the experts regarding cases of child offenders with psychiatric disorders. This challenge was addressed by using probes and asking for examples or additional details during the interviews.

1.7.7 Data analysis and interpretation

The purpose of data analysis and interpretation is to convert and reduce the collected data to an understandable and interpretable form (Leedy & Ormrod 2010:153). Qualitative data analysis is “...the non-numerical examination and interpretation of observations, for the purpose of discovering underlying meanings and patterns of relationships” (De Vos et al, 2011:399). Qualitative research employs specific procedures for analysing data and developing a theoretical model from the interpreted data (Creswell, 2014:245-246). As mentioned, data were collected through the use of semi-structured interviews. Open coding, axial coding and selective coding were used to analyse and interpret the data.

According to Creswell (2007:239) in the process of data analysis “...the researcher generates an abstract analysis schema of a phenomenon, a theory that explains some action, interaction or process”. In order to achieve this, the three-step process of open coding, axial coding and selective coding, as mentioned, provided that the researcher identify several themes which surfaced from the participant interviews pertaining to child justice and criminal capacity matters. De Vos et al (2011:319) elucidate that this unique three-step flexible process allows for a reciprocal relationship between the data analysis and interpretation phase, and it was executed in the study as follows.

During the open coding phase data were broken down, examined, compared and conceptualised in order to identify similarities and differences (Leedy & Ormrod, 2010:143). In the study, audio recordings were transcribed and notes of the general themes were made for each transcript. Each audio recording was labelled with a unique participant and interview number and participant profession. Each transcript was labelled with the corresponding information, thereby linking the transcript to the corresponding audio tape. A colour coding and labelling scheme was employed to group and compress the information into manageable portions of data. Pertinent points made by the experts, which captured the essence and aim of the objectives, were quoted in the report to substantiate the findings presented in chapter 4 of the study. The process of open coding reduced the data to a small set of themes/categories which was explored in more depth during axial coding.

During the process of axial coding, the focus was on the coded themes which had emerged during the open coding phase. According to Creswell (2007:160), during axial coding information is arranged into a coding paradigm that presents data and the relation to the main theme, as depicted in the study. The data were condensed and key concepts were identified. The themes and concepts that emerged were combined to form general categories. The categories were arranged to form sequences and data were compared with the study's central or main categories, as mentioned in the aim and objectives of the study.

The third process of data analysis and interpretation that followed was selective coding. Creswell (2007:160) and Leedy and Ormrod (2010:143) dictate that during selective coding the propositions or statements that connect the categories in the coding paradigm to the main/central category, are identified. Hence, more detailed information about the phenomenon emerges. In the present study, selective coding was applied by making use of mind maps and spider diagrams to visually compare the existing categorised data to new data. The same method was also used to compare and group the identified categories with the aim and objectives of the study. Each of these themes was discussed in detail in the contents of chapter 4.

The final stage of data analysis involved interpreting and documenting the emergent theory. In qualitative research, the two typologies for data interpretation are the emic or first-order approach, and the etic or second-order approach (De Vos et al, 2011:417). The first-order approach is based on the meaning of the individuals being investigated; the data are interpreted by exploring how the people being studied define the situation or see the world (De Vos et al, 2011:467). The second-order approach is based on the researcher's discovery and reconstruction of the first-order approach and/or added relevant data. For the purpose of this study the data were interpreted by incorporating the second-order approach. This was done in order to explore if psychiatric disorders influence and impact on children in conflict with the law, from the perspective of the experts who work with child offenders.

In order to ensure that the research and collected data were valid and reliable, the researcher assessed the quality of the data against the credibility, transferability,

dependability and conformability of a qualitative study. The validity and reliability for the study will be discussed below.

1.8 ASSESSING THE VALIDITY AND RELIABILITY OF THE STUDY

Validity and reliability dictate the process of quality assurance, which is vital to any research investigation. Although related concepts, validity and reliability are defined differently. According to Rossouw (2003:180), validity refers to whether the research instrument effectively measures the concept it is designed to measure, whereas, reliability refers to the level of consistency and ability of the research instrument to replicate the same results (Rossouw, 2003:180).

According to Lincoln and Guba (1985:1), in order to establish validity and reliability, it is imperative to evaluate the trustworthiness of the study. Trustworthiness refers to the principles of credibility, transferability, dependability and conformability. The model of evaluating trustworthiness, established by Lincoln and Guba (1985), is well developed and was therefore applied to the study.

To comply with the principles of validity in this study, the interview schedule (Annexure B) was submitted to the research supervisor as well as the University of South Africa (UNISA) College of Law Ethics Committee for evaluation. Additionally, to assure validity, the interview schedule (Annexure B) was piloted on two participants. Subsequently, challenges that arose during the pilot study relating to the interview schedule were rectified, as discussed previously.

The credibility and transferability of a study refer to 'truth' in the findings, the researcher's accuracy in capturing and interpreting the subjects' views and questions, and if the collected data can be transferred from a specific situation or case to another (Lincoln & Guba, 1985:1; Rossouw, 2003:180). With reference to the transferability of this study, the question posed would be if the findings from this particular investigation would apply to all child offenders with psychiatric disorders. In the study the clearly set parameters on which the data collection, analysis and interpretation were conducted, created a sense of assurance that other researchers

who want to conduct research of the same nature, under similar conditions, would be able to deduce the research findings and apply them to their investigation.

In order to improve the credibility of this study, the process of 'lengthy engagements', as identified by Creswell (2007:207-208), was supported with added communication, through the use of electronic mail services. Participants who wished to receive updates regarding the development or concluded findings in the study were notified via electronic mail services. By adhering to the aforementioned factors of quality assurance, the dependability and conformability of the study were also assured as the research findings were well documented and reflected in an objective manner using verbatim quotes from participants.

Mouton (2001:107) and Leedy and Ormrod (2010:100-101) draw attention to guiding principles such as diarising influential events that could influence the research. In this study, personal opinions such as identifying child offenders with behavioural psychiatric disorders as vulnerable, were acknowledged and bracketed. Bracketing was done by noting memos during the data analysis and interpretation phase in order to examine preconceptions. These preconceptions were explored and deferred in the presentation of the findings. This process ensured that the data were not influenced by the researcher's preconception; for example, identifying child offenders with psychiatric disorders as victims of their circumstances. The findings from this study are, therefore, reported in a manner that reflects the true opinions of the participants.

In qualitative research there is no definite expectation to replicate or generalise research findings. Therefore, it is important to note that the aim of this study was not to generalise the research results, but rather to embark on an in-depth exploration of the topic at hand and to create awareness on child justice and criminal capacity issues for South African service providers who are involved in criminal capacity assessment procedures.

According to De Vos et al (2011:420-421), in assuring validity and reliability, the evaluation of the researcher is removed and emphasis is placed entirely on the quality and reliability of the data to reflect consistent findings. In an attempt to

enhance the reliability of the study, the data were collected and interpreted in an unbiased and objective manner. The results of the study may be considered reliable as the sample consisted of experts in child justice, criminal capacity procedures and mental health for children. Thus, participants were able to provide evident-rich data to achieve reliable findings. In any research investigation, there are various ethical standards to adhere to. Ethical considerations applicable to this study will be discussed below.

1.9 ETHICAL CONSIDERATIONS FOR THE STUDY

Ethical concerns emerge in any field of social research. The primary consideration when conducting social research, according to De Vos et al (2011:113), is to protect the well-being of the participants involved. The Belmont Report, implemented by the National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research (1979), concurs with De Vos et al (2011:113) and adds that the three basic ethical principles regarding the protection of human subjects consist of respect for persons, beneficence and justice. These three principles encompass factors such as the avoidance of harm, voluntary participation, informed consent, privacy and confidentiality, deception of subjects and assessment of risk-benefits (De Vos et al, 2011:113; National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research, 1979:4-9). In cognisance of the aforementioned ethical concerns, the researcher complied with the ethical standards guided by the Belmont Report (1979:4-9) and De Vos et al (2011:113), as follows.

1.9.1 Respect for persons

In order to adhere to the ethical concern of autonomy, the researcher addressed issues relating to the informed consent process. In the study, ethical clearance was firstly acquired from the UNISA College of Law Ethics Review Committee (Annexure C). All participants were informed of the nature and potential impact associated with the study that might be influential in their decision to participate. Participants were provided with an informed consent letter (Annexure A) that addressed the goal of the research study, the expected duration of participants' involvement, the potential

advantages, disadvantages, dangers, research goals, research methods, level of privacy, confidentiality and anonymity that would be granted to each participant. Informed consent (Annexure A) was obtained and the research participants were knowledgeable of their rights and obligations, such as the opportunity to voluntarily participate or withdraw from participation in the study.

1.9.2 Beneficence

The ethical standards of privacy, anonymity, confidentiality and minimising potential risks within research are closely linked and often overlap between the process of 'respect for persons' and 'beneficence' (National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research, 1979:4-7).

As highlighted above, participants were informed of their rights, such as the right to voluntarily participate, and the level of privacy, confidentiality and anonymity that would be granted in the study. The participants, who dealt with child offenders, disclosed confidential information during the interview, such as the details of cases and issues experienced in the criminal capacity assessment procedures implemented by the child justice system. This information remained private during the data analysis and interpretation phase when the analysed data were interpreted and categorised, as indicated above, by labelling and grouping the participants' opinions with unique numbers and a colour-coding scheme. This ensured that the levels of privacy, anonymity and confidentiality of the participants were maintained and that the identities and opinions expressed were not reflected in a manner that would reveal such information in the research findings. As indicated, the researcher ensured that the data were interpreted and reported in a truthful and unbiased manner. Three of the participants waived their right to anonymity, thus the views expressed by these participants were reflected as their expert opinion in the field of child justice and criminal capacity issues.

Additionally, privacy and confidentiality were further ensured as only the researcher had access to the original data collected, namely the audio-recordings,

corresponding notes and transcripts, which were stored in a lock-up safety box shortly after the process of transcription.

There was no form of compensation granted for participation in the study. However, due to the various challenges faced in the child justice system, many of the participants expressed a sense of gratitude to the researcher for conducting a study that addressed and aimed to contribute to the improvement of criminal capacity issues for children in conflict with the law.

1.9.3 Justice

The final ethical standard guided by the Belmont Report (1979:8-9) is 'justice'. Justice refers to the prospects of fair and equal treatment for all participants. This principle enforces that all participants should be treated equally and that appropriate credit should be granted to all parties who contributed to the study. In this study, merit was awarded to all who played an active role in the research and to the participants for their expert opinion and time contribution.

The significance of maintaining a professional code of ethics is of absolute importance, in terms of not only the researcher and the project, but also concerning the participants and society as a whole. The British Society of Criminology's (Anon, 2006:1) general ethical principle highlights that researchers should make certain that research is undertaken to the maximum possible methodological standard and with the highest eminence, in order to allow the greatest possible knowledge and benefits to ensue society. The researcher aimed to maintain the highest ethical standard during the research investigation by encompassing the Belmont Report (1979) ethical principles and the professional code of ethics in social sciences research.

1.10 CONTENT OF THE RESEARCH REPORT

The research report is divided into four further chapters that emphasise and elaborate on the scope, aim and objectives of the study. The chapter outlay for the study is as follows.

Chapter 2: Contextualising the criminal capacity assessment of children in conflict with the law

In this chapter various aspects concerning the criminal capacity for child offenders with psychiatric disorders are defined, discussed and analysed. These aspects include a historical overview of legal developments in child justice and human rights principles addressing the rights of children with psychiatric disorders who are in conflict with the law. The legislative guidelines to determine the criminal capacity of child offenders with psychiatric disorders, child offenders with psychiatric disorders in need of care and protection, and the nature of services delivered to children with psychiatric disorders who come into conflict with the law, are also discussed.

Chapter 3: The relation between psychiatric disorders, criminality and criminal capacity

Chapter 3 provides a detailed discussion on the prevalent psychiatric disorders manifested in children who are in conflict with the law. The symptoms, characteristics and functional consequences associated with ADHD, ASD, ODD and CD are explored. Assessing the criminal capacity of child offenders with psychiatric disorders, criminal capacity assessment concerns and challenges and theoretical explanations on child offenders with psychiatric disorders, are also furnished.

Chapter 4: Presentation of the research findings

In this chapter, the collected data are analysed, interpreted and reported on.

Chapter 5: Summary of the findings, conclusions and recommendations

Chapter 5 provides a discussion on the research findings and a conclusion to the study. In this chapter, limitations in the study are highlighted and recommendations for future research are outlined, based on the research findings.

1.11 CONCLUSION

The primary obligation of the Child Justice Act is to uphold the best interest of the child. However, in South Africa, the child justice system presents several challenges regarding the methods used to deal with child offenders, and specifically child offenders with psychiatric disorders. The consequence of this is that the rights of children in conflict with the law are infringed upon and this hampers the best interest of the child.

This chapter provided an introduction to the research topic, the rationale for research and the methodological foundation that was executed in the compilation of this study. The introduction and rationale for the study emphasised the relevance and importance of investigating the criminal capacity of child offenders with psychiatric disorders presently in South Africa. The methodological foundation provided the outline regarding the research design, in terms of the unit of analysis, data collection tool, sampling technique, and data analysis and interpretation method that were adopted in the study.

In the next chapter a historical overview of the legal developments in child justice and the relevant international and national human rights instruments, pertaining to children with psychiatric disorders who are in conflict with the law, will be discussed. Provisions and legislations pertaining to the criminal capacity of child offenders will also be discussed. This will include the application of the Child Justice Act, the Children's Act, Mental Health Care Act 17 of 2002, and the Criminal Procedure Act. Lastly, chapter 2 will provide a detailed discussion on children in need of care and protection and the nature of services that are delivered to this vulnerable group.

CHAPTER 2

CONTEXTUALISING CRIMINAL CAPACITY ASSESSMENTS OF CHILDREN IN CONFLICT WITH THE LAW

“The South African Government’s approach to the question of children’s social and political rights derives from the basic principle that to value our children is to value our future” (Mandela, 1994b).

2.1 INTRODUCTION

The task of establishing the criminal capacity of a child who is in conflict with the law involves determining if the child had the ability to distinguish between right and wrong and to act in accordance with that understanding (Child Justice Act, S11). It is argued in this dissertation that the effects of a psychiatric disorder must be considered in respect of the motive and criminal liability, in accordance with the Child Justice Act (S11 & 48) and the Criminal Procedure Act (S77-78). According to the National Mental Health Association (2004:9) there is a high correlation found amongst delinquent behaviour in children and psychiatric disorders such as ADHD, depression, substance abuse and CD. Child justice issues, such as criminal capacity assessment concerns and challenges for child offenders with psychiatric disorders, are still topical since measures have not been taken to improve the procedures used to deal with this vulnerable group (Breen, 2011:5-7; Skelton & Badenhorst, 2011:22-23).

In this chapter, a historical overview is given of legal developments in child justice and human rights principles addressing the rights of children with psychiatric disorders who are in conflict with the law. The legislative guidelines used to determine the criminal capacity of child offenders with psychiatric disorders will be explored. Additionally, the topic of child offenders with psychiatric disorders in need of care and protection, and the nature of services delivered to children with psychiatric disorders who are in conflict with the law, will also be discussed.

2.2 HISTORICAL OVERVIEW OF LEGAL DEVELOPMENTS IN CHILD JUSTICE

The first democratic election in 1994 led to the development of a new political era, which also provided constitutional guarantees for children in conflict with the law. The Child Justice Act, as an example of these developments, places renewed emphasis on the rights of children in conflict with the law and the desire to keep these children out of prison (Badenhorst, 2011:1-2).

Traditionally, children who were in conflict with the law were expected to adjust to and function within the criminal justice system designed for adult offenders (Karels & Pienaar, 2015:57). Van Eeden (2013:18) highlights that, in the early 1990s, various groups of non-governmental organisations (NGOs), in an attempt to raise awareness about the issues concerning children in conflict with the law, provided assistance to children who were in police cells, court and prison. This emancipation gave rise to the 1992 campaign 'Justice for Children: No child should be caged', initiated by the University of the Western Cape (Van Eeden, 2013:18). Another significant development in South African child justice history was the initiative by the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), also launched in 1992, which aimed to promote youth-based restorative justice concepts by diverting children away from the criminal justice system (Skelton & Tshehla, 2008:32).

Despite these attempts to raise awareness of child justice matters, South Africa still lacked the legislative framework pertaining to the rights of children who came into conflict with the law. The death of Snyman; a 13-year old boy who was beaten to death in the Robertson police cell by older cellmates while awaiting trial, demonstrated the consequences which resulted from a lack of legislative framework that dealt with child offenders (Gxubane, 2010:36). During this period, children who entered into the criminal justice system were subjected to abusive conditions and lengthy detention periods. Gxubane (2010:35-36) stated that "...his [Neville Snyman's] death in September 1992 led to rigorous advocacy for the reform of the child justice system in South Africa". This was a watershed moment in South Africa; the death of Snyman drew attention to the increasing number of children in conflict with the law, the predicaments facing these children and the need for effective and

humane methods of dealing with children in conflict with the law (Gxubane, 2010:36; Van Eeden, 2013:20).

In addition to the case of Snyman, the sentencing of corporal punishment, in 1992, raised further concern. During this period, state courts sentenced more than 30 000 children per year to receive corporal punishment, over and above their sentence of imprisonment (Skelton & Tshehla, 2008:32).

These incidences, that drew attention to the human rights violations faced by children who were in conflict with the law, emphasised the need for a separate justice system for child offenders and brought rise to various campaigns initiated by NGOs to raise awareness, both nationally and internationally, on the issues affecting children in conflict with the law (Badenhorst, 2011:1).

In his State of the Nation Address in 1994, the late President Nelson Mandela advocated the will to change and bring about a juvenile justice system that not only dealt with but also upheld the rights of children in conflict with the law. The words of the late President Nelson Mandela (1994a:1) were as follows:

The government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders.

In 1996 a project committee of the South African Law Commission was appointed to investigate juvenile justice matters, in an attempt to develop a separate legal system that dealt with children in conflict with the law (Gallinetti, 2009:7). In 2002 this committee finalised the report on juvenile justice, together with a draft of the Child Justice Bill, which was later introduced as 'Bill 49 of 2002' (Gallinetti, 2009:7). The finalisation of this Bill included a range of debates, research and a prominent consultation study that reflected the voice of the children who were in conflict with the law (Gallinetti, 2009:7). According to Gallinetti (2009:8), this development led to the implementation of the Child Justice Act in May 2009. This Act created a new

‘rights-based’ approach for children in conflict with the law and addressed issues of accountability and respect for the fundamental freedom of others.

As mentioned, the Child Justice Act has since celebrated just over seven years of its application in South Africa. The legislation in the Act (Child Justice Act, S5, 10 & 11) regarding criminal capacity, is intended to create individualisation for children within the justice system. The Deputy Minister of Justice and Constitutional Development (DJCD, 2015:1) recently debated and focused on the issue of criminal capacity for children in conflict with the law, at the National Workshop on the Review of the Minimum Age of Criminal Capacity 2015. Issues regarding the criminal capacity of children in conflict with the law were wrestled with at the 2001 and the 2008 national workshops and are still topical, since challenges pertaining to criminal capacity issues for child offenders, have not yet been resolved. The findings from the workshop suggest that the South African laws, on the issue of criminal capacity for child offenders, although improved, are not yet on par with valid and reliable international practices (DJCD, 2015:1).

Even though great strides were made in terms of addressing the rights of children in conflict with the law at these workshops, limited attention was given to the rights of children with psychiatric disorders who came into conflict with the law. Tromp et al (2014:1) demonstrated the lack of attention to the plight of child offenders with psychiatric disorders in South Africa, by highlighting the scarcity of facilities and the conditions faced by child offenders with psychiatric disorders within these facilities. One of the facilities featured in the article (Tromp et al, 2014:1) was the Vikelwa Reform School in Ogies, Mpumalanga, which placed 15 male adolescents per room and housed up to 380 delinquent children with psychiatric disorders. In the report, Tromp et al (2014:1) documented that the Vikelwa Reform School was under investigation by the Human Rights Commission resulting from accusations that the adolescents were subjected to ‘prison-like conditions’, where they were locked up at night. Incidences of rape and assault were reported to happen frequently.

Of interest to this study is that the majority of child and adolescent offenders placed at the reform school, were male and portrayed as being aggressive and unruly. Such behaviour is traditionally found in children diagnosed with ADHD and CD (Grisso,

2008:146). Breen (2011:6-7), referring to findings from research conducted by Tromp et al (2014), states that despite some development after attention was drawn to issues relating to criminal capacity for children in conflict with the law, there has been very little improvement concerning child offenders with psychiatric disorders. Against this background, the purpose of the present study is to explore the influence of psychiatric disorders and the implications thereof on the criminal capacity of children in conflict with the law.

2.3 HUMAN RIGHTS PRINCIPLES ADDRESSING THE RIGHTS OF CHILDREN WITH PSYCHIATRIC DISORDERS WHO ARE IN CONFLICT WITH THE LAW

Since the ratification of the 1989 United Nations Convention on the Rights of the Child (UNCRC, 1990a) in 1995, South Africa obliged to create various laws, policies, procedures and services that pertain to the protection and rights of children in conflict with the law (Badenhorst, 2011:2). In addition to the ratification of UNCRC (1990a), South Africa is party to numerous international human rights instruments that address the principles, minimum rules and standards pertaining to the rights of children in conflict with the law. Well-established in this regard is the United Nations (UN) Guidelines for the Prevention of Juvenile Delinquency (UN, 1990b), the UN Standard Minimum Rules for the Administration of Juvenile Justice (UN, 1985) (also referred to as the Beijing Rules), the UN rule for the protection of Juveniles Deprived of their Liberty (UN, 1990c) and the UN Convention on the Rights of Persons with Mental Disabilities (UNCNCRPD, 2007a).

In order to meet the obligations recognised under the ratification of the UNCRC (1990a), South Africa established the Constitution of the Republic of South Africa (Act of 108 of 1996) (DJCD, 1996), the Mental Health Care Act no 17 of 2002 (DoH, 2002) (hereafter referred to as the Mental Health Care Act), the Children's Act, the Child Justice Act and the Criminal Procedure Act, in which the rights and criminal capacity of children with psychiatric disorders are addressed. National and international human rights instruments and legislative frameworks relevant to the study will be discussed below.

2.3.1 International human rights instruments

2.3.1.1 *The United Nations Convention on the Rights of the Child 1990 (UNCRC)*

The UNCRC (1990a) is an important convention that is grounded on the best interest of the child. Under this convention, a detailed framework, pertaining to the rights of children and child justice issues, is comprehensively addressed. Articles 37 and 40 (UNCRC, 1990a) are of significance to this study, since they place direct emphasis on the rights of children in conflict with the law.

Article 37(a-b) (UNCRC, 1990a) dictates that no child shall be subjected to torture, cruel, inhumane or degrading treatment and that the application of arrest or imprisonment shall be used as a measure of last resort for the shortest period. Article 37(c) stipulates that every child deprived of liberty must be held separately from adults, unless it is considered not in the best interest of the child, as similarly stipulated in section 28 (1a) of the Child Justice Act.

According to article 40(3a) (UNCRC, 1990a) all parties ratified under the UNCRC (1990a) are obliged to establish a legislative framework pertaining to the minimum age of criminal capacity. Section 2(b)(i) of the UNCRC (1990a) emphasises the right of innocence, until proven guilty, for every child accused of committing a crime. Article 40 (2ii) of the UNCRC (1990a) stipulates that children who are in conflict with the law have the right to receive prompt information regarding the charges brought against him/her, and the right to a legal guardian/assistant in the preparation of defence. Under this Convention (UNCRC, 1990a, article 40 (3b)) there is provision of services granted to children in conflict with the law, which include counselling, probation, education, vocational training programmes and options for diversion. This section recognises the services needed to address the special needs of children. In the context of this study, sections 7(ss2), 28(ss1), 48(ss3) and 53(ss3) of the Child Justice Act, which will be discussed below, are aligned and echo the legislative frameworks dictated under article 40 of the UNCRC (1990a), pertaining to the criminal capacity, legal representation and provision of services for children who are in conflict with the law.

Article 23 of the UNCRC (1990a) is of significance to the present study since attention is drawn to the rights of children with mental disabilities. The UNCRPD (2007a), which will be discussed below, also highlights the rights of persons with disabilities. Although this Convention does not recognise any new human rights, it compliments and clarifies the procedures and legal duties stipulated under the UNCRC (1990a) (Boezaart & Skelton, 2011:7). According to article 23 (1 & 3) of the UNCRC (1990a), children suffering from mental disabilities have the right to receive treatment and have access to services that promote self-reliance, dignity and that is conducive to the development and special mental health needs of the child.

Sections 2 and 11 of the Children's Act and legislation in the Mental Health Care Act similarly highlight the legislative guidelines pertaining to the rights of children with mental disabilities. This will be discussed under the Acts relevant to criminal capacity issues for child offenders with psychiatric disorders. Lastly, article 23(4) (UNCRC, 1990a) dictates that all states ratified to this treaty are obliged to improve services for children with mental disabilities, as well as develop capacity and skills to effectively deal with children who suffer from mental disabilities.

Current challenges experienced in the delivery of services to children with psychiatric disorders were already mentioned in chapter 1 of this study. These aspects will furthermore be addressed in section 2.6 of the study.

2.3.1.2 *The United Nations Guidelines for the Prevention of Juvenile Delinquency (1990)*

The UN Guidelines for the Prevention of Juvenile Delinquency (1990b), also referred to as the 'Riyadh Guidelines', outline principles pertaining to the rights and well-being of young people and provide strategies to prevent and control children from becoming involved in criminal activity. Here, the primary focus is to address the cause, motives, needs, opportunities and other related factors that give rise to criminal conduct in children and adolescents.

According to Skelton and Tshehla (2008:18) the crime 'control and prevention' approach, established by the Riyadh Guidelines (1990), does not grant a quick or

easy solution to juvenile delinquency issues, but rather a long-term, effective means that addresses the causative factors which predispose young people to criminal activity. Sections 1 to 4 of the fundamental principles of this convention (Riyadh Guidelines, 1990) state that for successful crime prevention in children and adolescents, it is vital that the youth adopt an active role in society and that societal efforts address and promote positive development from early childhood.

Furthermore, sections 5 and 6 of the fundamental principles (Riyadh Guidelines, 1990) stipulate that children should not be labelled or criminalised for minor offences and that children who exhibit defiant or rule-breaking behaviour should be dealt with through a restorative justice approach. The sentiment of utilising a restorative approach in child justice is also echoed in the objectives of the South African Child Justice Act. According to the Riyadh Guidelines (1990, S5-6) the restorative justice approach incorporates educational and therapeutic programmes that provide a supportive framework in safeguarding the individualised development of young persons. In the context of this study, it is of significance to mention the application of the Riyadh Guidelines (1990), since the methods of approaching and dealing with children who are in conflict with the law are deemed effective in their application to child offenders with psychiatric disorders. This is mainly due to the application of addressing and treating the individualised needs of a child offender with a psychiatric disorder through a restorative justice approach.

2.3.1.3 *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985)*

The UN Standard Minimum Rules for the Administration of Juvenile Justice (1985), also referred to as the Beijing rules of 1985, primes on upholding the rights of children in conflict with the law. In this regard, section 5 of the Beijing Rules (1985) states “...the juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence”. The guiding principles of the Child Justice Act (S3) echo this convention, as it is stipulated that “...all consequences arising from the commission of an offence by a child should be

proportionate to the circumstances of the child, the nature of the offence and the interests of society”.

This is of significance in cases dealing with a child who has a psychiatric disorder since, as discussed in chapter 3, these children are more at risk of coming into conflict with the law due to the influence of the disorder. This implies that by abiding to a legislative framework of this nature, the well-being of the child, within the justice system, should be assured. Furthermore, the justice system’s reaction to the child offender will remain in proportion to the offence as the safety of the victim and the personal, social and familial circumstances of the child offender should be considered.

2.3.1.4 *The United Nations rule for the protection of Juveniles Deprived of their Liberty (1990)*

The UN rule for the protection of Juveniles Deprived of their Liberty (1990c) advocates against the torture, cruel, inhumane and degrading treatment or punishment of children in conflict with the law, as also stipulated in the UNCRC (1990a) and UN Standard Minimum Rules for the Administration of Juvenile Justice (1985). Under this Convention (UN rule for the protection of Juveniles Deprived of their Liberty, 1990c), the vulnerability of juveniles is emphasised and attention is drawn to the fact they are susceptible to abuse, victimisation and a violation of their rights. Guideline 17 of the UN rule for the protection of Juveniles Deprived of their Liberty (1990c) recognises this vulnerability in child offenders and places emphasis on upholding their rights. This includes the right to innocence until proven guilty, detention as a last resort for the shortest period and access to legal services, as also echoed under section 40 of the UNCRC (1990a).

Guideline 28 of the UN rule for the protection of Juveniles Deprived of their Liberty (1990c), further states that in the case of detention, the physical, mental and moral integrity of the child and/or adolescent should not only be considered, but also protected. According to guideline 38 (UN rule for the protection of Juveniles Deprived of their Liberty, 1990c), juveniles with cognitive and learning difficulties have the right to special care and educational facilities. Guidelines 28 and 38 of this Convention

(UN rule for the protection of Juveniles Deprived of their Liberty, 1990c) are of significance to the present study, since they focus on the mental health needs and emphasise the need for specialised care for child offenders with a psychiatric disorder.

2.3.1.5 *The UN Convention on the Rights of Persons with Mental Disabilities (UNCRPD) (2007)*

In addition to the aforementioned human rights instruments, the state is obliged to acknowledge and address the rights and needs of persons with mental disabilities (UNCRPD, 2007a). Although the UNCRPD (2007a) serves the general rights of persons with mental disabilities, particular areas in this Convention are applicable to the rights of children with mental disorders. This is highlighted in the preamble, sections 3 and 7 of the CRPD (2007) which focus on the best interest of the child by stipulating that consideration ought to be granted to the age, maturity, cognitive development and all environmental circumstances that could affect a child who suffers from a mental disorder.

These specifications, that address the rights of children with mental disorders, are of significance since they highlight the importance of assessing all influential factors that could affect a child who suffers from a mental disorder. In the context of this study, the significance of recognising influential factors on the development of mental disorders is relevant, since similar factors have been identified to also contribute to criminal behaviour. This is discussed in chapters 3 and 5 of the study.

Even though the UNCRPD (2007a) does not specifically pertain to the rights of children in conflict with the law, as mentioned, this international human rights instrument, informed by the UNCRC (1990a), outlines and clarifies the obligations of the state pertaining to children with mental disorders. The Mental Health Care Act of South Africa provides a national legislative framework pertinent to the rights of persons, including children with mental disorders, which will be discussed below.

2.3.2 National human rights instruments and legislation protecting the rights of children in conflict with the law

2.3.2.1 *The Constitution of the Republic of South Africa Act 108 of 1996*

The Constitution of the Republic of South Africa Act 108 of 1996 (S28), provides protection to the rights of children. In this regard, it is stipulated that the child's best interest is of paramount importance in all matters relating to a child. Furthermore, section 28 of the Constitution of the Republic of South Africa (Act 108 of 1996), stipulates that when a child is found to be in conflict with the law, detention should only be used as a measure of last resort and for the shortest period of time. This legislation is aligned with international human rights instruments, as discussed above, and is of importance since it places emphasis on upholding the best interest of a child who is in conflict with the law.

2.3.2.2 *The Mental Health Care Act no 17 of 2002*

The Mental Health Care Act is of significance to the present study since it provides the legislative framework pertaining to the rights of children who suffer from mental health disabilities. The preamble of the Mental Health Care Act protects the rights of persons with mental disabilities or illnesses and obliges the state to provide mental health care services to all persons in need of such facilities. The aim of this is to provide care, treatment and rehabilitation to persons, including children, who suffer from a mental disorder (Mental Health Care Act, preamble). The preamble of the Mental Health Care Act furthermore recognises the rights of persons with mental disorders who are in conflict with the law. This includes the rights of child offenders with mental disorders.

Boezaart and Skelton (2011:18) point out an important issue pertaining to the definition and subsequently a diagnosis of a mental disorder as stipulated in the Mental Health Care Act, which is now severely affecting the services that are available to children with psychiatric disorders, particularly for those who are in conflict with the law. Section 1 of the Mental Health Care Act defines a mental illness/disorder as "...a positive diagnosis of a mental health related illness in terms

of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis". According to Boezaart and Skelton (2011:18), the challenge here is that children with psychiatric disorders, such as CD, are not receiving adequate care, as many medical practitioners do not regard behavioural psychiatric disorders, such as CD, as a mental health disorder. This approach is questionable and ought to be challenged since behavioural psychiatric disorders, such as ODD and CD, are recognised as diagnosable psychiatric disorders under the DSM-5 (2013:426, 470), which is an international diagnostic system for the diagnosis of mental disorders.

According to Burns (2011:102), environmental circumstances such as poverty, violence and substance abuse are challenges experienced by some South African children, which increase the risk for the development of mental disorders and coming into conflict with the law. Factors pertaining to the recognition of behavioural psychiatric disorders, their influence on criminal behaviour and criminal capacity, will be discussed in more detail in chapters 3, 4 and 5 of the study. The influence of environmental factors on the child's predisposition to criminal involvement will also be discussed in more detail in chapters 3, 4 and 5.

It can, therefore, be concluded that the national and international human rights instruments and legislation dealing with children in conflict with the law, and children with psychiatric disorders who are in conflict with the law, promote the best interest of the child. These instruments also advocate for a 'rights-based approach' in providing fair and just treatment for children in the justice system by upholding their fundamental rights for respect and dignity. In light of the study, national legislation and procedures pertaining to the criminal capacity of child offenders with psychiatric disorders will be discussed below.

2.4 LEGISLATIVE GUIDELINES PERTAINING TO THE CRIMINAL CAPACITY OF CHILD OFFENDERS WITH PSYCHIATRIC DISORDERS

The prevalence and influence of psychiatric disorders as a risk factor associated with criminal behaviour and delinquency, as mentioned, is well documented and will also be discussed in chapter 3 of this study (Coker, Smith, Westphal, Zonana & Mckee,

2014:888-898). As touched on above, negative environmental encounters experienced by South African children were found to not only predispose children to develop psychiatric disorders, but to also increase their risk of criminal behaviour (Burns, 2011:102). South Africa has established specific legislative procedures pertaining to children who come into conflict with the law, and pertinent to the study are children with psychiatric disorders who come into conflict with the law. These legislations are found under the Children's Act, Child Justice Act and Criminal Procedure Act. The application of these Acts, in respect of the criminal capacity of child offenders with psychiatric disorders, will be explored below.

2.4.1 The Children's Act no 38 of 2005

The Children's Act is premised on the best interest of the child. This is reflected in section 9 of the Act, as it is stipulated that: "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied." Additionally, according to section 6(2f) of the Children's Act: "All proceedings, actions or decisions in a matter concerning a child must recognise a child's disability and create an enabling environment to respond to the special needs that the child has." Both section 6 and 9 of the Children's Act are of significance to this study, since they place emphasis on upholding the constitutional rights of protection, and recognise the vulnerability of children with disabilities, such as psychiatric disorders and the importance of addressing their special needs.

Section 7(g-j) of the Children's Act stipulates that factors such as the age, maturity, stage of development, intellectual, emotional and social development and the impact of a disability or chronic illness are paramount to the best interest of the child. This legislative framework is pertinent to the study since it identifies that the measures taken when dealing with a child, also implied to child offenders, ought to consider factors such as maturity, intellect, emotional development and the influence of a disability or disorder.

As mentioned, sections 2 and 11(ss1-3) of the Children's Act stipulate that children who suffer from disabilities and chronic illnesses have the right to experience conditions that promote dignity, self-reliance and support systems that recognise and cater to the special needs of the child. This, for example, is demonstrated by the provision of psychological, emotional and intellectual services that promote social development for this vulnerable group of children (Children's Act, S2).

According to Breen (2011:6-7), children who exhibit uncontrollable behaviour due to the effects of a psychiatric disorder, are in need of care and protection and have an increased risk of coming into conflict with the law. Section 150 of the Children's Act defines a child in need of care and protection as one who is in a state of physical or mental neglect and exhibits behaviour that the parent and/or caregiver is unable to control. Within the context of the study, the recognition of disruptive behaviour as a risk factor, in the identification of a child in need of care and protection, is of relevance since such behaviour is symptomatic of children with ODD and CD. Risk factors associated with a child who is in need of care and protection will be addressed in further detail under section 2.4.2.

2.4.2 The Child Justice Act no 75 of 2008

The Child Justice Act (S43) introduced an inquisitorial pre-trial procedure to determine the criminal capacity of children in conflict with the law. During pre-trial procedures, the guiding principles in the Child Justice Act (S3) stipulate that it is compulsory to deal with a child, who is in conflict with the law, in a manner that is appropriate to the child's age, intellectual development, language, culture and values. Furthermore, the prosecutor ought to consider the circumstances of the child, the nature of the offence and the interest of society during the decision-making process in order to conclude with an appropriate judgement that is fair and in proportion to the act (Child Justice Act, S3). These factors are also of relevance in determining criminal capacity for child offenders.

As previously mentioned, the determination of criminal capacity, stipulated under section 11 of the Child Justice Act, questions the child's ability to distinguish between

right and wrong and the ability to act in accordance with this knowledge. Pertaining to the determination of criminal capacity, cognitive and intellectual development establishes the ability to understand that an act constitutes a wrongdoing; why such an act constitutes a wrongdoing; and furthermore the ability to understand the consequences that could be associated with the commission of that wrongful act (Pillay & Willows, 2014:1-2).

According to Papalia and Feldman (2011:8-10), cognitive and intellectual capacity is in a state of constant development during early childhood and adolescence, as is discussed in detail in chapter 3. Impairments in the cognitive and intellectual functioning, caused by the impact of behavioural and learning psychiatric disorders, will ultimately affect a child's criminal capacity in terms of the child's ability to appreciate the wrongfulness of the act and to act in cognisance with that understanding (Child Justice Act, S11; Papalia & Feldman, 2011:357-358). In light of this argument, the effects of impaired intellectual and cognitive functioning was demonstrated in the case of *S v Dyk* (1969(1) SA 601(C)), where the conviction of an 11-year old boy, who was the 'look out' in a housebreaking, was challenged. In this case, it was argued that although the boy may have the ability to appreciate the wrongfulness of his actions, he may not fully appreciate the wrongfulness of his role when the crime was committed, due to impaired intellectual and/or cognitive development.

Section 48(ss5) of the Child Justice Act makes provision for the postponement of a preliminary hearing if "...the child has been referred for a decision relating to mental illness or defect in terms of section 77 or 78 of the Criminal Procedure Act". The question asked in this study is if the current procedure used to determine the criminal capacity of children with psychiatric disorders is adequate to firstly identify whether a child has a psychiatric disorder, and secondly to determine if adequate recognition is given to the influence of such a disorder on the criminal capacity of the child. In the context of the study, the factors mentioned in sections 11 and 48 of the Child Justice Act are important to consider in the criminal capacity assessment of children with a psychiatric disorder. The link between criminality and psychiatric disorders will be discussed in more detail in chapter 3.

2.4.3 The Criminal Procedure Amended Act no 13 of 2008

The Criminal Procedure Act includes provisions for procedures in criminal proceedings. Section 105 (a,ss2) of the Criminal Procedure Act provides a protective mantle on the rights of individuals, including children, who come into conflict with the law. It stipulates that a person, accused of committing a crime, is presumed innocent until proven guilty beyond a reasonable doubt. The application of sections 77-79 of the Criminal Procedure Act is of relevance to the present study, since the Child Justice Act (S48) refers to the legislative framework under this provision (Criminal Procedure Act, S77-79) pertaining to criminal capacity procedures for child offenders with mental disorders.

As mentioned above, challenging behaviour exhibited by child offenders with psychiatric disorders not only increases their vulnerability, but also predisposes them to criminal involvement, where they are at risk for coming into conflict with the law. In light of the criminal capacity legislations applicable to child offenders with psychiatric disorders, section 77 of the Criminal Procedure Act states that the accused must be capable of understanding the proceedings in order to make a viable defence. This part of the Criminal Procedure Act (S77) does not deal with the capacity of maturity, in other words the influence a child's biological age has on his or her ability to appreciate the wrongfulness of their misconduct or their ability to act in accordance with this understanding. It rather deals with the issue of mental capacity and a person's ability to understand legal proceedings.

Section 78 of the Criminal Procedure Act deals with cases in which a psychiatric disorder is assumed and the influence of such a disorder on the criminal capacity of a child is recognised. The Child Justice Act (S11, ss3-4 & S48, ss5) stipulates that if a child has a psychiatric disorder, he or she should be referred to a suitably qualified person, who is registered under the Health Professions Act (Act 56 of 1974), for further assessment. Section 97(3) of the Child Justice Act identifies such qualified persons, namely a psychiatrist and/or psychologist, as suitably competent to conduct criminal capacity evaluations. If it is found that a psychiatric disorder has influenced the criminal capacity of the child, the child may not be held criminally

liable (Criminal Procedure Act, S78). In such a case, the child who is found not to have criminal capacity will be dealt with in accordance with section 10(ss2b) of the Child Justice Act, whereby a probation officer can make recommendations for the child to be referred to therapeutic and developmental services.

In the context of this study, it is important to note that no provisions have been made in the Child Justice Act to specifically address aspects pertaining to the criminal capacity of children with psychiatric disorders. As mentioned above, children who suffer from psychiatric disorders and are in conflict with the law, are recognised as a vulnerable group that is in need of care and protection. In light of this, McDiarmord (2013:148) is of the opinion that this group of children should not be categorised under the same legislative presumptions as adult offenders, and that children with psychiatric disorders who come into conflict with the law should receive treatment that caters for their special mental health care needs.

The Children's Act and Child Justice Act entrench the principle of the best interest of the child and provide specific legislative frameworks that pertain to the rights and needs of children in conflict with the law. The Child Justice Act and Criminal Procedure Act address legislations regarding child offenders with psychiatric disorders. Each of the Acts, as well as national and international human rights instruments addressed in this section (and under which South Africa is ratified), is of significance to the study, since it encapsulates the conventions and obligations pertaining to the best interest, rights and legislative framework for dealing with child offenders with psychiatric disorders.

2.5 CHILD OFFENDERS WITH PSYCHIATRIC DISORDERS IN NEED OF CARE AND PROTECTION

As part of the study the services available to child offenders with psychiatric disorders, who were found to have and not have criminal capacity, were explored. As mentioned, South African children are often exposed to circumstances such as dysfunctional environments, parental abuse and neglect, abandonment, substance abuse, violence, poor schooling facilities and child-maltreatment (Ward, Van der Merwe & Dawes, 2013:1; World Health Organisation, 2015:10). Under the preamble

of the Child Justice Act and section 150 of the Children's Act, these circumstances facing South African children are acknowledged as increasing their vulnerability to develop mental disorders and criminal behaviour. Section 150 of the Children's Act, as discussed above, defines a child who is in need of care and protection as one who exhibits defiant, uncontrollable, criminal behaviour and is in a state of physical or mental neglect. This description is of significance to the study since it correlates with that of a child offender who displays symptoms associated with psychiatric disorders (Grisso, 2008:146). The assumption can thus be made that children with psychiatric disorders, who come into conflict with the law, might also be classified as being children in need of care and protection.

Based on the above description and circumstances, a child who is in need of care and protection requires additional, individualised care to address his or her special needs. The Child Justice Act (S29 & 50) makes provisions for children who are in need of care and protection. The services available to these children, according to the Children's Act (S150), include counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to other suitably qualified persons and/or organisations. This includes referral to a children's court, diversion and placement in an appropriate Child and Youth Care Centre (CYCC). A child may be considered for referral to a children's court if he/she does not live with family or an appropriate guardian and/or if the child is accused of committing a schedule 1 offence, with the motive of satisfying the child's basic needs for food, water and warmth (Child Justice Act, S50).

The effects of psychiatric disorders can become debilitating for child offenders. This becomes apparent when the child poses a threat to himself and/or those around him and when the child is unable to function in conventional care and educational facilities (Breen, 2011:6). According to Tromp et al (2014:1) 75 per cent of South Africans who are affected by mental illnesses, do not receive any form of treatment. Breen (2011:7) concurs with Tromp et al (2014) by highlighting the lack of adequate facilities that specifically address the needs and best interest of children with psychiatric disorders. Here, the incidence of child offenders in Gauteng, who are in need of special care and protection due to the disability of psychiatric disorders, was identified (Breen, 2011:6). In light of this challenge, the South African Depression

and Anxiety Group (Anon, 2016d:1) stated that “mental health is not given the priority it deserves in South Africa and there is very little research into mental health and service conditions”. Below, the nature of services delivered to child offenders with psychiatric disorders will be discussed.

2.6 THE NATURE OF SERVICES DELIVERED TO CHILDREN WITH PSYCHIATRIC DISORDERS, WHO COME INTO CONFLICT WITH THE LAW

In addition to focusing on criminal capacity assessments, it is also important to take note of the services that are available for children with psychiatric disorders, who are found to have, as well as not have, criminal capacity. The Constitution of South Africa (Act no 108 of 1996, S28), the Children’s Act (S11) and the Child Justice Act (S3h, 35 & 50), dictate that the services delivered to a child offender should take the circumstances of the child, as well as the circumstances under which the alleged offence was committed, into consideration. As mentioned previously, the UNCRC (1990a, article 3(1)) stipulates: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The South African government, in an attempt to align itself with international human rights instruments, advocated a new approach of recognising and upholding the rights of persons with disabilities and to furthermore implement services for child offenders with psychiatric disorders, who are in need of care and protection. These services are delivered by governmental and non-governmental organisations.

2.6.1 Governmental organisations

Both the Children’s Act (S2 & 11) and Child Justice Act (S3, 9 11 & 48) emphasise that children with psychiatric disorders, who are in conflict with the law, have the right to receive services from various governmental departments. These include the South African Police Services (SAPS), Department of Social Development (DSD), Department of Health (DoH), Department of Education (DoE), DJCD and DCS (DJCD, 2014b:26-28).

DSD and DoH are responsible for individualised treatment programmes, counselling, therapy, psychological services and medical care that support and address the challenges experienced by child offenders with psychiatric disorders (DJCD, 2014b:3-4). Children in conflict with the law also have the right to receive services that uphold and promote their rights within the justice system. The SAPS and DJCD provide such services to child offenders with psychiatric disorders in the form of psychological evaluations and psychometric assessments associated with the determination of a child's criminal capacity, referrals to children's court, diversion and placement in secure facilities or CYCCs, as provided for in the Child Justice Act (S11,29,35).

The SAPS and DJCD are responsible for protecting the rights of children in conflict with the law, namely age demarcation and criminal capacity issues, sentencing issues, relationship building, and support services for children who are released from state facilities (DJCD, 2014b:26-27).

DSD is responsible for the delivery of therapeutic programmes, diversion service facilities, secure centres, CYCC, drug rehabilitation, and life skills development (DJCD, 2014b:28). The DCS addresses issues such as the continuation of health services for imprisoned children with disabilities and chronic illnesses, substance abuse and anger management (DJCD, 2014b:27).

Research conducted by the DJCD (2014b:28,32) investigated the availability of facilities for children who come into conflict with the law. The findings indicated that there were only three functional 'one-stop child justice centres' in South Africa; situated in the Eastern Cape, Free-State and Northern Cape (DJCD, 2014b:32). Additionally, findings from the DoH reflected that there were a limited number of medical professionals available and a lack of facilities to conduct criminal capacity assessments (DJCD, 2014b:28). Due to inadequate resources, the DoH was unable to improve on or provide additional infrastructures to deliver services to child offenders with psychiatric disorders. Consequently, children with psychiatric disorders, between 10 to 14 years of age, who were accused of a crime, were assessed as out-patients and medical treatment and follow-up assessments were

provided as an out-patient facility, instead of an in-patient facility, where the child could be monitored (DJCD, 2014b:32).

Findings from the study furthermore highlighted a general lack of resources and services that cater to the needs of children in conflict with the law, and child offenders with psychiatric disorders. In a national study, the SAPS (Korf, 2010) conducted research on the treatment of child offenders and their reintegration into society. According the findings reported by SAPS (Korf, 2010:40), there is still a lack of secure facilities in South Africa that address the needs of child offenders with psychiatric disorders, who are in need of care and protection. This was also confirmed by the DJCD reports (2014b:32, 40) in which the lack of available 'one-stop child justice centres' across the provinces in South Africa, and a lack of mental health care professionals to conduct criminal capacity assessments, were reported.

In an article documented by Tromp et al (2014:1) concern was also raised about the scarcity of available facilities for children with psychiatric disorders in South Africa. According to Tromp et al (2014:1) only one per cent of beds in psychiatric state facilities are reserved for children – and there is a one-month waiting period of admission for children with psychiatric disorders (Tromp et al, 2014:1). Skelton (cited in Tromp et al, 2014:1) stated that "...we have a severe lack of facilities for children suffering from mental health problems...we see a lot of children who are at the end of the road and who don't have any options available". In this regard Breen (2011:6) added that: "The lack of appropriate designated placement facilities means that every time a child with conduct disorder enters the criminal justice system a flurry of panic arises as to where to place the child pending the outcome of the matter and thereafter."

Skelton (*The Witness*, 2015:1) furthermore argued that there is a lack of vision when it comes to dealing child offenders in South Africa. Grisso (2008:143) concurs, stating that: "Juvenile justice systems today are struggling to determine how best to respond to those youths' needs, both to safeguard their own welfare and to reduce re-offending and its consequences for the community."

In addition, findings from the aforementioned research conducted by SAPS (Korf, 2010:32, 40), which explored the nature of services available to children in conflict with the law, reflected that there is a wide range of CYCCs available in each province of the country, but due to the high crime rate these facilities are unable to meet the needs of children in conflict with the law.

In light of the aforementioned concerns regarding the lack of available state facilities for child offenders with psychiatric disorders, the report from the SAPS (Korf, 2010:42) recommended basic areas for improvement. This included the establishment of more 'one-stop-crisis centres' in various areas and regular reporting about the functioning and issues that stem from CYCCs and 'one-stop-crisis' centres. Additionally, recommendations highlighted in the report (Korf, 2010:42) indicated that state departments ought to develop strategies that consider the function of each department. They should respectively address the needs of the children in the justice system by creating more resources in urban and rural areas, to improve on the environmental circumstances that initially predisposed the child to criminal behaviour.

2.6.2 Non-governmental organisations (NGOs)

The co-operation between government departments, non-governmental organisations (NGOs) and civil society is central to the effective delivery of services to children in conflict with the law. NGOs such as Young and in Prison South Africa, Khulisa and NICRO are a few of the NGOs that actively work towards ensuring the rights of children who find themselves in conflict with the law.

Young and in Prison South Africa (2016:1) aims to prepare children and youths in the transition from incarceration into society. This is done by addressing the needs, with the aim to rehabilitate and reintegrate young people in conflict with the law, through psychosocial, personal and entrepreneurial interactive development. Programmes provided by Young and in Prison South Africa (2016) are entrenched in developing self-confidence by treating each child as a valued human being. "We believe in their natural capacity to challenge their behaviour and grow, and that all

the young people we work with have their own strengths. These strengths will flourish even more when they are accompanied by positive sources of support with families, schools and communities” (Young and in Prison South Africa, 2016:1).

The services provided by Young and in Prison South Africa (2016:1) include educational facilities, internships, jobs, entrepreneurial and volunteer opportunities. Due to the fact that many of the young people struggle with attention deficits, as mentioned in the study, team building exercises, games, physical exercise and the strengthening of relationship skills form the basis of the programmes. This provides a fun experience that promotes a positive environment to develop social responsibility while addressing the children’s individual needs. According to Young and in Prison South Africa (2016:1), when young people show initiative, perform well and show good behaviour, they are rewarded and their duties are restructured; such as the promotion to a role model for younger children in conflict with the law, who are entering the programme. This action serves a twofold purpose in that the young person is rewarded for doing well, thereby reinforcing his/her value and contribution and the new child offender receives support and guidance from an older person whom he/she can receive mentoring from.

Khulisa (2015:1) aims to address the holistic needs of the community by attending to the challenges that contribute to criminal behaviour, namely poverty, inequality, unemployment, inadequate care and a failure to internalise societal norms. Based on this, Khulisa (2015:1) offers diversion programmes, employment generation services, entrepreneur development, early childhood development, offender rehabilitation and reintegration, parenting programmes and educational facilities, self-esteem and self-actualisation programmes to address individualised needs and promote positive development.

NICRO (2016) aims to develop crime prevention strategies, diversion facilities and constructive alternatives for child offenders. Here, the aim is to encourage personal development and to reintegrate child offenders into the community after their incarceration. NICRO (2016:1) not only provides services to children and young people in conflict with the law, but also provides assistance and support to the families of the young offenders in the process of reintegration. These facilities

provided by NICRO (2016:1) include, but are not limited to, diversion, reintegration, non-custodial sentencing, skills development, counselling and advice, sports and recreational facilities, moral regeneration programmes, therapeutic services, entrepreneurial development, vocational and hard skills training. All programmes are grounded on restorative justice principles, where social work services, such as psychosocial assessments, expert witnesses in court, support with expungement of criminal records, and aftercare are available to child offenders.

The services that the aforementioned NGOs provide are not only focused on delivering services to children in conflict with the law, but also focus on crime prevention and intra-personal strengthening of the young offender by promoting their individualised interests for positive growth (Khulisa, 2015:1; NICRO, 2016:1; Young and in Prison South Africa, 2016:01). It should be noted that there are currently no NGOs that specifically focus on delivering services to children with psychiatric disorders who are in conflict with the law.

It is apparent from the discussion on the nature of services delivered to children in conflict with the law, who have psychiatric disorders, that there is a dire need for mental health care facilities, especially to deal with children who come into conflict with the law. According to Schnieder, Docrat, Onah, Thomlison, Baron, Honikman, Skeen, Van der Westhuizen, Breuer, Kagee, Sorsdahl and Lund (2016:154), in order to reduce the gaps in mental health services, the National Development Plan identified the need to raise awareness and implement mental health services that address psychosocial challenges facing South African citizens. As intended in the Child Justice Act, this will require collaboration between government departments, non-governmental organisations and civil society. This concern will remain topical until the appropriate measures that attend to the needs of the vulnerability of children in conflict with the law, are implemented.

2.7 CONCLUSION

The contents of this chapter included a discussion on the historical overview of the legal developments in South African Child Justice, the human rights principles and

the legislative guidelines that are used to determine the criminal capacity of child offenders with psychiatric disorders. The issue of child offenders with psychiatric disorders in need of care and protection, and the nature of services delivered to children with psychiatric disorders who are in conflict with the law, were also discussed.

In light of South African legislative developments, implemented under the ratification of the UNCRC (1990a) and other international conventions, there has been significant development in the methods used to address children in conflict with the law in South Africa. However, in order to reach the goals set out in the Child Justice Act, namely to serve the best interest of the child, the processes and methods used to determine criminal capacity for children in conflict with the law, and children with psychiatric disorders who are in conflict with the law, require further development. Furthermore, the nature of services that are available and delivered to child offenders with psychiatric disorders requires improvement on a governmental level – with support from the relevant NGOs.

The next chapter will explore the relation between psychiatric disorders, criminality and criminal capacity for children in conflict with the law. Symptoms, characteristics and functional consequences of childhood and adolescent psychiatric disorders, such as ADHD, ASD, ODD and CD, will be discussed. The importance of assessing the criminal capacity of child offenders with psychiatric disorders, and the concerns and challenges regarding criminal capacity assessments, will be addressed. Lastly, an application of a criminological theoretical framework relevant to child offenders with psychiatric disorders will be discussed.

CHAPTER 3

THE RELATION BETWEEN PSYCHIATRIC DISORDERS, CRIMINALITY AND CRIMINAL CAPACITY

"There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace" (Annan, 2000:04).

3.1 INTRODUCTION

Children are viewed as the most vulnerable members of society; this vulnerability increases substantially with the diagnosis of a psychiatric disorder (Murphey, Barry & Vaughn, 2013:4). Statistics reflect that more than 17 million people in the South African population, children included, suffer from mental illnesses (Tromp et al, 2014:1). According to the South African Depression and Anxiety Group (Anon, 2016d:1), 17 per cent of South African children suffer from mental disabilities and 75 per cent of these children do not receive the necessary treatment for their mental health issues (Tromp et al, 2014:1).

Boezaart and Skelton (2011:120-122) emphasise the importance of addressing the special needs of children with psychological, behavioural, emotional and mental disorders in order to address their rights, dignity and safety. As mentioned in chapter 2, these rights are acknowledged in the Children's Act and the rights of children who come into conflict with the law, in the Child Justice Act.

Behavioural psychiatric disorders may impair the psychological and intellectual development of children and adolescents, causing weakened impulse control and the inability to regulate social behaviour (Austin, Bezuidenhout, Botha, Du Plessis, Du Plessis, Jordaan, Lake, Moletsane, Nel, Pillay, Ure, Visser, Von Krogsigk & Vorster, 2014:513-514). Due to the increased impulsivity and impaired social regulation, children with behavioural psychiatric disorders have a heightened tendency to engage in high-risk, impulsive and defiant behaviour (Grisso, 2008:146). The risks associated with the impact of behavioural psychiatric disorders predispose children

and adolescents to inter-personal as well as intra-personal challenges and an increased involvement of conflict with figures of authority (Murphey et al, 2013:4). In addition, psychiatric disorders could influence a child's ability to interpret social scenarios, diminishing their ability to differentiate between right and wrong.

The Centre for Disease Control and Prevention (Perou, Bitsko, Blumberg, Pastor, Ghandour, Gfroerer, Hedden, Crosby, Visser, Schieve, Parks, Hall, Brody, Simile, Thompson, Eds, Avenevoli, Kogan & Huang, 2013:1) describe mental disorders among children as "...serious deviations from expected cognitive, social and emotional development". Perou et al (2013:1) highlight that 13 to 20 per cent of children in the United States suffer from psychiatric disorders. According to parent-reported cases in this study (Perou et al, 2013:01) ADHD is the most predominant psychiatric disorder (6.8%) found to affect children in the United States. Behavioural psychiatric disorders such as CD (3.5%), anxiety disorders (3.0%), depression (2.1%) and ASD (1%) rated respectively below ADHD (Perou et al, 2013:1). Children who suffer from psychiatric disorders were reported to have a high suicidal rate and exhibited an increase in defiant behaviour that challenged figures of authority (Perou et al, 2013:1).

Delinquent children, who struggle with the regulation of social behaviour, pose a challenging task for the many professionals that have worked with them (Grisso, 2008:143). The prevalence of psychiatric disorders found in child offenders is high and may deny this vulnerable group the capacity to appreciate their actions (Coker et al, 2014:888-898; Swanepoel, 2015:3238). Psychiatric disorders have a multi-dimensional impact with early onset and disruptive symptoms negatively influencing the child, family and community as a whole (Murphey et al, 2013:4). It is acknowledged that children with psychiatric disorders are predisposed to criminal activity (Coker et al, 2014:888-898; Grisso, 2008:148; Murphey et al, 2013:4; Swanepoel, 2015:3238). Thus, for the purpose of this study, emphasis will be specifically placed on the influence that psychiatric disorders have on the criminal capacity of children in conflict with the law.

In this chapter the symptoms, characteristics and functional consequences of four prevalent psychiatric disorders (ADHD, ASD, ODD and CD), found in child offenders,

will be discussed. The importance of assessing criminal capacity and challenges in conducting criminal capacity assessments for children with psychiatric disorders will also be explored. Lastly, this chapter will conclude with the application of a criminological theoretical framework on the relation between psychiatric disorders, criminality and criminal capacity for child offenders with psychiatric disorders.

3.2 THE PREVALENCE OF PSYCHIATRIC DISORDERS FOUND IN CHILDREN WHO ARE IN CONFLICT WITH THE LAW

The topic of children in conflict with the law, as well as the link between psychiatric disorders and delinquency, is a diverse field for investigation. In research conducted by Coker et al (2014:888-898) children with psychiatric disorders displayed a higher incidence of delinquency than those who are not diagnosed with a disorder. Fazel et al (2008) conducted research in the United Kingdom to determine the prevalence of psychiatric disorders in a sample of 16 750 delinquent boys and girls. The sample population consisted of 13 778 boys and 2 972 girls, and the 'Diagnostic Interviewing Schedule for Children' was used as the data collection tool. Findings from this study concurred with findings by Coker et al (2014), namely that the majority of the boy (64.5%) and girl (71.3%) population, respectively, were diagnosed with ADHD and CD (Fazel et al, 2008:7). Findings from research conducted by Coker et al (2014) surprisingly found that girls (71.3%) reflected a higher incidence of psychiatric disorders, in comparison to the boys (64.5%). This is of significance since research suggests that psychiatric disorders, such as ADHD and ODD, are found to affect more boy than girl children. This will be discussed in more detail later on in this chapter.

Grisso (2008:148) draws attention to three different studies which explored the correlation between psychiatric disorders and criminal behaviour in children. The first study focused on the overlap between the population of youths with mental disorders and youthful offenders within a community. Here, the findings outlined that children who sought mental health services (over a nine-month period) were two to three times more likely to come into conflict with the juvenile justice system, in comparison to the children who did not seek mental health services (Grisso, 2008:148). In the

second study, the persistence of mental health disorders found in serious youth delinquency was explored. Here, approximately 30 per cent of the youth with persistent mental health disorders were found to exhibit continual delinquent behaviour (Grisso, 2008:148). In the final study, the proportions of youths with mental health disorders found in the juvenile justice system were researched. The findings concluded that approximately one half to two thirds of adolescents in the juvenile justice system met the criteria for more than one mental health disorder. This prevalence was much higher in comparison to the general population (approximately 15-20%), who were not diagnosed with a mental health disorder (Grisso, 2008:150).

In a similar study to those discussed above, Teplin et al (2002) researched the occurrence of psychiatric disorders found amongst juvenile detainees in Cook County, Illinois. In a random sample, altogether 1 172 boy and 657 girl children, aged 10 to 18, were interviewed, also using the 'Diagnostic Interview Schedule for Children' (Teplin et al, 2002:1134). The findings from this study reflected that nearly two thirds of the male and nearly three quarters of the female children met the diagnostic criteria for at least one or more psychiatric disorder (Teplin et al, 2002:1135). According to Teplin et al (2002:1136), "...youth with psychiatric disorders pose a challenge for the juvenile justice system and, after their release, for the larger mental health system". In this study, approximately 40 per cent of the male and female participants met the criteria for disruptive behavioural disorders, such as ODD and CD (Teplin et al, 2002:1136). One half of male and female participants manifested with substance abuse disorder and the older adolescents, female and non-Hispanic white participants, were found to fit the diagnostic criteria for multiple psychiatric disorders (Teplin et al, 2002:1135).

Similar findings were found in studies conducted by Shufelt and Coccozza (2006), Teplin et al (2002) and Grisso (2008). Research by Shufelt and Coccozza (2006:2) was conducted in Texas, Louisiana and Washington, as these areas lacked research with regard to this topic. In each state data were collected from juveniles in community-based programmes, detention centres and secure residential facilities. The overall population size for the study was over 1 400 youths from approximately 29 different juvenile facilities. Findings from this study outlined that the majority of youths (70.4%) in the juvenile facilities met the criteria for at least one mental

disorder (Shufelt & Cocozza, 2006:2). In addition, 79 per cent of those youths met the criteria for two or more mental disorders. The findings suggested that disruptive behavioural disorders, such as CD and ODD (46.5%), reflected as most prevalent in comparison to other disorders, such as depression, anxiety disorders and obsessive compulsive disorder (Shufelt & Cocozza, 2006:2). Based on the findings of the study, Shufelt and Cocozza (2006:2) questioned if the high incidence of psychiatric disorders found in child offenders could be attributed to the assessment criteria used; because the characteristics found in delinquent youths are similar to those present in children with disruptive behavioural disorders, such as CD and ODD. Based on this, a second analysis was conducted by removing disruptive behavioural disorders (such as CD) from the data. The findings reflected that the high rate of psychiatric disorders found in child offenders was not resultant of the assessment criteria, as 63 per cent of children in the juvenile justice systems still met the criteria for psychiatric disorders, other than disruptive behavioural disorders (Shufelt & Cocozza, 2006:2). The studies discussed above, confirm that a significant correlation exists between criminality and psychiatric disorders in children.

As mentioned, the literature reviews conducted in this study emphasised a gap in South African research in which the prevalence of psychiatric disorders in child offenders, as well as how these disorders influence the criminal capacity of children in conflict with the law, is explored. No statistics could be found reflecting the incidence of child offenders with psychiatric disorders in Africa. The DJCD (2015:1) emphasises the importance of addressing the needs of children in conflict with the law and recognises the need for attention to be drawn to this area. With regard to the incidence of psychiatric disorders found in South African child offenders, Boezaart and Skelton (2011:3), Breen (2011:6) and Trytsman (2016:5) documented that an increasing trend of impulse-control psychiatric disorders, such as ODD and CD, is found in children who come into conflict with the law. According to research (Boezaart & Skelton, 2011:3; Breen, 2011:6; Trytsman, 2016:5), there have been several cases identified where children diagnosed with debilitating forms of CD and co-morbidities of ODD and ADHD, entered into the criminal justice system for schedule 1, 2 or 3 related offences, as categorised in section 6 of the Child Justice Act.

Schedule 1 offences are considered as less serious criminal acts, which include, but are not limited to, theft or receiving stolen property, common assault where severe bodily harm was not inflicted, blasphemy, trespassing and public indecency (Child Justice Act, S6). Schedule 2 offences are viewed as more serious criminal offences, which include, but are not limited to, malicious damage to property, assault where there was serious bodily harm, arson, culpable homicide, abduction and public violence (Child Justice Act, S6). The most serious crime categorisation in terms of section 6 of the Child Justice Act, are schedule 3 offences. Criminal offences categorised under schedule 3 include, but are not limited to, treason, murder, kidnapping, rape, sexual assault and/or exploitation and trafficking of persons for sexual purposes.

Similar to the studies discussed above, Boezaart and Skelton (2011:3), Breen (2011:6), as well as Trytsman (2016:5) concur that children with psychiatric disorders display an increased risk of criminal behaviour. The prevalence of delinquency, violent and aggressive crimes, alcohol and substance abuse and anti-social behaviour in children who are diagnosed with CD, has been confirmed in research. CD was also found to be present in more incidences in these children than any other disorder associated with criminal behaviour (Boezaart & Skelton, 2011:3; Breen, 2011:6; Trytsman, 2016:5).

The findings from the aforementioned studies substantiate that psychiatric disorders are a risk factor for delinquent behaviour in children. The lack of research to explore if psychiatric disorders influence the criminal capacity of children in conflict with the law is of relevance in this study. Henceforth, the symptoms, characteristics and functional consequences of psychiatric disorders that were found to be a risk factor for criminal behaviour, will be discussed.

3.3 PSYCHIATRIC DISORDERS: SYMPTOMS, CHARACTERISTICS AND FUNCTIONAL CONSEQUENCES

Various psychiatric disorders have been linked to anti-social and delinquent behaviour in child offenders. According to Koning et al (2010:1) as well as Classel

and Burstein (2007:2), ADHD, ASD, ODD and CD are the most prevalent psychiatric disorders found in delinquent children. Against this background, the study will focus on ADHD, ASD, ODD and CD.

3.3.1 Attention deficit hyperactivity disorder (ADHD)

ADHD is associated with socially disruptive behaviour; either with impairing levels of hyperactivity-impulsivity and/or inattentiveness that interfere with the functioning and development of the child (Sue, Sue & Sue, 2010:423). ADHD is one of the most commonly found learning and behavioural mental disorders affecting children (Schellack & Meyer, 2012:12). This disorder is found to be an 80 per cent genetic condition that is caused by an imbalance of certain neurological neurotransmitters (Picton, 2016: 01). Ward et al (2013:56-57) are of the opinion that children in South Africa are particularly at risk for developing ADHD due to a high incidence of alcohol and drug abuse in the country. The American Psychiatric Association (Parekh, 2015:1) identified that other causative factors of ADHD include premature birth, brain injury, exposure to and/or smoking and stress during pregnancy.

Schellack and Meyer (2012:12) highlight that internationally, approximately 5.3 per cent and nationally (in South Africa), approximately 4.5 per cent of the population are diagnosed with ADHD. The occurrence of this disorder is found to be higher in boys than girls. The Centre for Disease Control and Prevention (Visser, Bitsko, Danielson, Gandhour, Blumberg, Schieve, Holbrook, Wolraich & Cuffe, 2015:1) reflected that the percentage of children with ADHD, in the United States, increased from 7.8 per cent in 2003 to 11 per cent in 2011; this 11 per cent represented approximately 6.4 million children in the United States. According to research conducted by the Attention Deficit Hyperactivity Disorder Support Group of Southern Africa (ADHDSA) (Picton, 2016:1) between 8 to 10 per cent of the South African population is diagnosed with ADHD; this is not limited to children. ADHDSA (Picton, 2016:1) indicates that although many individuals (approximately 50%), with ADHD will note a reduction in the symptoms experienced during adolescence and early adulthood, very few people report being symptomatically free of ADHD in their life course.

The DSM-5 (2013:32) determines that in order for a positive diagnosis of ADHD to be made, the behaviour must manifest as inconsistent with the individual's age and developmental levels and should negatively influence the social and/or academic functioning of the person. Children (12 years and younger) and/or adolescents (13-17 years) must present six or more characteristics of (1) inattention and/or (2) hyperactivity; and young adults/adults (18 years and older) must present five or more characteristics, for a period of at least six months, as reflected in table 3.1 below (DSM-5, 2013:59-60). The characteristics (for children, adolescents and adults) must be present in multiple contexts, such as home, school, work and/or general social setting (park, mall and restaurant) (DSM-5, 2013:32).

In accordance with the DSM-5 (2013:59-60), characteristics of (1) inattention and/or (2) hyperactivity are characterised by the following behaviour, as outlined in the table below:

Table 3.1: Diagnostic criteria for attention deficit hyperactivity disorder

1. Inattention	2. Hyperactivity and impulsivity
a. Often fails to give close attention to details or makes careless mistakes in schoolwork, at work, or during other activities (e.g., overlooks or misses details, work is inaccurate).	a. Often fidgets with or taps hands or feet or squirms in seat.
b. Often has difficulty sustaining attention in tasks or play activities (e.g., has difficulty remaining focused during lectures, conversations, or lengthy reading).	b. Often leaves seat in situations when remaining seated is expected (e.g., leaves his or her place in the classroom, in the office or other workplace, or in other situations that require remaining in place).
c. Often does not seem to listen when spoken to directly (e.g., mind seems elsewhere, even in the absence of any obvious distraction).	c. Often runs about or climbs in situations where it is inappropriate. (Note: In adolescents or adults, may be limited to feeling restless).
d. Often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the workplace (e.g., starts tasks but quickly loses focus and is easily sidetracked).	d. Often unable to play or engage in leisure activities quietly.
e. Often has difficulty organising tasks and activities (e.g., difficulty managing sequential tasks; difficulty keeping materials and belongings in order; messy, disorganised work; has poor time management; fails to meet deadlines).	e. Is often 'on the go,' acting as if 'driven by a motor' (e.g., is unable to be or uncomfortable being still for extended time, as in restaurants, meetings; may be experienced by others as being restless or difficult to keep up with).
f. Often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort (e.g., schoolwork or homework; for older adolescents and adults, preparing reports, completing forms, reviewing lengthy papers).	f. Often talks excessively.
g. Often loses things necessary for tasks or activities (e.g., school materials, pencils, books, tools, wallets, keys, paperwork, eyeglasses, mobile telephones).	g. Often blurts out an answer before a question has been completed (e.g., completes people's sentences; cannot wait for turn in conversation).
h. Is often easily distracted by extraneous stimuli (for older adolescents and adults, may include unrelated thoughts).	h. Often has difficulty waiting his or her turn (e.g., while waiting in line).

i. Is often forgetful in daily activities (e.g., doing chores, running errands; for older adolescents and adults, returning calls, paying bills, keeping appointments).	i. Often interrupts or intrudes on others (e.g., butts into conversations, games, or activities; may start using other people's things without asking or receiving permission; for adolescents and adults, may intrude into or take over what others are doing).
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(Source: DSM-5, 2013:59-60).

The impact of ADHD manifests in children and adolescents as dysfunctional and problematic behaviour (Ludici, Faccio, Belloni & Costa, 2014:507). Documented above, as per the DSM-5 (2013:59-60), the influence of inattention and hyperactivity affects the daily abilities and functioning of the child in school, at home and/or social environments. This is because the symptoms of 'inattentiveness' and 'hyperactivity' render the child with a disadvantage in the academic sector as well in the social environment; resulting in persistently low academic performance and conflict with figures of authority, such as parents and teachers (Schellack & Meyer, 2012:15). ADHD is considered to not only affect the child but also the family unit, due to the influence of the disorder which severely affects the behaviour of a child. It furthermore impairs the social and emotional skills of the child, thereby having a negative influence on the ability to develop relationships (Snyman & Truter, 2012:2995).

The level of severity for diagnosis depends on the manifestation of inattentiveness, hyperactivity and/or a combination of these characteristics and the influence it has on the individual's ability to function in a normalised daily capacity (DSM-5, 2013:60). Based on the aforementioned characteristics and symptoms of ADHD, the DSM-5 (2013:60) recognises three types of attention deficit/hyperactivity disorders; namely the predominantly hyperactive-impulsive type, the predominantly inattentive type, and the combination type, characterised by hyperactivity and inattentiveness.

Children diagnosed with the predominantly hyperactive-impulsive type of ADHD exhibit behaviour that is characterised by a limited attention span, impulsivity, lack of self-control, increased motor activity (such as fidgeting and the inability to sit still) and

distractibility. Children with this type of ADHD are often accident-prone and tend to be rejected by peers.

On the other hand, children with the predominantly inattentive type of ADHD are described as slow, daydreamers, shy and anxious. The predominantly inattentive type of ADHD is characterised by inattention to detail, challenges with completing tasks, difficulty with sustained focus and being easily distracted. These children do not experience severe defiant behavioural issues, such as conduct problems and impulsivity, in comparison to children with the predominantly hyperactive-impulsive type of ADHD (Sue et al, 2010:423-424).

ADHD combined type is characterised by both the hyperactive and inattentive form of ADHD. This type of the disorder is highlighted as the most prevalent form of ADHD (DSM-5, 2013:60). Children who experience both inattentiveness and hyperactivity are socially and emotionally immature and may experience an increase in anti-social behaviour, aggression, impulsivity, intrusiveness, engagement in dangerous physical activities and mood swings (Schellack & Meyer, 2012:15). The functional consequences and risks associated, across all three types of ADHD, often result in social rejection, poor academic performance, high rate of school drop-out, substance abuse, juvenile delinquency, promiscuity, escalated risk of teenage pregnancies and HIV/AIDS, elevated interpersonal conflict, low self-esteem, unemployment and an increased tendency to come into conflict with the law (Schellack & Meyer, 2012:15; Snyman & Truter, 2012:2995). Research indicated that ODD and CD are frequent co-morbidities that exist with ADHD (Sue et al, 2010:423-424). Adolescents diagnosed with ADHD are statistically more likely to develop CD and anti-social personality disorder in adulthood, in comparison to peers without ADHD (DSM-5, 2013:63).

Sibley, Pelham, Molina, Gnagy, Waschbusch, Biwas, Maclean, Bobinski and Karch (2011) examined the association between childhood ADHD and juvenile delinquency. The Pittsburgh ADHD longitudinal study tracked individuals who were diagnosed with ADHD in childhood (5-12 years of age) through their adolescence and young adulthood during annual follow-up consultations. The study included 288 male participants with childhood ADHD and a control group of 209 male participants

without ADHD. The participants were divided into three groups, namely children diagnosed with ADHD only; ADHD plus ODD and ADHD plus CD; as well as the control group of those who were not diagnosed with any of these disorders. The findings reflected that individuals with childhood ADHD plus CD displayed a significantly higher incidence of delinquent activities, in comparison to the children in the other groups (Sibley et al, 2011:2). A comparative analysis between the control group and participants with ADHD, and ADHD plus ODD, found that participants with ADHD, and ADHD plus ODD, displayed an early onset of delinquency and criminal behaviour, when compared to the control group. In addition, the group diagnosed with ADHD and a combination of ADHD plus ODD were found to have committed a larger variety of criminal offences and displayed a higher prevalence to severe delinquency (Sibley et al, 2011:3). Sibley et al (2011:3) conclude that all three groups of children with ADHD displayed a higher risk for becoming involved in criminal behaviour in comparison to the children without the disorder. This study did not focus on whether ADHD influences the criminal capacity of these children.

Calderon (2014) analysed 12 court decisions, from 2000 to 2011, in the United States of America. Similar to the previous studies, significant correlations (19%-46%) were found to exist between ADHD and anti-social behaviour in child offenders; this prevalence was found to be four times higher than in a non-delinquent population (Calderon, 2014:19). Calderon (2014:19) furthermore highlighted that limited attention is given to the influence of ADHD as a risk factor for criminal behaviour and the impact of the disorder on the child offender's criminal capacity (Calderon, 2014:19).

Garza (2001:97) is of the opinion that, "[a]n ADHD defendant, unlike other defendants, is unable to control his actions and behaviours". The argument raised in this study is that the symptom of impulsiveness, which is prevalent in children diagnosed with ADHD, may impair the child's ability to control his or her actions, thus having an influence on the criminal capacity of the child (Garza, 2001:97).

As discussed in chapter 2, in light of assessing the criminal capacity of a child with a psychiatric disorder, symptoms associated with ADHD such as emotional immaturity and the inability or impaired ability of a child to conform to social norms, could also

influence whether a child with ADHD can be held liable for criminal conduct (Child Justice Act, S11).

Symptoms associated with ADHD such as impulsivity, failure to consider the consequences of actions, misinterpretation of social cues, inappropriate behaviour and the inability to learn from experiences, could influence the criminal capacity of children in conflict with the law (Austin et al, 2014:515). It is furthermore argued that the symptoms and impairments associated with ADHD could, in stressful and emotionally challenging situations, impair a child's self-control (conative processing) and ability to appreciate the wrongfulness and consequences of behaviour (cognitive processing). With that said, it must be noted that not all children with ADHD are likely to develop criminal behaviour. However, when a child with ADHD commits a crime the influence of this disorder on the child's criminal capacity should be assessed.

In the context of this study, literature supports the correlation between ADHD and criminality. Therefore, if research supports that a disorder such as ADHD contributes to criminal behaviour, the question arises: To what extent does ADHD influence the child's criminal capacity? The inability to control one's actions, lack of social inhibitions and hyperactivity associated with ADHD, are factors that ought to be considered when the criminal capacity of a child with ADHD is assessed.

3.3.2 Autism spectrum disorder (ASD)

ASD is categorised as a pervasive developmental disorder and is characterised by recurrent deficits in social communication, social interaction and restricted stereotypical interests in multiple contexts (DSM-5, 2013:31). According to the American Psychiatric Association (Benson, 2016:1) ASD and autism are both general terms that refer to a group of complex brain development disorders. These disorders are characterised by the varying degrees of difficulty in social interaction, verbal and non-verbal communication and repetitive behaviour (Benson, 2016:1), and are therefore referred to as a spectrum disorder.

Leo Kanner (cited in Sue et al, 2010:415), a child psychiatrist, in 1943 described the triad of characteristics associated with autism as “...extreme isolation and inability to relate to people; a psychological need for sameness; and significant difficulties with communication. According to a report on ASD, from the South African Government (2016:1), ASD manifests in the first three years of a child’s life and is a neurological disability that impairs thinking, communicating and problem-solving skills.

The Centre for Disease Control and Prevention (Christensen, Baio, Van Naarden, Bilder, Charles, Constantino, Daniels, Durkin, Fitzgerald, Kurzuis-Spencer, Lee, Pettygrove, Robinson, Schulz, Wells, Wingate, Zahorodny & Yeargin-Allsopp, 2016:1) estimates that approximately 14.7 per cent per 1 000 children are diagnosed with ASD worldwide. This disorder is found to affect more boys than girls (Christensen et al, 2016:1). There are no reliable statistics on the incidence of ASD in South African children but research suggests that this disorder affects approximately two per cent of the South African population (South African Government report on ASD, 2016:1).

A diagnosis of ASD requires the presentation and manifestation of symptoms outlined in section A and/or at least two symptoms indicated in section B of the DSM-5 (2013:50), as depicted in table 3.2 below.

Table 3.2: Diagnostic criteria for autism spectrum disorder

A. Persistent deficits in social communication and social interaction	B. Restricted, repetitive patterns of behaviour, interests, or activities
<p>1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.</p>	<p>1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies lining up toys or flipping objects, echolalia, idiosyncratic phrases).</p>
<p>2. Deficits in nonverbal communicative behaviours used for social interaction, ranging, for example, from poorly integrated verbal and non-verbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures: to a total lack of facial expressions and non-verbal communication.</p>	<p>2. Insistence on sameness, inflexible adherence to routines, or ritualised patterns of verbal or non-verbal behaviour (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).</p>
<p>3. Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behaviour to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.</p>	<p>3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).</p>
	<p>4. Hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).</p>

(Source: DSM-5, 2013:50).

Severity of the disorder depends on the seriousness of social communicative impairments, restricted and repetitive behaviour and its influence on the individual's ability to function in a normalised daily capacity (DSM-5, 2013:31). The National Institute of Mental Health (2016:1) draws attention to the primary features of ASD, namely a level of unresponsiveness and the inability to relate to others. A child with

this disorder tends to be aware of the presence of people but perceives them as being similar to an inanimate object, such as a desk or filing cabinet (Sue et al, 2010:415).

The functional consequences of ASD in children are associated with a lack of social communication skills, sensory sensitivity and challenged adaptive skills (National Institute of Mental Health, 2016:1). Adults with ASD experience poor psychosocial skills, dependency or isolation, routine-like behaviour, communication problems and challenges in building and maintaining relationships (DSM-5, 2013:57). Depending on the level of severity and degree of the disorder, children who are on the autism spectrum experience functional impairments in their daily activities (Austin et al, 2014:537-538). These impairments include difficulty in the ability to fulfil basic personal needs, such as eating and sleeping. In addition, this disorder is associated with impaired learning and relationship development skills (Austin et al, 2014:537-538). As a result, children with this disorder attain low academic scores (even for those with higher functioning abilities), experience social rejection, portray inappropriate sexual behaviour, high levels of unemployment and are accident-prone. Disorders such as ADHD, anxiety disorders and depressive disorders often co-exist with ASD (DSM-5, 2013:40 & 59).

Due to the impairment in social skills, children with ASD lack the ability to judge social situations or to identify dangers in their environment (Bishop, 2008:3). Subsequently, these children are not only prone to commit crime but can also be coerced into peer pressured criminal activities or fall victim to crime (Bishop, 2008:3). In contrast, Cea (2015:501) is of the opinion that the inherent need for routine and ritualistic behaviour may deter children with ASD from committing crime. An example is when an individual with ASD, who is taught and understands socially acceptable behaviour, abides by such behaviour, implementing rules and regulations rigidly. Deviation from the learned behaviour will therefore be inconceivable.

Strickland (2011:7-8) is of the opinion that the issue of criminal capacity can be divided into two categories, namely the first category, "Theory deficits in theory of mind abilities", whereby the individual is able to acknowledge the perceptive, cognitive and affective life of others. Individuals within this category demonstrate the

ability to acknowledge socially acceptable behaviour and are therefore cognisant of wrongful or socially unacceptable behaviour. However, although an ASD person may demonstrate the ability to appreciate the wrongfulness of behaviour, he/she may not fully understand why that particular act is viewed as anti-social, delinquent or criminal. According to DeAngelis (2011:1) and Frekelton (2011:251-252) this is because individuals with ASD may react in response to their heightened sensory-stimulation needs (such as wanting to smell the shiny hair of somebody in public) or heightened sexual orientation needs (which is categorised as a need for hunger or sleep). The reactions to these needs are instinctual and not premeditated or consciously violating behaviour. Children with ASD have difficulty reading social cues and struggle to identify when another person has a different cognitive experience and/or interpretation of a shared event (Austin et al, 2014:537-538). For example, an individual with ASD may repeatedly make phone calls in the middle of the night. The ASD person may view the repeated phone calls as merely wanting to speak to a friend, while the person he or she called may perceive this as disruptive behaviour.

The second category is “abnormal repetitive, narrow interests”, whereby the individual has fixations on a particular object or topic and does not realise that their intense interests fall outside of social norms (Strickland, 2011:8). Children and adults with ASD tend to develop special interests or fixate on particular objects and/or topics that can result in intense repetitive, ritualistic behaviour (National Institute of Mental Health, 2016:1). This type of ‘intense fixation’ can become a risk associated with criminal behaviour if the area of interest includes hazardous or threatening objects and/or topics such as violence, guns, shooting, bombs and inappropriate sexual behaviour (Sue et al, 2010:416). Obsessive or intense fixative behaviour can also trigger aggressive actions if the routine, repetitiveness and rituals of an ASD child are challenged or disturbed (Sue et al, 2010:416).

According to Netter (2009:1), not all children with ASD are violent or are prone to aggressive behaviour, but a disruption in routine or the inability to communicate can cause frustration and acting out behaviour. Managing such behaviour can become increasingly difficult when dealing with an older adolescent or adult with ASD and may require the use of physical restraints.

DeAngelis (2011:1) is of the opinion that a large number of high-functioning autistic adolescents are detained in juvenile detention facilities for inappropriate or obsessive behaviour. In Pennsylvania (USA), 43 per cent of the juveniles in the sex-offense unit met the criteria for ASD. The motives for children, with ASD, who commit sexual offences or display inappropriate social behaviour, such as stalking, differ from those who are not on the spectrum. People who are not suffering from ASD, may for example commit a sexual offence to gratify a need or want, whereas people diagnosed with ASD may commit a criminal act as a means of gaining attention, communicating a particular message and/or due to emotional impulsivity (Cea, 2015:501-503; Taylor, Mesibov & Debbaudt, 2009:1).

Findings from studies conducted by Chang (2011:4-6), Bishop (2008:16) and Strickland (2011:8-13) confirm a significant relationship between a diagnosis of ASD and criminality. Additionally, it is proposed that the symptoms associated with this disorder affect the ability to appreciate and understand the impact of behaviour. Due to the 'hidden nature' of ASD, professionals in the justice systems are not adequately equipped to recognise or deal with individuals on the spectrum. Individuals with this disorder are, therefore, vulnerable in any situation where their condition is not recognised, such as when they come into conflict with the law because of the inappropriate treatment they may receive (Bishop, 2008:3). It is, therefore, important that the criminal capacity of children with ASD ought to be assessed in order to determine if the child's individual cognitive and conative functioning allows for him/her to appreciate the wrongfulness of a criminal act and to act in accordance with that understanding.

3.3.3 Oppositional defiant disorder (ODD)

ODD is a psychiatric disorder most frequently diagnosed in children and is associated with emotional dysregulation which is evident in negativistic, hostile and argumentative behaviour patterns (DSM-5, 2013:462). The American Academy of Child and Adolescent Psychiatry (Anon, 2009:2) estimates that approximately 16 per cent of children suffer from ODD, while the DSM-5 (2013:462) estimates it to be 3.3

per cent of children. Lehmann (2009:1-2) and Sue et al (2010:426) highlight that children with this disorder often lose their temper and challenge or defy figures of authority, such as parents, teachers and caregivers. Austin et al (2014:520) describe ODD as "...a display of recurrent and repetitive pattern of negative and antagonistic behaviour that significantly impacts on their academic and family functioning, as well as their social and emotional well-being".

In order for a child to be diagnosed with ODD, he/she must present four or more symptoms for a period of six months (or more), with at least one individual other than a sibling (DSM-5, 2013:462-464). The frequency, severity and appropriateness of behaviour, exhibited by a child with ODD, should surpass normalised age, gender and culture-based behaviour (DSM-5, 2013:462-464). Behaviour associated with ODD should occur frequently; weekly for children younger than five years old and approximately twice per week for a period of six months (or more) for those older than five years (DSM-5, 2013:462). In milder cases, the disruptive symptoms associated with this disorder manifest in familiar environments (amongst family and peers). In more severe cases, the symptoms are present in multiple environmental settings, such as in school or public settings, and are not limited to familiar environments (DSM-V, 2013:463).

The characteristics of ODD can be depicted as: (A) angry/irritable mood; argumentative/defiant behaviour; or vindictiveness, as tabulated below:

Table 3.3: Diagnostic criteria for oppositional defiant disorder

A. Angry/irritable mood	Argumentative/defiant behaviour	Vindictiveness
1. Often loses temper.	4. Often argues with authority figures or, for children and adolescents, with adults.	8. Has been spiteful or vindictive at least twice within the past 6 months.
2. Is often touchy or easily annoyed.	5. Often actively defies or refuses to comply with requests from authority figures or with rules.	
3. Is often angry and resentful.	6. Often deliberately annoys others.	
	7. Often blames others for his or her mistakes or misbehaviour.	

(Source: DSM-5, 2013:426).

Klopper (2009) conducted research on the occurrence of neurodevelopmental disorders in delinquent children in the Eastern Cape. Similar to the study conducted by Sibley et al (2011) and Fazel et al (2008), a significant number of children with disorders such as ODD, ADHD and learning disabilities, were found to be in conflict with the law in comparison to children who were not diagnosed with a psychiatric disorder (Klopper, 2009:38, 49).

Sue et al (2010:426) outline that ODD is one of the more controversial childhood behavioural disorders because it is often difficult to differentiate this disorder from normal developmental difficulties and milder forms of CD. The functional consequences of ODD are associated with emotional and social impairment, low academic performance, occupational adjustment, substance abuse, parent-child conflict and depression (Austin et al, 2014:520; DSM-5, 2013:465-466). These consequences often materialise as incessant anti-social behaviour, interpersonal relationship conflict, self-esteem issues, conflict with the law and an increased risk of suicidal tendencies (Sue et al, 2010:426). ODD often precedes CD and ADHD, and a co-morbidity is found to exist between substance-abuse disorder, anxiety related disorders and ODD (DSM-5, 2013:465-466).

Research found that predisposing factors associated with ODD can be biological, psychological and/or social (Anon, 2009:3). The biological factors include parents with behavioural disorders, substance abuse disorders and exposure to toxins during pregnancy. Psychological factors such as poor parent-child relationships, parental neglect and the inability to form social relations and process social cues, can contribute to the development of ODD. Furthermore, social factors such as poverty, abuse and instability in the family unit are all factors that predispose children to the development of ODD (Anon, 2009:3). These predisposing factors are also identified and will be discussed in section 3.5.5.1, whereby the integrated cognitive anti-social potential theory (ICAP) is applied to child offenders with psychiatric disorders.

Similar to research conducted by Lehmann (2009:17) and Chandler (2008:22-25), Pardini and Fite (2011:1) found a significant correlation between ODD and criminal tendencies. Children with ODD manifest challenging behaviour and are inclined to defy authority, which often leads to an early onset of substance abuse, truancy, and subsequently, conflict with the law (Pardini & Fite, 2011:1). The consequences are that children diagnosed with ODD tend to exhibit behavioural patterns associated with frequent tantrums, emotional instability, impulsivity and defiance (Brook, 2009:1). The manifestation of this type of behaviour in children with ODD often results as a lack of self-control due to the influence of the disorder on the cognitive, psychological, emotional and social abilities. With this in mind, the criminal capacity of a child with ODD should be assessed to determine if the child has the ability to appreciate the wrongfulness of an act and to act in accordance with that appreciation (Child Justice Act, S11). In terms of the characteristics associated with ODD, factors such as impulsivity, emotional instability and the consequential aggression ought to be considered during the assessment to determine the criminal capacity of the child.

3.3.4 Conduct disorder (CD)

CD is characterised as associated with repetitive, dissocial, aggressive and/or defiant behaviour (DSM-5, 2013:469-470). Examples of such types of behaviour include bullying, cruelty to people and/or animals, lack of empathy, excessive fighting, severe destructiveness to property, stealing, fire-setting, truancy from school, persistent

lying, severe and frequent temper tantrums and disobedience (DSM-5, 2013:469-470). The national prevalence of CD is estimated to affect approximately four per cent of children (DSM-5, 2013:473). According to international statistics, Mental Health America (Anon 2016b:1) documented that CD affects six to 16 per cent of children and this disorder is found to affect more boys than girls.

A clinical diagnosis of CD requires the individual to present at least three characteristics, from the criteria of (A), in the past 12 months and at least one characteristic in the past six months (DSM-5, 2013:470), as indicated in the table below.

Table 3.4: Diagnostic criteria for conduct disorder

A. Aggression to people and animals	Destruction of property	Deceitfulness or theft	Serious violations of rules
1. Often bullies, threatens, or intimidates others.	8. Has deliberately engaged in fire setting with the intention of causing serious damage.	10. Has broken into someone else's house, building, or car.	13. Often stays out at night despite parental prohibitions, beginning before age 13 years.
2. Often initiates physical fights.	9. Has deliberately destroyed others' property (other than by fire setting).	11. Often lies to obtain goods or favors or to avoid obligations (i.e., 'cons' others).	14. Has run away from home overnight at least twice while living in the parental or parental surrogate home, or once without returning for a lengthy period.
3. Has used a weapon that can cause serious physical harm to others (e.g., a bat, brick, broken bottle, knife, gun).		12. Has stolen items of nontrivial value without confronting a victim (e.g., shoplifting, but without breaking and entering; forgery)	15. Is often truant from school, beginning before age 13 years.
4. Has been physically cruel to people.			
5. Has been physically cruel to animals.			
6. Has stolen while confronting a victim (e.g., mugging, purse snatching, extortion, armed robbery).			
7. Has forced someone into sexual activity.			

(Source: DSM-5, 013:470-473).

Children and adolescents diagnosed with CD are found to experience psychological, emotional and cognitive impairments more severely and chronically, in comparison to most other clinical diagnoses (DSM-5, 2013:474). The functional consequences of CD may result in poor academic performance, school expulsion, labour-related conflict, early onset of sexual behaviour, unplanned pregnancies and/or sexually transmitted diseases, anti-social, reckless and risk-taking behaviour, abuse of alcohol and illegal substances, increased suicidal intentions and conflict with the law (Boezaart & Skelton, 2011:3; Trytsman, 2016:6-7).

According to a study conducted by Haskins (2010:2), the juvenile division in the State of Missouri, St Louis, detains approximately 60 to 100 children a day and approximately 90 to 100 per cent of those children, who come into conflict with the law, portray aggressive, defiant and uncontrollable behaviour – which are characteristics of CD. The findings from this report indicated that children/adolescents with CD suffer from substance abuse, depression and brain-functioning issues that are due to the impact of the disorder (Haskins, 2010:3). In addition, Haskins (2010), as well as Morde, Groholt, Kjelsberg, Sandstad and Myhre (2011:1-2) highlighted that incarcerated youths were found to display an increased tendency of having psychological problems and mental illness issues in comparison to youths who were not in the criminal justice systems. Findings from these studies revealed that psychiatric disorders, such as CD and ADHD, emerged as a significant risk that predisposed youths to criminal behaviour.

Sue et al (2010:427) state that approximately 40 per cent of cases with a childhood-onset of CD develop into anti-social personality disorder in adulthood. Accident rates and health issues are found to escalate for individuals with CD in comparison to those without the disorder (DSM-5, 2013:747). Various associated conditions such as learning disabilities, ADHD, ODD, anxiety disorders, mood disorder and substance disorders co-exist with CD (DSM-5, 2013:474).

Boezaart and Skelton (2011:3) draw attention to the challenges faced by children with CD. In their opinion, children who suffer from psychiatric disorders, such as CD, are at a disadvantage and are continuously failed by the health and justice systems that are supposed to help them. Breen (2011:6) and Trytsman (2016:5) concur that

children with CD have a higher probability of negative encounters with the law. Boezaart and Skelton (2011:4) emphasise that the characteristics of CD that manifest as defiant and uncontrolled behaviour, ought to be a factor that is considered when determining the criminal capacity of such a child. Sue et al (2010:427) support the aforementioned criteria for diagnosis and highlight that a positive diagnosis of CD in a child/adolescent/adult does not automatically confirm criminality. However, the symptoms associated with psychiatric disorders predispose behaviour that is defiant and challenges authority, which can contribute to rule-breaking, acting-out and misconduct. This emphasises the need for specialised training to ensure that practitioners who are responsible for criminal capacity assessments and the delivery of services to child offenders with psychiatric disorders, are able to ensure that the needs of this vulnerable group of children are met.

From the discussion of psychiatric disorders above it can be concluded that youths with mental disorders manifest high frequencies of impulsiveness, anger and cognitive confusion that predispose them to come into conflict with the law. Furthermore, due to the challenging nature of their behaviour, they could potentially pose a risk to themselves as well as society in general (Grisso, 2008:151). When the criminal capacity of a child with a psychiatric disorder is questioned, the state ought to conduct an assessment that evaluates the cognitive and conative functioning of the child in order to determine if the disorder influenced the child offender's behaviour and his or her criminal capacity (Child Justice Act, S11). Section 11(3) of the Child Justice Act stipulates that the inquiry magistrate may order a report by a suitably qualified person, who must include an assessment of the cognitive, moral, emotional, psychological and social development of the child.

The importance of assessing the criminal capacity of child offenders with psychiatric disorders will be discussed in the next section.

3.4 ASSESSING THE CRIMINAL CAPACITY OF CHILDREN WITH PSYCHIATRIC DISORDERS WHO ARE IN CONFLICT WITH THE LAW

The rights of children in conflict with the law and children with psychiatric disorders, who come into conflict with the law, are documented under the Children's Act, Child Justice Act and the Criminal Procedure Act, as discussed in chapter 2. When the criminal capacity of a child is questioned, the state is obliged to conduct a multi-faceted assessment which evaluates "...behaviour, human development, individual variation and non-specific concepts such as intelligence and moral development, amongst others" (Skelton & Badenhorst, 2011:22). As mentioned, the concept of determining criminal capacity refers to the ability to distinguish between right and wrong (cognitive ability) and the ability to act in accordance with that knowledge (conative ability), as per the Child Justice Act (S11). The cognitive function refers to the ability to think, reason and perceive information (McLeod, 2009:1). The conative function refers to the ability to practise free-will and self-control, which is based on the understanding developed in the cognitive functioning (Badenhorst, 2006:39).

Prior to the implementation of the Child Justice Act, the criminal capacity of a child was determined by merely asking the parent(s) or guardian if the child had been taught the difference between right and wrong and if the child had the ability to make this distinction at the time when the alleged offence was committed (Skelton & Badenhorst, 2011:15). According to Skelton and Tshehla (2008:43), this practice placed emphasis on the child's cognitive functioning, namely if the child had the ability to appreciate the wrongfulness of his or her actions, but ignored the conative functioning of the child, namely if the child had the ability to act in accordance with the appreciation of that understanding. Human (2015:23) is of the opinion that these methods used to determine criminal capacity for children in conflict with the law, prior to the implementation of the Child Justice Act, were unjust and not in the best interest of the child.

In context of the present study, as mentioned in chapter 2, legislation pertaining to the criminal capacity of a child offender with a psychiatric disorder is dealt with under sections 11(ss3) and 48(ss5) of the Child Justice Act and sections 77 to 79 of the

Criminal Procedure Act, with reference to the Beijing Rules (UN, 1985, S4) as an underpinning legislative format. As previously mentioned, section 11(ss3) of the Child Justice Act stipulates that, when the criminal capacity of a child is questioned, the prosecutor or magistrate may order an evaluation by a suitably qualified person to evaluate the cognitive, moral, emotional, psychological and social functioning of the child. Should the presence of a psychiatric disorder emerge, the impact of the disorder must be explored in terms of the influence it has on the child's criminal capacity. As mentioned, procedures in this regard are covered under sections 77 to 79 of the Criminal Procedure Act.

According to section 79 of the Criminal Procedure Act, in the request for a further evaluation on the mental state, functioning and capacity to understand, the court may appoint a psychiatrist or psychologist to determine the extent to which the mental defect or psychiatric disorder influences the individual's criminal capacity. In this light, the assessment ought to recognise the existing patterns of symptoms or experiences that led to a specific diagnosis and explore the influence of the disorder in relation to the child's ability to stand trial – and more so his or her criminal liability (Swanepoel, 2015:3243, 3251). As mentioned, this is done by examining the cognitive, conative and affective aspects of mental functioning (Badenhorst, 2006:39). According to section 78 of the Criminal Procedure Act, if a mental illness or disability affected the accused to a point of being incapable of appreciating the wrongfulness of his or her actions and incapable of acting in accordance with that understanding, he or she shall not be held criminally responsible for the misconduct.

The primary issues addressed under the aforementioned legislative frameworks, namely section 11 of the Child Justice Act used to determine *doli incapax*, and section 78 of the Criminal Procedure Act used to determine the influence of a psychiatric disorder on the criminal capacity, are the same. That is, if the accused had the ability to appreciate the wrongfulness of the act and had the cognisance to act in accordance with that appreciation. McDiarmord (2013:14-149) is of the opinion that the determination of criminal capacity is a multifaceted and complex task that cannot be reduced to a 'yes' or 'no' binary, that is purely based on one's cognitive and conative functioning. This is because cognitive developmental and moral

learning are an on-going process during childhood, adolescence and young adulthood (Delmage, 2013:106; Papalia & Feldman, 2011:422-42).

Papalia and Feldman (2011:418) illustrate the process of cognitive development by referring to Piaget's developmental theory. Piaget theorised that children experience four universal stages of cognitive development, namely sensorimotor stage, preoperational stage, concrete operational stage, and formal operational stage (McLeod, 2015:1). Each stage of cognitive development is vital and there are variations in the rate at which each child reaches the stages of development. Of significance to this study are the concrete operational and formal operational stages of development. The concrete operational stage is responsible for the development of logical thinking and operational thoughts (McLeod, 2015:1). The formal operational stage marks the point where a higher form of cognition occurs; this stage usually begins at the age of 11 and continues into adulthood (McLeod, 2015:1). During the formal operational stage, the capacity for abstract thoughts – the ability to capture feelings and meanings and apply learned skills – is demonstrated. Piaget's theory reveals that as children grow, they develop higher levels of cognition and are therefore more capable of complex reasoning, moral issues and understanding the consequences associated with their behaviour. Lamb and Sim (2013:135) suggest that it is important to assess cognitive abilities such as logical thinking and processing of information, memory, communicative capacity and social orientation, when one is to determine the criminal capacity of a child who is in conflict with the law.

The knowledge regarding acceptable and unacceptable, right and wrong, and desired and undesired behaviour is learnt during the concrete operational and formal operational stages of development. It must be noted that it is natural and instinctive for humans to test boundaries in order to learn the limits of these boundaries by which they need to abide (Delmage, 2013:105-106). In this respect, McDiarmord (2013:149) states that "...knowledge of wrongness is more superficial than a self-generated understanding of what it means to do wrong". This implies that in many cases children reach the appropriate developmental stages and are able to distinguish between right and wrong; however, they fail to fully understand why such an act is wrong and are therefore not always able to exhibit conforming behaviour.

The argument regarding the ability to appreciate the wrongfulness of an action, to act in accordance, and furthermore to fully comprehend why such an act is wrong, depends on the variables appropriate to the situation, the lesson learnt and the manner in which the lesson was interpreted by the child (McDiarmord, 2013:149). Thus, the task of determining criminal capacity, based on section 11 of the Child Justice Act, should also consider the question of 'why' in respect to the concept of criminal capacity. In other words, does the child understand 'why' the act is wrong?

Various influences, such as frequent exposure to violence, parental neglect, child maltreatment, mental disorders and instability in the family unit, can contribute to immature cognitive development (Papalia & Feldman, 2011:428). The influence and impact of psychiatric disorders not only disrupt but also delay the child's cognitive developmental process. All three functions (cognitive, conative and affective) can become impaired or underdeveloped due to the influence of a psychiatric disorder. Immature cognitive development may weaken the ability to logically process information and consider the consequences of one's actions. The effect of the psychiatric disorder on a child is reflected as mental and emotional immaturity. Subsequently, the child's chronological age often far exceeds their mental and emotional age (Breen, 2011:7). As a result, cognitive developmental delays, in conjunction with a lack of impulse control and a natural tendency to challenge authority, impair the functioning of child offenders with psychiatric disorders. Subsequently, these disorders influence their ability to make informed, rational decisions, as one would observe in a child of the same age who does not suffer from a psychiatric disorder (Breen, 2011:7).

3.4.1 The influence of psychiatric disorders on the criminal capacity of children in conflict with the law

According to Grisso (2008:143,147), psychiatric disorders such as ADHD, ASD, ODD and CD increase the likelihood of aggressive and disruptive behaviour. Children who suffer from psychiatric disorders may test such boundaries on a different, more defiant and oppositional level, when compared to children without psychiatric disorders (Grisso, 2008:146). A child with a psychiatric disorder may encounter the

same experience, learn the same lesson and demonstrate the ability to comprehend why an act is wrong; as one would observe in child without a psychiatric disorder. Yet, due to the impact, the child with a psychiatric disorder may repeatedly act in a manner which results in confrontation with figures of authority or conflict with the law. As mentioned, this is because despite the lessons learned, the child who suffers from the psychiatric disorder may experience impaired cognitive development that disables or impairs the ability to practise self-control (conative function) (Breen, 2011:7; Grisso, 2008:146).

Sanborn (2008:194) concurs with the findings of Grisso (2008), by highlighting that children with psychiatric disorders, who are in conflict with the law, could experience the following:

- Impaired thinking and analysing abilities;
- Limited and impaired communication skills;
- Easily influenced and a limited ability to defer gratification;
- Limited memory about events and an impaired long-term thinking ability;
- Less ability to appraise and understand the potential outcome of the proceedings;
- Inability to empathise with others;
- Limited or no control over impulsivity to behave and a low tolerance due to the stress of trial; and
- Limited ability to relate and disclose information to a defence council.

Pillay and Willows (2014:6) researched the criminal capacity of children from a medical perspective. The research analysed the relationship between the implemented laws in South Africa and the psychological perspective on the criminal capacity of children. The findings from this study highlighted an increasing trend of young offenders who were presenting with more 'adult-like' serious criminal behaviour, such as aggressive and sexual offences, in comparison to previous minor offences such as theft, truancy and vandalism. These child offenders all suffered from the influence of psychiatric disorders and exhibited features of anti-social personality disorder and CD. The findings from the study by Pillay and Willows

(2014:6) imply that the influence of psychiatric disorders can impact on and influence the nature and seriousness of criminal offences.

In light of the influence of a psychiatric disorder on criminal capacity, Swanepoel (2015: 3245) states that during a criminal capacity assessment, it is more important to determine the level of a child's functioning and behaviour than to determine a psychiatric diagnostic label. This is because despite the confirmation of a psychiatric disorder, additional information will be required to determine the child's functional ability and criminal capacity. Children's abilities and impairments are unique and will vary with each diagnosis; therefore, additional information may be required during an assessment to determine how these impairments affected the child's abilities. This, therefore, calls for an individualised approach to criminal capacity assessments for children. Snyman (2002:158-179) is of the opinion that, irrespective of the cause of the inability, if a person commits a crime, but at the time of the commission lacks the ability to appreciate the wrongfulness of the act and the ability to conduct himself in accordance with that appreciation, he/she does not possess the capacity to be held liable for such an act and is, therefore, not guilty.

Walker (2011:33-36) concurs with the individualised criminal capacity assessment approach suggested by Swanepoel (2015:3245). In this light, Walker (2011:33-36) proposes that the criminal capacity assessment ought to be "conduct specific" because the ability to appreciate the wrongfulness of misconduct is presumably one and the same as the ability to appreciate the difference between right and wrong. However, some people may be capable of drawing this distinction in certain instances and not in others. According to Walker (2011:38), this was demonstrated in *S v Dyk* (1969(1) SA 601(C)), where Corbit J set aside the conviction of an 11-year old, who was the third accused on a case of housebreaking. Corbit J disputed that, even though the boy may have the ability to appreciate the wrongfulness of the crime, he may not fully appreciate the wrongfulness of his role when the crime was committed. In this regard, Walker (2011:38) critically assesses the criminal capacity assessment procedure in the Child Justice Act by stating:

As a result of his or her intellectual immaturity, a child who is quite capable of appreciating that certain types of conduct are considered wrong in general, abstract terms, might nevertheless be incapable of engaging in the complex, abstract reasoning necessary to enable him or her to apply this generalised knowledge to his or her own conduct, at the time and in the particular circumstances in which he or she engaged in that conduct. The danger inherent in applying a vague, generalised right and wrong test is that, in an instance like this, such a child could well be found criminally responsible. This finding would however, be inconsistent with the fundamental principles of criminal law and contrary to all sense of justice.

As touched on in chapter 2 of the study, the Centre for Child Law (Breen, 2011:7) documented the high incidence of children with psychiatric disorders who are in conflict with the law. In this article, Breen (2011:7) outlines that more than 20 cases of child offenders with psychiatric disorders emerged in Gauteng and evidently, due to the lack of available facilities, this vulnerable group of children failed to receive the protection and appropriate treatment needed. Of the emerged cases, two children were charged with multiple cases of assault, attempted murder and malicious damage to property. In both cases the children suffered from a severe case of CD, in addition to co-morbid learning disabilities. Consequently, the children were predisposed to recurrent violent outbursts that resulted in their expulsion from a number of schooling facilities; CYCC, safe and foster care centres and detention facilities (Breen, 2011:8). According to Breen (2011:7), the report that followed the assessment from a panel of psychiatrists, concluded that one of the two child offenders were found fit to stand trial. This, despite the influence and damming effects the disorder placed on the child in question. In both cases, due to the lack of facilities, the state requested an investigation to establish a system that could deal with the placement of child offenders suffering from this type of debilitating disorder (Breen, 2011:8).

Breen (2011:6) emphasises that child offenders with psychiatric disorders are disabled by their circumstances and may lack the presence of certain cognitive, conative and decision-making functions. Therefore, it is unjust to hold a child, who is

cognitively and conatively impaired by a psychiatric disorder, to the same standard as a child without a disorder, who is developmentally on par. Calderon (2014:25) adds that experts should emphasise the influence that psychiatric disorders such as ADHD place on the child offender's behaviour, in order to appropriately serve the needs and rights of young offenders with mental disorders. This is because in each case where a child is found to be in conflict with the law – and more so suffers from a psychiatric disorder – the influence of the disorder on the child's functioning must be explored in relation to the child's cognitive and conative development to determine if the child has criminal capacity and, therefore, can be held liable for their conduct. It is also believed by the researcher that the presumption of *doli incapax* must be challenged, in accordance with the Child Justice Act and the Criminal Procedure Act, even for children with psychiatric disorders who are above the criminal capacity age demarcation.

3.4.2 Criminal capacity assessment concerns and challenges for children with psychiatric disorders

It is evident from the discussion on age demarcation and criminal capacity assessment procedures that the issue of determining criminal capacity for a child is a complex task. According to Schoeman (2016:1), the debate of a minimum age for criminal capacity is limited to establishing an age at which children are considered mature enough to appreciate their actions, accept responsibility and act in accordance with that appreciation. In this regard, Schoeman (2016:1) states: "In reality the debate is more complex, since any decision is moot if the procedural mechanisms and available infrastructure are inadequate to deal with the implementation of the decision." This implies that issues pertaining to the age of criminal capacity will remain topical if the procedural framework and mechanisms implemented do not adequately meet the intended requirements stipulated in the Child Justice Act. Henceforth, it fails to ensure the best interest of the child, as established in the judicial expectations.

With regard to the provisions in the Child Justice Act (S11 & 48) and the Criminal Procedure Act (S77-79), used to determine criminal capacity for children with psychiatric disorders who are in conflict with the law, Karels and Pienaar (2015:61)

pose the question if "...the procedure for mental assessment in section 79 of the Criminal Procedure Act, form part of a child-friendly system of justice?". In the context of this study, the argument made by Karels and Pienaar (2015:61) is significant, since concern is raised as to whether these two approaches to the assessment of criminal capacity can function simultaneously in the case of a child offender with a psychiatric disorder, who is between 10 and 14 years of age. The basic cognitive and conative capacity of an adult with a psychiatric disorder differs from that of a child with a psychiatric disorder. Therefore, the legislative framework pertaining to a child offender with a psychiatric disorder ought to provide specific legislations that address the special needs of child offenders and act in their best interest.

Skelton (2013:266) is furthermore of the opinion that the manner in which *doli incapax* is applied, is another area for concern. Psychologists and psychiatrists conduct criminal capacity assessments by differentiating between 'pathology' and 'normality'. In terms of section 11 of the Child Justice Act, children between 10 and 14 years of age are under the presumption of *doli incapax*; hence they are presumed to lack criminal capacity. This is because the psychological maturity and cognitive functioning of a child within the said age group is considered to be under-developed or inadequate to appreciate the wrongfulness of a criminal act and to act in accordance with that understanding. However, should the criminal capacity of a child, between 10 and 14 years of age, be questioned, and if the presumption of *doli incapax* is applied correctly, the state holds the responsibility of proving beyond a reasonable doubt that the child in question has an above normal level of maturity and is, therefore, presumed to have the ability to distinguish between right and wrong and to act in accordance with that understanding.

Skelton (2013:266) dictates that the manner in which *doli incapax* is currently applied creates the presumption that child offenders between the age of 10 and 14 are mature enough to be held criminally liable for their actions. Hence, due to this incorrect application of the presumption of criminal capacity, the state needs to prove that the child lacks criminal capacity. The consequence of this incorrect application is that children who are developmentally and pathologically 'normal' and lack criminal capacity are brought into the justice system unnecessarily, and are exposed to

various factors that are detrimental to their best interest. Furthermore, this causes a delay in services for children who actually have abnormal levels of maturity or suffer from mental illnesses and need to be assessed in the justice system (Skelton, 2013:266-267).

Schoeman (2016:6) and Badenhorst (2006:165) argue that the evaluation of criminal capacity requires an in-depth assessment on the psychosocial development and functioning of the child; a task that should not be limited to a one-dimensional opinion from a probation officer, psychologist or psychiatrist (Child Justice Act, S11 & Criminal Procedure Act, S79). Schoeman (2016:6) states that this task requires a "...holistic evaluation of predisposing risk factors and a clinical analysis of how the co-morbidity of these factors influences the child's ability to distinguish between right and wrong and act in accordance with this appreciation".

Professionals, such as psychologists and psychiatrists, who are directed by the court to evaluate a child accused of committing a crime, are trained in a one-dimensional, medical and/or psychological framework of conducting criminal capacity assessments (Karels & Pienaar, 2015:66). Research conducted by Human (2015:98) found that professionals develop their own model and/or instrument for criminal capacity assessments because there is no standardised model or instrument that is currently available. In addition, findings indicated that professionals who conduct criminal capacity assessments were uncertain as to how to report on such assessments, as there is currently also no standardised criminal capacity reporting format in place (Human, 2015:98-100). The concern in this regard is that the procedural disparity may result in children being denied the services as intended by the Child Justice Act.

Furthermore, another pressing issue that has not been addressed is that the request for a criminal capacity assessment is not compulsory and is left solely at the discretion of the court of preliminary inquiry and child justice court (Child Justice Act, S11 (ss3)). The danger identified with this is that, should the magistrate not request such an assessment, the determination of criminal capacity will be based on the report of the probation officer and other existing pieces of evidence. According to Schoeman (2016:5-6), the probation officer is not adequately equipped to

independently determine the criminal capacity of a child. The risk of solely depending on the report of the probation officer, in the case where a criminal capacity assessment is not requested, is that there will be insufficient information to draw a viable conclusion when one is to determine the criminal capacity of a child who suffers from a psychiatric disorder. The consequence of this is that the effects of the disorder on the child offender may go unnoticed and he/she may receive an unfair sentence and be denied the care and protection services as intended by the Child Justice Act and Children's Act, pertaining to children in need of care and protection.

The task of conducting criminal capacity assessments for child offenders with psychiatric disorders still requires a great deal of development in order for these assessments to be carried out with more clarity and accuracy. In addition to the findings from research conducted by Human (2015:101-102), many professionals emphasised that there was a shortage of probation officers, psychologists and psychiatrists, and a general concern for the quality and tools used to determine the criminal capacity of children in conflict with the law. According to Skelton (2013:266) the shortage of professionals and issues regarding the criminal capacity assessment tools create a delay and place great strain on departments in the mental health sector as well as in the justice systems, as these departments are found to over compensate due to a shortage in staff and a lack of facilities. These challenges not only cause strain on departmental structures but are also detrimental to the well-being of the children in conflict with the law, as fragmented services are being provided to this vulnerable group.

Human (2015:102) documented recommendations, from the professionals who are instrumental in the process of determining criminal capacity, to improve on the methods used to deal with children in conflict with the law. These recommendations included specialised training for the professionals who provide support and conduct assessments of criminal capacity and a revision of the tools utilised to conduct criminal capacity assessments. More so, the professionals from the study highlighted that the implementation of conducting criminal capacity assessments from a multi-contextual framework would provide a holistic approach to the evaluation of criminal capacity for children in conflict with the law (Human, 2015:101).

Badenhorst (2006:166) concurs with the findings from research conducted by Human (2015:101). Here, Badenhorst (2006:166) dictates that reserving the criminal capacity assessment function to a single-dimension approach, such as psychological, will create a prejudiced approach in that certain developmental functions can be over emphasised and other aspects overlooked. Psychiatrists, psychologists, probation officers, social workers and criminologists render a level of expertise in the criminal justice system that is imperative to the process of holistically determining criminal capacity (Swanepoel, 2015:3251). In an attempt to improve on the approach used to conduct criminal capacity assessments, and to ensure that the best interest of the child is addressed, it is proposed that the category of professionals involved in criminal capacity assessments is broadened to a multi-disciplinary team. Such a team, that includes the expertise of social workers, clinical psychologists, occupational therapists, psychiatrists and criminologists, will allow for a more holistic assessment process (Schoeman, 2016:6), as intended by the Child Justice Act. Recognition of a multi-disciplinary criminal capacity approach is also supported in chapter 4 and 5 of the present study.

In order to explain crime, criminal capacity and the influence of psychiatric disorders, it is vital to adopt the application of a theoretical framework. There are various criminological theories that can be applied to evaluate and explain criminal behaviour, and more relatively the criminal behaviour of children. The principles of the developmental life course theory will be discussed below and applied to child offenders with psychiatric disorders.

3.5 THEORETICAL EXPLANATIONS OF CHILD OFFENDERS WITH PSYCHIATRIC DISORDERS

Various theoretical perspectives have evolved within the field of criminology and criminal justice which explain crime, justice, delinquency and punishment (Karimu, 2015:1). According to Karimu (2015:1), a theoretical explanation provides "...statements about relationships between actual events; about what is and what will be". Siegel (2013:7) highlights that the aim of a social theory is to provide understanding of the forces that shape and direct human behaviour. The application

of a social theory aims to modify the way people think about social issues and to change the practical methods used to deal with these issues (Karimu, 2015:1-2).

The issue of children in conflict with the law, the factors that predispose children to become involved in criminal behaviour, and factors pertaining to their criminal capacity are topics that are widely discussed and continually researched, both nationally and internationally (DJCD, 2015:1; Gallinetti, 2009:9-10).

In this study, which explores the criminal capacity of child offenders with psychiatric disorders, it was identified that there are no theories which specifically focus on the influence that psychiatric disorders have on criminality in children. If one is to consider a more traditional criminological viewpoint, such as the Classical school of thought, whereby the principle of the theory is grounded on human choices and rational thought processes to commit crime, then children with psychiatric disorders, who are in conflict with the law, would undoubtedly fall under the presumption of *doli capax*. This is implied because in the application of the Classical school of thought, individuals who commit crime are viewed as rational and free-willed agents and therefore, the influence that a psychiatric disorder has on the cognitive and conative processing would not be a factor that is considered in respect of the criminal capacity of the child offender (Liston, 2008:1).

The Centre for the Study of Violence and Reconciliation (2010:1) documented an article on the incidence of young offenders involved in crime in South Africa. This article was derived from a 21-month study and highlighted that approximately 31 per cent of suspects linked to violent crimes were reported to be child offenders, who were 19 years and younger. According to this study, the most prevalent factors that were found to contribute towards criminal activity in South African children were inequality, poverty, inadequate child rearing and socialisation, insufficient social values, a high level of ambivalence towards the law and the lack of appropriate learned social behaviour (Centre for the Study of Violence and Reconciliation, 2010:3-4). Findings from the literature review in this study also highlighted that a significant number of these children may have a psychiatric disorder. However, as previously mentioned, there is a gap in research which can confirm this as well as

identify the influence of the psychiatric disorder as a predisposing factor to criminal behaviour.

In recent years focus has been drawn to the issue of children in conflict with the law; the causes and penal control for child offenders (Badenhorst, 2011:1). The image of the child offender has changed in the eyes of the law and in South Africa. The Child Justice Act and the Children's Act have implemented legislations that protect the rights of the child offender and aim to reduce the harsh practices that were once applied to children in conflict with the law (Badenhorst, 2011:1). As mentioned, the Children's Act and the Child Justice Act also recognise the special needs and the rights of children with psychiatric disorders. Based on the application of these Acts, the rights and dignity of children who are in conflict with the law are of importance and children who are in conflict with the law are viewed as a vulnerable group that requires specialised treatment (DJCD, 2010b) (National Instruction 2 of 2010, Children in conflict with the law, 2010, S2).

Several criminological theories and models attempt to explain delinquency and provide recommendations for crime control and prevention. Criminological and penological research provides a holistic understanding on the causes of crime, which can be applied to an African and South African context (Mathabathe 2015:1, 19). In this section, attention will be drawn to the application of the developmental life course theory, specifically to Farrington's ICAP theory, to highlight the issues pertaining to child offenders with psychiatric disorders.

3.5.1 Developmental life course theories

Developmental life course theories are appropriate in explaining the causes of criminality in young offenders and the continuation of a criminal career in adulthood (Berk, 2007:6-7). There are various integrated developmental life course theories that can be employed to explain the topical issue of children in conflict with the law. A few of these include, but are not limited to: the social developmental model by Catalano and Hawkins; the integrated theory by Elliot; the integrated cognitive anti-social potential (ICAP) theory by Farrington; the theory of delinquency by Moffit; the theory of delinquent development by Farrington; the interactional theory by

Thornberry and Krohn; and the age-graded theory of informal social control and cumulative disadvantage by Sampson and Laub (Casey, 2011:14-18; Wortley, Seepersad, Mcalla, Singh, Mandon, Greene, Myers & Roswell, 2008:197-205). These theories focus primarily on the personal, social, cognitive, psychological and situational factors to identify, describe and understand criminal behaviour.

Developmental life course theories, such as the age-graded theory of informal social control and cumulative disadvantage and the ICAP theory, analyse the strength of social bonds and the development of cognitive processing that initiate, influence, reinforce and/or reduce criminal involvement (Casey, 2011:16; Farrington & Ttofi, 2011:40; Wortley et al, 2008:199-200).

The age-graded theory of informal social control and cumulative disadvantage focuses on the development of formal and informal social bonds and emphasises that the belief in conventional principles, in relation to these bonds, either encourages or inhibits criminal behaviour (Farrington & Ttofi, 2011:40). The ICAP theory focuses on the particular factors that promote anti-social behaviour and the influence these have on criminal involvement (Casey, 2011:16). Both these developmental theories support that a lack of developed bonds with parents/figures of authority, in addition to associations with delinquent peers, can contribute to the formation of delinquent values and furthermore criminal behaviour in children. Of these two theories, the one that is most relevant to the study is the ICAP theory, which will be discussed in more detail below.

3.5.1.1 *Farrington's integrated cognitive anti-social potential theory (ICAP)*

The ICAP theory, developed by Farrington, focuses on the early risk factors for anti-social behaviour and their influence on criminal behaviour (Casey, 2011:17). The development of this theory incorporates an integrated approach by using constructs from various criminological theories, such as the strain, labelling, learning and rational choice theory to provide a holistic overview on the influence that anti-social

behaviour has on criminal involvement during the life course of a child offender (Wortley et al, 2008:201-202).

The focal point of the ICAP theory is the long and short-term potential to commit anti-social acts (Casey, 2011:17). The shift from anti-social potential to anti-social behaviour occurs during the process of cognition (Casey, 2011:17). Based on the aforementioned description of cognition, the child offender considers the crime, the available opportunities, the rewards and the victim, through the process of thinking and decision-making (cognitive processing) (Casey, 2011:17). Casey (2011:17) highlights that the frequency and exposure to socialisation will directly influence the child's anti-social potential development and risk for criminal involvement. Therefore, an under-developed or impaired cognitive function (due to a lack of parental bonds and supervision, parental rejection, exposure to anti-social behaviour, substance abuse, stealing and criminal tendencies from parents, siblings and peers) will increase the child's impulsivity and subsequently the risk of developing anti-social behaviour.

The aspect of short-term offending is dependent on motivating and situational factors such as anger, jealousy, revenge and drunkenness, whereas long-term offending is dependent on levels of impulsiveness, socialisation, stress, strain, modelling and the experience of life events (Casey, 2011:17). Individuals with low levels of anti-social potential live lives that are more conventional, whereas individuals with high levels of anti-social potential are at risk for developing both long as well as short-term criminal career involvement and are found to commit minor and serious criminal offences (Casey, 2011:17). These factors that contribute to anti-social behaviour, namely anger and aggression, anti-social behaviour, substance abuse, impulsivity and environmental stress, are also identified as factors facing South African children. In addition, and pertinent to this study, these factors were also found to increase the child's risk of developing psychiatric disorders and subsequently criminal behaviour (Boezaart & Skelton, 2011:3; Ward et al, 2013:1; World Health Organisation, 2015:10).

The impact of anti-social potential is constant through the life course of a child offender and is found to peak during adolescence, due to the effects of maturation,

increased involvement with peers and decreased involvement with family (Wortley et al, 2008:201-202). This is of significance to the present study since factors which were found to predispose children to develop anti-social potential behaviour, were also identified as factors that contribute to the development of various childhood psychiatric disorders and criminal behaviour, as highlighted above.

According to Wortley et al (2008:201-202) this theory postulates that anti-social potential will only lead to criminal behaviour if the individual habitually chooses anti-social methods of attaining his/her needs/wants, such as financial gain, sexual satisfaction and/or status. Therefore, crime is not the result of having anti-social behaviour or anti-social characteristics, but rather the result of continuously choosing anti-social methods to achieve the needs/wants, instead of legitimate methods.

In contrast to situations where anti-social behaviour is a chosen response, children with psychiatric disorders are predisposed to exhibit heightened levels of impulsivity and anti-social behaviour. An example is the case of an aggressive attack on two schoolteachers by an 11-year-old boy with autism (Strickland, 2011:8). Strickland (2011:8) states that the child struggled with communicating, especially in his school environment, which often resulted in outbursts of frustration. On one similar incident, two of the schoolteachers attempted to physically restrain the ASD child during an aggressive outburst that resulted in serious injuries for both the teachers. The school elected to press charges against the child due to the injuries inflicted upon the teachers. The outcome of the cases and the possibility that the child did not have the ability to appreciate the wrongfulness of his behaviour and to act in accordance with that appreciation due to the disorder, was not acknowledged or documented in the article.

Children with psychiatric disorders are more at risk of being labelled due to the influence of the disorder. This compounds the risk and decreases their ability to rehabilitate. Should a child offender come into conflict with the law and should the punishment involve labelling or stigmatisation, the potential for the child in question to eventually rehabilitate and be reintegrated into society, is decreased due to the impact of labelling and stigmatising imposed by society (Casey, 2011:16-17; Wortley et al, 2008:201-202). The danger of not diagnosing or misdiagnosing a psychiatric

disorder, for a child who is labelled in the justice system, could result in serious, harmful consequences. The child will not be provided with the care and protection as intended by the Children's Act (S150) and the Child Justice Act (S50); thereby making it increasingly difficult for the child offender to develop social skills, gain legitimate employment and attain his/her desires through legal means.

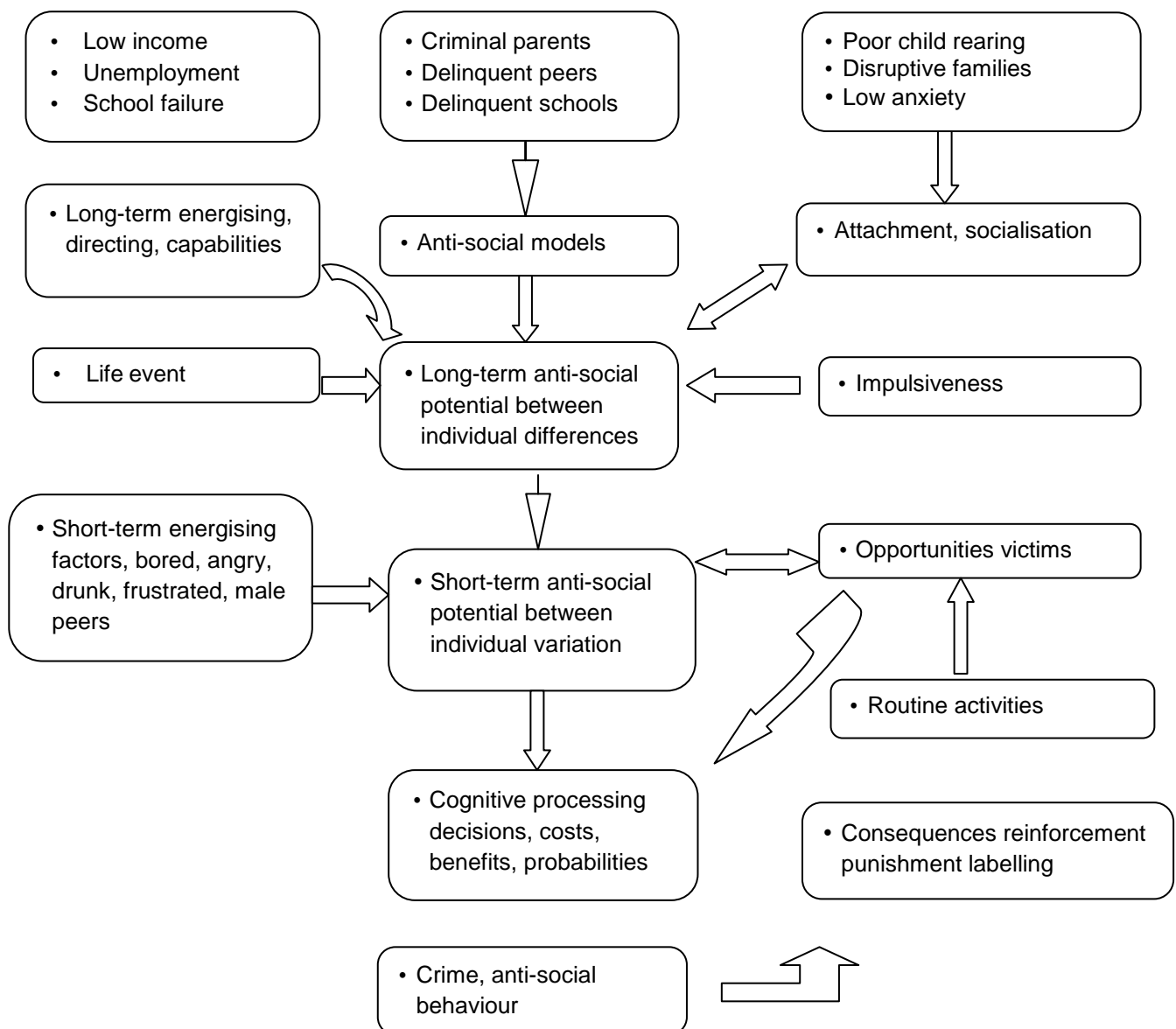
The research findings from a longitudinal study on delinquent development, conducted on the criminal careers of 411 males born in London, Cambridge, provided significant support for the ICAP theory (Wortley et al, 2008:201-202). The data collection tools utilised in this study were self-reports, interviews and psychological testing. The data were collected eight times over a period of 24 years, with the initial data collected from the subjects at age eight (Wortley et al, 2008:201-202). The findings from this study reflected that an early onset of criminal behaviour and the existence of chronic offenders led to persistent criminal activity over the life course of the children (Wortley et al, 2008:201-202). Symptoms of criminal tendencies manifested in the children as early as eight years old and were exhibited as anti-social behaviour, aggression, defiance and dishonesty (Wortley et al, 2008:201-202). These children reflected impulsive, restless, fidgety and hyperactive behaviour in multiple environments and furthermore presented with low academic performance and high levels of truancy at school (Wortley et al, 2008:201-202). This type of challenging behaviour not only impairs the child's ability in a classroom setting, but also predisposes him/her to uncontrolled emotional responses, impaired social functioning, increased risk taking and defiant behaviour, substance abuse and conflict with the law (DSM-5, 2013:57, 63, 466 474). Although not recognised in the ICAP theory, the characteristics of these behavioural tendencies are identified as being symptomatic of psychiatric disorders commonly found in children with ADHD, ODD and CD (DSM-5, 2013:57, 63, 466 474). This lack of recognition to the influence of psychiatric disorders identifies a gap in the ICAP theory that needs further exploration through research.

The findings from the longitudinal study on the criminal careers of 411 males, born in London, Cambridge, reflected that these children were found to live in disorganised, disrupted family systems where there was a lack of parental supervision and familial bonds, poor social conditions and poverty (Wortley et al, 2008:201-202). These

factors are of significance since, as identified above, they increase the risk of not only developing a pathway to criminal behaviour, but also a psychiatric disorder.

The following diagram provides a contextualised summary of the ICAP theory, documented by Farrington (2006:46).

Diagram 3.1: The integrated cognitive anti-social potential theory



(Source: Farrington, 2006:46)

The application of the strain, labelling, learning and rational choice theory as highlighted above, is integrated within the ICAP theory and provides that criminal

behaviour occurs, particularly when there are severe levels of strain experienced and no legitimate means by which to attain needs/wants. The child offender is exposed to anti-social means of attaining those needs/wants through the process of social learning and modelling; and based on the routine activities the child offender is able to predict the victim's behaviour, thereby reducing potential risk of conflict with the law. Furthermore, through the process of cognition and rational choice, the child offender will weigh out the pleasure versus the potential punishment, thereby creating an opportunity where the reward is high and the risk is low, based on the prediction of routine activities for criminal behaviour (Casey, 2011:17).

3.5.1.2 *An application of the ICAP theory on child offenders with psychiatric disorders*

Developmental life course theories, as discussed above, suggest that a lack or deterioration of social bonds during childhood/adolescence can be traced to potentially anti-social behaviour, which influences the onset of crime. This implies that children who fail to develop or develop weak social bonds often lack the completion of socialisation, cognitive processing and psychological maturity (Casey, 2011:16; Liston, 2008:1-2). The lack of development, or inadequate development, in children becomes apparent through the expression of aggressive, impulsive and acting-out behaviour, as illustrated in the ICAP theory. The inability to form meaningful relationships is not only due to socialisation but forms part of the symptoms associated with psychiatric disorders, such as ODD and CD. These factors that are resultant of under-developed bonds and cognition are of significance to the study, since these factors are also associated with psychiatric disorders.

The technique of labelling by negative reinforcement, when applied to a child offender with a psychiatric disorder, may not produce the desired results as one would observe in children without psychiatric disorders. This is because the influence of the psychiatric disorder disables the cognitive and conative abilities to practise logical thinking and self-control (Delmage, 2013:105-106; Sue et al, 2010:426). Subsequently, child offenders with psychiatric disorders such as ADHD, ODD and CD, test boundaries and manifest challenging and defiant behaviour that negatively

influences social functioning and predisposes them to confrontation with the law (Grisso, 2008:146; Sue et al, 2010:426).

Hence, it is vital to note that child offenders with psychiatric disorders are inherently difficult to manage as a result of the challenging nature of their behaviour (Breen, 2011:6). Liston (2008:2), Farrington and Ttofi (2011:39-40) and Wortley et al (2008:199-200, 202) identify that neuropsychological deficits experienced by children with weak or non-existent social bonds reflect warning signs for criminal behaviour. These neuropsychological deficits include impaired abilities in learning, listening, communicating, memory, inattentiveness, hyperactivity, impulsivity and poor emotional regulation. This is also relevant in the case of children with psychiatric disorders, where symptoms associated with the disorders often result in anti-social, challenging behaviours that are characterised as ADHD, OD and CD on the psychiatric diagnostic manual (DSM-5, 2013:32, 60, 462, 469). The impact of impaired, challenging and anti-social behaviour (in conjunction with disorganised neighbourhoods, poverty and a lack of supervision) produces defiant and challenging behaviour from children who experience the effects of psychological impairment and/or psychiatric disorders (Casey, 2011:16; Wortley et al, 2008:201-202). These children may have the ability to appreciate the wrongfulness of a deviant act, but fail to understand why such an act is wrong and due to high levels of impaired cognition and impulsivity, fail to act in accordance with that understanding.

Anti-social learned behaviour, manifested by children with psychological impairments and/or psychiatric disorders, will continue to manifest over time and often limits the child's opportunity to learn pro-social behaviour during their formative years of development. As a result, anti-social, aggressive and delinquent behaviour becomes ingrained, natural characteristics for the child/adolescent (Casey, 2011:16). The consequences associated with this type of behaviour can result in confrontation with figures of authority and conflict with the law because children with under-developed social bonds, impaired cognition and psychiatric disorders are unaware of what is expected of them on a social and inter-personal level (Casey, 2011:16; Liston, 2008:1-2). Thus, the developmental life course theory emphasises that children who enter into criminal behaviour may lack the ability for impulse control and are vulnerable to defiant behaviour due to the influence of social and psychological

factors. Therefore, even though the theory does not specifically focus on children with psychiatric disorders, it is recognised that children who have social and/or psychological impairments may lack criminal capacity in that they do not have the ability to recognise that their behaviour is wrong, or have the ability to act in accordance with this understanding.

The effects of labelling, when applied to a child offender with a psychiatric disorder, can have a largely damming effect on the self-concept, psychological and emotional well-being of such a child. Although the predisposition to become involved in criminal behaviour is associated with the psychiatric disorder or the influence of the psychiatric disorder, the child offender comes to anticipate a negative societal reaction. The consequences that result from the negative labelling cause the child offender, with a psychiatric disorder, to withdraw even more from society or agencies of control and to seek acceptance, a sense of belonging and fulfilment elsewhere (Rawoot, 2012:1; Ludici et al, 2014:508). Often, this need for acceptance, belonging and fulfilment is sought out in gangs and/or delinquent groups (Ward et al, 2013:4). Here the child offender will respond to the application of negative stigmatisation or social shaming by abandoning social norms and fulfilling the prophecy of the negative label imposed on by society/social control agencies (Plummer, 2004:191; Rawoot, 2012:1). This creates a spiral formed pathway of criminal behaviour for children with psychiatric disorders, with no means of breaking the cycle or improving themselves.

In the context of the study, the principles of the ICAP theory were applied to a South African context. Here, support is provided in terms of the Child Justice Act (ss7-11) and Criminal Procedure Act (ss77-78), whereby the Acts indicate that children with psychiatric disorders, who are found to be in conflict with the law, must be considered in light of their circumstances and disabilities. The aspects relating to the child's circumstances and disabilities include the influence of the environmental, social, emotional, cognitive, mental and psychological factors respectively. In this light, the presumption of criminal capacity must be challenged, based on the influence of circumstantial and disabling factors, and the child ought to be referred for appropriate treatment that addresses his/her special needs. The efforts of the social control agencies, such as the justice system, can address the problems identified in

life course and labelling theories, particularly in respect to secondary deviance, by rehabilitation and/or diversion and effective reintegration for young offenders (Mathabathe, 2015:21).

3.6 CONCLUSION

The psychiatric disorders (ADHD, ASD, ODD and CD) outlined in this chapter reflected the disorders that literature indicated as being most prevalent in children in conflict with the law, and therefore serve as point of departure for this study. The symptoms for a clinical diagnosis, characteristics and functional consequences that are emergent in ADHD, ASD, ODD and CD in relation to delinquency, were outlined in this chapter. All four psychiatric disorders were found to have negative consequences on a child's behaviour and more so, criminality for children. According to research referenced above, ADHD and CD predominantly influence and contribute to misconduct for child offenders, in comparison to ODD and ASD. In addition, this chapter furnished the importance of assessing children with psychiatric disorders, the challenges in criminal capacity assessments and the application of a criminological theory on the topic of children with psychiatric disorders who are in conflict with the law.

The ICAP developmental life course theory provided a criminological perspective on the potential to commit anti-social acts, such as delinquent and criminal behaviour, due to the impaired cognitive development of a child. Although many developmental life course theories such as the ICAP theory identify impulsive, defiant and anti-social characteristics which are symptomatic of ADHD, ODD and CD, (and similarly manifested in children with a potential for anti-social behaviour), they do not directly link the influence of psychiatric disorders to criminal behaviour. It is, therefore, vital to challenge and investigate the criminal capacity of a child offender with a psychiatric disorder, with cognisance of criminological theories.

The topical issue of criminal capacity for child offenders with psychiatric disorders is still controversial. Although attention has been drawn to the subject, this topic remains unexplored with very little development concerning child offenders with psychiatric disorders. This study aims to contribute to and fill the gap in research

conducted on this social challenge by exploring if psychiatric disorders influence the criminal capacity of children in conflict with the law. In addition, the study questions the current methods used to deal with child offenders with psychiatric disorders; thereby outlining current challenges and documenting the recommendations, made by the experts who deal with this vulnerable group, for improving on the methods used in criminal capacity assessments.

CHAPTER 4

PRESENTATION OF THE RESEARCH FINDINGS

“In serving the best interest of children, we serve the best interest of all humanity” (Bellamy, 2011).

4.1 INTRODUCTION

Findings from the literature review recognised the special needs of child offenders with psychiatric disorders and also identified the lack of attention that is given to the special needs of this group. Psychiatric disorders have been found to affect the cognitive and conative development of a child, thereby acting as a risk factor for criminal behaviour and a factor that could influence the criminal capacity of a child who is in conflict with the law. With cognisance of the legislative framework used to determine the criminal capacity of a child with a psychiatric disorder, the aim of the present study was to explore the associated risks and influences of psychiatric disorders on the criminal capacity of child offenders.

This chapter offers an analysis and presentation of the research findings which explored if psychiatric disorders influence the criminal behaviour and criminal capacity of children in conflict with the law. In addition, this chapter will reflect and discuss the findings of the interviewed experts' perspective on good practice and improvement to the procedures followed to determine the criminal capacity of child offenders who suffer from psychiatric disorders.

4.2 PRESENTATION OF THE FINDINGS

As identified in chapter 1, a qualitative approach was followed in the study and data were collected by making use of individual, telephonic and face-to-face interviews. Interviews were conducted with experts in the field of child justice and mental health, namely psychologists, psychiatrists, social workers, a criminologist, an advocate and academics.

The presentation of the research findings was divided into four sections. Section 1 focused on the demographic information of the research participants and included the participants' profession and professional experience of working in the field of child justice and criminal capacity. This information is of importance because it confirms the expertise of the participants and therefore also gives credibility to the study. As mentioned, participants were given a choice to remain anonymous or to waive their rights to anonymity. The identities of the participants who waived their right to anonymity were included in the presentation of findings. Section 2 presents the participants' perception about the influence of psychiatric disorders on the criminal behaviour and criminal capacity of a child offender.

Section 3 explores the methods used to determine criminal capacity for child offenders with psychiatric disorders, and questions if adequate recognition is given to the influence of psychiatric disorders during the criminal capacity assessments. In addition, section 3 also explores the nature and extent of services available to children with psychiatric disorders who are in conflict with the law. In light of exploring the aforementioned issues, section 4 presents recommendations from the experts, derived from the challenges experienced in the criminal capacity assessment of children with psychiatric disorders. Proposed improvements for criminal capacity assessment procedures for these children are also included in this section. The participants' responses are presented in narrated, verbatim quotes (referenced by interview number), as well as in a discussion to capture the essence and meaning of the experts' views and opinions.

4.2.1 Section 1: Biographical data of experts

The content of table 1.1, in chapter 1, reflects the profession and years of experience of the experts who participated in this study. As mentioned, the experts who participated in this study will be referred to as 'interview' and 'participant' interchangeably in the contents of this chapter. The experts with whom interviews were conducted include two psychiatrists (participants 1 and 11) from the Western Cape, who have 10 to 20 years of experience in working with children with psychiatric disorders and in conducting criminal capacity assessments. Also included in the study are three psychologists (participants 3, 4 and 8) from three different

provinces in South Africa, namely, Western Cape, KwaZulu-Natal and the Eastern Cape, respectively. These experts have three to 30 years of experience in the field of child justice and five to 30 years of experience in working with children with psychiatric disorders.

Participant 6: Professor A Skelton, who is a professor of law and the Director of the Child Law Centre at the University of Pretoria, also participated in the study. Professor A Skelton has approximately 25 years of experience in criminal capacity issues and 10 years of experience working with child offenders with psychiatric disorders.

Participant 10: This participant is an advocate from Pretoria, who has eight years of experience in working with the criminal capacity of children in conflict with the law and who specialised for five years in working with child offenders with psychiatric disorders.

Participant 7: Ms M Human, who is a criminologist, is presently completing her PhD in criminology and security sciences. Ms M Human has three years of combined experience of working with child justice issues and children with psychiatric disorders.

Participant 12: This participant is a professor of law, from Pretoria, who has six years of combined academic experience in child law, criminal capacity issues and children with psychiatric disorders.

Participants 2, 5 and 9: These three social workers are from KwaZulu-Natal and the Western Cape respectively, and they have seven to 25 years of experience in criminal capacity issues and seven to 16 years of experience in working with children with psychiatric disorders. Of the three social workers, Ms A Smith (participant 5) is a programme design and development manager at NICRO Western Cape.

4.2.2 Section 2: An exploration on the influence of psychiatric disorders on criminality and criminal capacity of children in conflict with the law

The findings in this section speak to objectives 1 and 2 of the study. These objectives aimed to establish if psychiatric disorders are a risk factor associated with the causation of criminal behaviour. The influence of psychiatric disorders on the criminal capacity of children in conflict with the law was furthermore explored.

4.2.2.1 *The prevalence and risks associated with psychiatric disorders as a predisposition to criminal behaviour in child offenders*

In summary, responding to the question: “Do you think that psychiatric disorders are a risk factor that can contribute to criminal behaviour in children?” the majority of participants were of the opinion that a large number of children who come into conflict with the law, display symptoms that are associated with one or another psychiatric disorder. The participants concurred that psychiatric disorders negatively influence the behaviour of children in conflict with the law, resulting in them having an inability or impaired ability to practise self-control.

“When children are not conforming, for whatever reason, one of those reasons could be because of learning disabilities or psychological difficulties or psychiatric disorders. When they are not conforming, they tend to become part of an excluded sub-group...and once they are part of that excluded sub-group then criminal infringements may serve certain purposes” (Professor A Skelton: Interview 6).

“Absolutely, without a doubt!...If you’ve got ADHD you’ve got impulsivity...it’s a function of the executive functioning [of the brain] so if you’re compromised in that regard, you are more than likely to do something reactive” (Interview 3).

“...these kids [with psychiatric disorders] don’t have the capacity on a broad scale, its intellectual, its social, its moral reasoning” (Interview 3).

“CD, yes then it is a risk factor...ID [Intellectual Disability] can also be a risk factor” (Interview 8).

“Yes...definitely ADHD because of the risk taking behaviour and not seeing...the consequences of the actions” (Ms A Smith: Interview 5).

“Most of the Conduct Disorders and as well as some of the autism spectrum disorders [are considered as a risk factor that contributes to criminality and influences the criminal capacity of child offenders]” (Ms M Human: Interview 7).

Participant 12 acknowledged the influence a psychiatric disorder can have on the criminal capacity of a child, but added that the impact of a psychiatric disorder on the child’s predisposition to criminal behaviour and its influence on the criminal capacity of the child, are dependent on the child’s age.

“I think you need to look at it according to the age categories; the younger the child, the greater the exposure to psychiatric risk disorders and more of a propensity towards crime” (Interview 12).

In addition to acknowledging psychiatric disorders as a risk factor associated with delinquency, participants also recognised the influence of societal risk factors in the following opinions:

“The other thing is that by far I would say, almost 100% of our referrals come from poor socio economic backgrounds...where there is a lot of violence in the communities...they often come from broken families [and] a lot of violence at home. So they come from a particular context which...is quite unsupervised, it doesn’t necessarily model appropriate behaviour and how it is very stressful on the child” (Interview 8).

“Environmental circumstances impact a lot [on the child’s predisposition to criminal behaviour]” (Interview 8).

“There are many children...who have high exposure to recurrent trauma, they come in from socio-economically disadvantaged communities and very often there is a high instance of domestic violence, substance abuse and gang activity” (Interview 3).

Participants 3, 8 and 9 emphasised that societal and environmental factors are prominent aspects which influence the development of anti-social and criminal behaviour in children. These factors were also found to contribute to depression and disruptive behavioural episodes, which are commonly found in children with ODD and CD. In light of these influential factors, all three participants (3, 8 and 9) indicated that the psychiatric disorders should, therefore, not be the only factor that is taken into consideration when assessing child offenders with psychiatric disorders. Participant 9 also added that the influence of psychiatric disorders, in conjunction with external factors, increases the child's vulnerability to be manipulated and coerced into criminal behaviour.

“Yes it does [psychiatric disorders are a risk factor associated with criminal behaviour] ...but I think it's more because there are external factors or people that influence these children or use them in order to carry out their behaviour” (Interview 9).

Participant 2 highlighted potential dangers that could arise if psychiatric disorders are not identified or are incorrectly diagnosed.

“...because the disorder is sometimes not correctly diagnosed, because the children are not dealt with appropriately, the psychiatric disorders will definitely...contribute to their criminal behaviour” (Interview 2).

“...if correctly diagnosed, what would have been dealt with in a different way or manner in terms of the professionals, the educators, the parents, the social workers, the health professions...what would have been dealt with, with a little more sensitivity is now clumped together as a learning challenge and dealt with as such. It [psychiatric disorders] doesn't get dealt with appropriately” (Interview 2).

In light of the aforementioned opinions, participant 2 elaborated on the societal circumstances, such as substance abuse and toxic psychosis found in child offenders. Toxic psychosis is induced by and is as a result of the poisonous effects of chemicals or drug substances (DSM-5, 2013:110-112). Research and participant feedback indicates that toxic psychosis contributes to criminal behaviour and influences the criminal capacity of children in conflict with the law (Jules-Macquet, 2015:20-21). Participant 2 indicated that, in her experience, children who abuse illegal substances from an early age, as well as children who have parents who abuse illegal substances, were found to be predisposed to develop psychiatric disorders. Due to the influence of the psychiatric disorders, these children exhibit increased levels of impulsivity, frustration and emotional dysregulation, which are often ensuing impaired abilities to express themselves and/or communicate. Impairments in the cognitive and social functioning of the child may result in a dislike for school, an increased involvement with delinquent groups and frequent conflict with figures of authority.

Participant 11, who explained that the interaction between the genetic constitution of the child and the environment are factors associated with the causation of criminal behaviour, also supported the aforementioned opinions.

"I don't think children are being born criminals, they are born innocent"
(Interview 11).

In this light, participant 11 identified triggers and risk factors in the environment, such as stress hormones from the mother (due to a lack of support during early and/or teenage pregnancies) which penetrate through the placenta and negatively impact on the development of the child before he or she is born. Here, it was indicated that environmental factors can also include early separation from the mother, maternal depression and/or psychiatric disorders, imprisoned parents, violence in the home, substance abuse and neglect. These factors were identified to predispose children to develop attachment or detachment issues, mood and personality disorders. In the context of the study, attachment and/or detachment issues are caused by stress or

exposure to trauma that negatively influences the connection, or a lack thereof, between a child and the primary caregiver. This affects the ability for emotional expression, relationship building and the overall development of the child (DSM-5, 2013:265-267). The impact of the aforementioned environmental risk factors found to predispose children to develop impaired inter-personal relationships or broken social bonds, is also recognised in the ICAP theory, as discussed in chapter 3. According to participant feedback and the theoretical framework, these factors also contribute to impaired cognitive childhood development and subsequently criminal behaviour.

In conclusion, participant 11 reflected that children need a structured family unit and a stable mother, especially in the first two years of his/her life. Disruptive, disorganised environments compel children to develop anti-social behaviour in order to cope with the stressors, which may cause the development of psychiatric disorders due to the joint effect of the genetic constitution and the environment.

Participant 3 commented that the reactive behaviour of children with ADHD is affected and subsequently these children experience a failure in their executive functioning due to the increased levels of impulsivity. Reactive behaviour refers to behaviour that is in response to a situation or stimuli in the environment, linked to emotional dysregulation and impulsivity (Latham, 2008:1). Executive functioning refers to the ability for planning, mental flexibility, memory, inhibition and attention (Berlin, 2003:15). In the context of the study, a failure in executive functioning would be described as an impaired ability or the inability for planning, mental flexibility, memory, inhibition and attention. Children who suffer from heightened impulsivity struggle to make informed decisions and practise self-control. As a result, impulsiveness may trigger or act as a stimulus that could result in conflict with figures of authority.

It was interesting to note that two of the participants, namely participants 4 and 5, did not fully agree with the opinion that psychiatric disorders predisposed children to criminal behaviour and influenced the criminal capacity of children in conflict with the law.

“I don’t think that one can say that they [psychiatric disorders] contribute in any significant way to criminal behaviour” (Interview 4).

“It’s rather the child’s developmental level” (Interview 4).

Participant 4 was of the opinion that it is not accurate to say that the majority of children in conflict with law present with a form of psychiatric disorder. However, the exception is CD, because the characteristics of this disorder increase aggression and defiance, which, according to participant 4, have been diagnosed in a few cases. These factors predispose CD children to coming into conflict with the law. According to participant 4, the more prevalent factor influencing criminal behaviour, which could influence the criminal capacity of a child, is the child’s psychological functioning and the level of cognitive and conative impairment influencing impulse control. The primary factors that should, therefore, be considered during the assessment of a child’s criminal capacity are the psychological and developmental influences and the level of impairment.

“The purpose of the examination is not to look for psychiatric disorders; rather we are looking at the child’s development. It’s a whole different issue and that is the difference between psychiatry and psychology. So really, we’re not looking for psychiatric disorders; we are looking for psychological development” (Interview 4).

This view, expressed by participant 4, is in accord with section 11 of the Child Justice Act, where the determination of criminal capacity assesses the five developmental domains, namely the cognitive, moral, emotional, psychological and social development. Each of the five developmental domains should assess the child’s ability to distinguish between right and wrong and to act in cognisance with that understanding.

Even though Ms A Smith (participant 5) acknowledged psychiatric disorders as a risk factor that contributes to criminal behaviour, she also supported the aforementioned opinions, namely, that psychiatric disorders should not be the only factor to consider when determining the criminal capacity of a child who is in conflict with the law

“I have not noted necessarily disorders that would at that point in time [that] one would be able to diagnose and say that this is a disorder. I definitely picked up on early onset of certain types [of psychiatric disorders]” (Ms A Smith: Interview 5).

“[It is] more the circumstances surrounding the child...The social influences, the support that is lacking...it [the aforementioned factors] more acts as the risk factors...that make the children more susceptible to develop these types of things [psychiatric disorders and criminal behaviour]” (Ms A Smith: Interview 5).

According to Ms A Smith (participant 5) the influence of psychiatric disorders, the psychological development (or a lack thereof) and the environmental issues such as a lack of parental supervision, child maltreatment, insecurity, inappropriate social behaviour and a lack of social bonds, increase the child's risk of beginning and continuing on a criminal pathway. Ms A Smith's (participant 5) opinion, therefore, supports that in addition to the influence of psychiatric disorders, other aspects that influence criminal behaviour and criminal capacity for children, as mentioned above, also need to be taken into consideration.

The findings from this section concur with the findings from the literature indicating that psychiatric disorders increase the risk of criminality and predispose children to criminal behaviour. Participants were of the opinion that, in conjunction with the influence of psychiatric disorders, various environmental factors also increase the risk of criminal involvement for children. Lastly, participants provided alternate opinions to consider when determining criminal capacity. In this respect it was identified that the child's psychological functioning and the level of impairment of a child's impulse control were additional factors to consider in the assessment of the criminal capacity of a child with a psychiatric disorder.

4.2.2.2 *The influence of psychiatric disorders on criminality and criminal capacity for children in conflict with the law*

In this section, participants were asked to comment on the influence that psychiatric disorders have on the criminal capacity of children in conflict with the law. The predominant theme that emerged in the exploration of the influence psychiatric disorders have on children is that different psychiatric disorders will affect the child's predisposition to criminality and criminal capacity to different degrees. Participants also identified the various factors to consider in the assessment of the criminal capacity of children with psychiatric disorders.

"ID, it impacts because it makes children more vulnerable to being exploited. It makes them more prone to get caught, and it makes them delayed in their appreciation of societal norms...There is very good evidence that low verbal skills make impulse control difficult to learn...It both increases their chance of behaving in an anti-social way and also their chance of being caught while behaving in an anti-social way" (Interview 1).

"A holistic view of taking in consideration... [the] other factors...that will influence [the child's predisposition to criminality and influence criminal capacity]. Because...there will be a degree of a disorder and one might have a milder degree of a certain disorder, which in conjunction with other risk factors will definitely play a big role [in the child's ability to appreciate the wrongfulness of their behaviour and to act in accordance]" (Ms M Human: Interview 7).

"We all know that you can have ADHD and maybe still have criminal capacity. It depends on how extreme your ADHD is...there are plenty of people who have ADHD and live normal lives..." (Professor A Skelton: Interview 6).

“...if they are below the age of 14, then I think that any of these disorders [ADHD, ASD, ODD and CD] would be very significant in deciding if they have criminal capacity and what should lead in favour of them to lack it...”
(Professor A Skelton: Interview 6).

“...If they are 14 and above, I would say that these things [psychiatric disorders] still ought to be factored in. In other words, it should be understood that these type of things [psychiatric disorders] influence the child’s predisposition to criminality and on his or her criminal capacity]. I have had this experience with CD children... [It is] because of their lack of impulse control that they satisfy the second leg of any criminal capacity inquiry [the inability to act in accordance with the appreciation of their criminal conduct] ...” (Professor A Skelton: Interview 6).

“...the psychiatric disorders that I come across most frequently, at least from the kind of psychiatric perspective, doesn’t really have all that much impact on the criminal capacity inquiries [for children in conflict with the law]” (Interview 10).

A professor of law (participant 12) concurred that psychiatric disorders, such as ADHD, can contribute to less serious crimes, whilst psychiatric disorders, such as untreated ASD, ODD and CD can contribute to more serious criminal behaviour.

“More petty crimes, your lesser crimes, I think that ADHD does play a role there” (Interview 12).

“Untreated [ASD] has a good contribution to your more serious offences...”
(Interview 12).

“Your serious offences [ODD and CD has] ...a definite contribution!”
(Interview 12).

Participant 1 identified that acute psychiatric disorders, such as schizophrenia, may predispose children to criminal behaviour and influence their criminal capacity.

“For instance, schizophrenia may predispose the child to being on the wrong side of the law if he is reacting to psychotic phenomena, like auditory hallucinations...But that’s very...rare. In fact most of the evidence is that people with schizophrenia are not more violent than the average person, in fact they may be less violent” (Interview 1).

The DSM-5 (2013:122) describes schizophrenia disorder as “clinically significant distress or impairment in social, occupational, or other important areas of functioning”. Schizophrenia disorder is manifested by incoherent or illogical thoughts, abnormal behaviour and speech, auditory hallucinations and delusions, such as hearing voices (Anon 2016c:1). According to Hodgins (2008:2505) schizophrenia disorder manifests in early childhood, however symptoms of anti-social behaviour only emerge in late adolescence. Adolescents, as well as adults, who suffer from this disorder and who were criminally involved, were found to exhibit violent behaviour due to substance abuse (Hodgins, 2008:2509).

In response to the influence of psychiatric disorders on criminal capacity, participants were of the opinion that the focus of a criminal capacity assessment should not be on the psychiatric disorder but rather if the disorder and associated symptoms have an impact on the child’s criminal capacity. In this regard, section 11 of the Child Justice Act refers to the ability to appreciate the wrongfulness of an act, namely the cognitive component, and the ability to act in accordance with that appreciation, namely the conative component, as discussed in chapter 2.

“...the psychiatric conditions, that I pick up most frequently, have very little impact on the assessment itself and...the child’s ability to distinguish between right and wrong [and to act in accordance] ”(Interview 10).

“Whether or not one has a mental disorder, does not mean, necessarily, that disorder had affected the individual’s capacity or lack of capacity. It is more the issue about the child or individual’s reasoning behind the behaviour. The court looks at two factors...and that is the same with the

Child Justice Act and the same with adults...That is the ability to distinguish between right and wrong at the time of the offence...referred to as the cognitive component. In addition to that there must also be the ability to act in accordance with that understanding. In other words, the child must know this cognitively but must also be able to act accordingly. So we are talking about behavioural control or lack of control” (Interview 4).

“There isn’t necessarily a distinct, clear relationship between a particular mental disorder like ADHD for example and having criminal capacity. Of course if you’re looking at CD children with severe CD they will tend to have a greater likelihood to commit and behave in a way that is contrary to the law” (Interview 4).

“...can you really say that it [ODD and CD] makes the child incapable of facing trial?” (Interview 12).

“Of the assessments I have done, we have obviously had all these children formally assessed and looking at their cognitive development...or other areas of development, particularly moral [development]” (Ms A Smith: Interview 5).

“Some of the children have been...diagnosed with your cognitive delay...when they do the general IQ and cognitive functioning” (Ms A Smith: Interview 5).

“...all these children [child offenders with psychiatric disorders] had one thing in common, they did not fully understand their behaviour” (Interview 9).

“If they have developmental delays...that would cause their mental age to be lower than their chronological age...It’s obvious that they should be treated as children that are below the age of criminal capacity...So let’s say we might expect that an average 14 year old has criminal

capacity...but if you have a 14 year old who's functioning on the capacity of an 8 year old...then I would say that child clearly lacks criminal capacity" (Professor A Skelton: Interview 6).

"The second leg of criminal capacity comes into play, which is whether they are able to act in accordance with the knowledge of right and wrong. So then, they understand the difference between right and wrong but if their impulse controls are very poor, as a result of their psychiatric disorder, then they won't be able to act in accordance with that knowledge...So to me they would still be looking at it from the two legs of the legal inquiry" [namely, the ability to appreciate the wrongfulness of the act and the ability to act in accordance in that understanding]" (Professor A Skelton: Interview 6).

According to the views expressed by the participants, children with psychiatric disorders are viewed as individuals who do not fully understand or appreciate their actions and therefore should not be held criminally liable for their misconduct. Mental health disorders cause cognitive delays, which are reflected as immature development and behaviour. Based on the responses from the participants, a failure in executive functioning, failure to control impulses and reaction-based offences are considered as a few of the most predominant risk factors that predispose children with psychiatric disorders to come into conflict with the law.

In light of the influence of psychiatric disorders, such as ASD, on the criminal capacity of child offenders, a psychiatrist (participant 1) was of the following opinion:

"...children who grow up with ASD...are very, very particular about the rules. So if someone teaches them the rules...then they are very sticky around the rules and everyone has got to stick to them, and they can get very angry if somebody breaks the rules, especially if they get away it...So in a sense they might be predisposed to be in conflict with the law because they don't understand... social rules" (Interview 1).

Based on this opinion, participant 1 added that although children with ASD do not intentionally inflict pain on others, these children could be predisposed to crime, as they lack emotional and social awareness. In light of this opinion, participant 1 provided the following example of a child offender with ASD, who suffocated a school peer, by putting a packet over the boy's head.

"...the boy [school peer] had not understood what it's like for fish in the sea, when they lose oxygen and there's pollution...He [child with ASD] was just trying to show him [school peer] what it was like...to be a fish in the sea and not be able to breathe...He [child with ASD] hadn't actually intended to hurt anybody; he was just very, very keen that the fish were understood. That kind of misunderstanding of social cues and situations is what might lead ASD children into trouble" (Interview 1).

As discussed in chapter 3, children with ASD do not always interpret information as others would in the same situation. In the example provided by participant 1, the ASD child did not intend to hurt his school peer by suffocating him. Yet, in an attempt to communicate, the ASD child demonstrated how fish felt when removed from water or lived in polluted water, by placing a plastic packet over the head of another child. Due to the impaired ability to communicate, understand social behaviour and emotional awareness of others, the ASD child unintentionally suffocated his school peer, without realising the extent or severity of his actions.

Findings from the section indicated that different psychiatric disorders would affect the child's predisposition to criminality and criminal capacity to varying degrees. As discussed in chapter 2 of the study, based on section 11 of the Child Justice Act, the determination of criminal capacity is dependent on the child's ability to appreciate the wrongfulness of his/her actions and to act in cognisance with that understanding. The five developmental domains for evaluating the criminal capacity of a child include the cognitive, moral, emotional, psychological and social development (Child Justice Act, S11 (ss3)). Based on literature discussed in chapter 3 and the opinion of the majority of participants, the impact of psychiatric disorders may very well influence the child's psychological development and contribute to criminal behaviour.

In the study, many of the psychiatric disorders that are prevalent in child offenders were recognised as increasing the risk of vulnerability to criminality.

The opinions of the participants concurred with the literature findings, which confirmed the prevalence of psychiatric disorders in child offenders and the influence of a psychiatric disorder on the child, which creates a predisposition to delinquency and coming into conflict with the law (Coker et al, 2014:888-889; Murphey et al, 2013:4; Swanepoel, 2015:3238). The opinions of the participants, indicating that children with psychiatric disorders may be cognitively impaired and unable to appreciate their actions – or may have the ability to understand their actions but lack self-control, were also highlighted in chapter 3. This psychiatric impairment or disability would influence the child's criminal capacity on both legs of the legislative framework found in section 11 of the Child Justice Act, namely, the ability to appreciate the wrongfulness of the act and the ability to act in accordance with that understanding. It can, therefore, be concluded that the determination of criminal capacity ought to consider the impact of psychiatric disorders on the child's cognitive and conative ability, namely, the ability to appreciate or understand behaviour and furthermore act in accordance with that appreciation.

4.2.2.3 *The most prevalent psychiatric disorders found in children in conflict with the law*

When asked: "In your expert opinion, which psychiatric disorders are most prevalent in children who are in conflict with the law?" the majority of participants were of the opinion that ADHD, learning disabilities (LD), intellectual disability disorder (IDD), behavioural disorders such as ODD and CD, and mood/anxiety disorders were the most prevalent in child offenders. However, contrary to literature discussed in chapter 3, all of the participants indicated that from their experience, the prevalence of ASD in child offenders was minimal. This will be reflected on in more detail in the contents of this section.

"We see quite a lot of children [in conflict with the law] with ADHD..."
(Interview 3).

“An obvious one is CD; because of the fact that it has a lot to do with them [children] doing things that would cause them to get into trouble with the criminal justice system” (Professor A Skelton: Interview 6).

“LD, like ADHD...is not diagnosed and if we were to do proper assessments of children in our criminal justice system...you will find that a lot of them have undiagnosed LD” (Professor A Skelton: Interview 6).

“...a lot of them [child offenders] suffer from acute behavioural problems, [such as] CD, ODD” (Interview 10).

“We have picked up that there were a few that had...ODD...most of the others [child offenders] basically had learning problems or...slight mental retardation issues [also referred to as IDD]” (Interview 9).

“I definitely picked up on early onset of certain types of things [psychiatric disorder symptoms]” (Ms A Smith: Interview 5).

“I think definitely...ODD... [and] attention deficit...that one finds a lot where you can see children [behaviour] ...can be questioned” (Ms A Smith: Interview 5).

“Certain [types of] ...mental retardation [also referred to as IDD], where you could pick up that there is certain developmental issues related to that [the child offender’s behaviour] ...such as LD...I would say an inability to very often process information” (Ms A Smith: Interview 5).

According to participants 5 and 9, although IDD has been identified, it is not as prevalent as the other mentioned psychiatric disorders (ADHD, ODD and CD). Ms A Smith (participant 5) is of the opinion that IDD found in child offenders, and the symptoms associated with this disorder, predispose children to develop anti-social behaviour as adults. IDD manifests as intellectual and adaptive functioning deficits in the conceptual, social and practical domains (DSM-5:2013:33). The American

Association of Intellectual Disability and Developmental Disorder (Anon 2013:1) describes IDD as “...significant limitations in both intellectual functioning and in adaptive behaviour, which covers many everyday social and practical skills. This disability originates before the age of 18”. The functional consequences associated with IDD include difficulty in social communication, processing of information, easily distracted, gullibility and difficulty in processing hidden motives (Worcester, 2013:07-09). This disorder predisposes both children and adults to an increased risk of victimisation as well as to be coerced into criminal activity, which is resultant of the gullibility and impaired social skills found in those who suffer from IDD.

In addition to the most prevalent psychiatric disorders that were identified in child offenders, depression and substance-induced bipolar disorders were also identified to emerge in children in conflict with the law.

“...the main factor here is the kind of socio-economic background and obviously that can lead to a whole lot of mental illnesses. Particularly childhood depression...but that is not often picked up as a primary presentation on a child justice assessment” (Interview 8).

“...parents [of child offenders] frequently have some form of psychiatric or psychological challenge, such as depression” (Interview 11).

The American Psychiatric Association (Parekh, 2016b:1) defines depression as a “common and serious illness that negatively affects how you feel, the way you think and how you act”. This disorder is manifested as feelings of sadness, low self-esteem, loss of interest in pleasurable activities, a disturbance in sleeping routine, fatigued, increased impulsivity or restlessness and attention deficit (Parekh, 2016b:1). According to Anderson, Cesur and Tekin (2013:3) negative and depressive emotional experiences were found to not only increase the risk for criminal activity, but also for victimisation in adolescents.

Participants 2 and 8 were of the opinion that bipolar disorder emerged in children due to an early onset of substance abuse/substance abuse disorders.

"...if one looks at the longevity of when sugars [a powder mixed substance of heroine, rat poison and dagga (DoH, 2011:2)] came into our area, it's been like over 20 years and it's now manifesting in the children of those adults" (Interview 2).

According to an article in Africa's Medical Media Digest (2016:1), 'sugars', also referred to as 'whoonga', is an extremely addictive drug that is predominantly sold in areas along the North and South Coast of South Africa.

"Early access to substance abuse...fairly often...it would be dagga, sniffing glue...sometimes alcohol" (Interview 8).

"Almost 100 per cent of our referrals come from poor socio-economic backgrounds...where there is a lot of violence in the community...they often come from broken families...they come from a particular context which...is quite unsupervised, it doesn't necessarily model appropriate behaviour" (Interview 8).

"A lot of these children come from areas where such problems are not necessarily picked up" (Interview 8).

Bipolar disorder is associated with mood swings, which are described as "manic, hypo-manic or depressive" (Parekh, 2016a:1). The DoH (2011:1-4) highlights that substance abuse is the use of mood altering substances which results in a significant impairment in the individual's functioning. The DSM-5 (2013:142) refers to "substance/medication induced bipolar and related disorders" as:

A prominent and persistent disturbance in mood that predominates in the clinical picture and is characterized by elevated, expansive, or irritable mood, with or without depressed mood, or markedly diminished interest or pleasure in all, or almost all, activities.

Children who suffer from substance abuse require long-term supervision and treatment. The symptoms of substance induced bipolar disorder develop soon after the substance intoxicification or after exposure to medication. According to Africa's Medical Media Digest (2016:1) and Burns (2011:102-103), due to environmental circumstances, South African children and adolescents are predisposed to substance abuse and the associated risks include aggressive, defiant and disruptive behaviour, poor school performance and increased criminal activities.

In the present study, the influence of four prevalent psychiatric disorders on criminality and criminal capacity was explored in the literature review. As discussed in chapter 3, ADHD, ASD, ODD and CD are the most prevalent psychiatric disorders found in delinquent children (Classel & Burstein, 2007:2; Koning et al, 2010:1). The opinions of the participants concurred with the literature that ADHD, ODD and CD are the psychiatric disorders that are most prevalent in children. In addition to these disorders, participants identified other psychiatric disorders that were noticed, from their experience, to influence children in conflict with the law. This was depicted in the views of the participants, who outlined that psychiatric disorders such as IDD, LD and bipolar and substance abuse disorders were the predominant psychiatric disorders found to contribute to criminality in children. However, contrary to literature discussed in chapter 3, all of the participants indicated that the prevalence of ASD in child offenders was minimal.

In conclusion, participants reflected that the misdiagnosis or an incorrect diagnosis of a psychiatric disorder can be detrimental to children who are in conflict with the law. This is because the influence of the disorder will not be considered when determining the criminal capacity of the child. In this respect, participants identified that the needs of the child offender will not be addressed in his/her best interest. Moreover, the method of treatment or manner of dealing with such a child will not proceed with the necessary level of sensitivity and care as one would require for a child with a psychiatric disorder.

4.2.2.4 The effect of ADHD, ASD, ODD and CD on child offenders

As mentioned previously, ADHD, ASD, ODD and CD were identified in the literature as the disorders that are most frequently found in children who come into conflict with the law. In light of this, the influence of these disorders was explored in more detail. When probed on the influence of each of these psychiatric disorders, the general findings from participants were similar to the findings in the literature reviews, namely that ADHD, ODD and CD negatively influence children's behaviour and heighten the risk of criminal conduct. As mentioned in the previous discussion, participants indicated that ASD was rarely found in the child offenders they rendered services to. Findings for each of the disorders will be presented below.

- **ADHD**

When asked about the prevalence and influence of ADHD, the majority of participants concurred that the incidence of ADHD was high in children who come into conflict with the law.

"We often pick it [ADHD] up...quite regularly but often it's co-morbid to ID and can contribute to CD as well" (Interview 8).

"ADHD is definitely a big risk factor" (Ms M Human: Interview 7).

"We've seen a few with CD, definitely some with ODD...you also got to look at the aetiology of it...but the most frequent...would be ADHD". (Interview 3).

"ADHD...more than half of them [child offenders with ADHD were assessed]" (Interview 1).

"Very prevalent amongst them [child offenders] is untreated ADHD" (Interview 1).

“I would probably say that...60 per cent of the kids I deal with have ADHD”
(Interview 10).

Participant 10 highlighted that these cases, as reflected above, referred specifically to children 14 years and older, who, as per section 11 of the Child Justice Act, are presumed to have criminal capacity for the crimes committed. When probed on the outcome of these cases, participant 10 was asked if consideration was granted to the influence of ADHD and the increased levels of impulsivity experienced by children suffering from this disorder. In response, participant 10 stated:

“...it goes to...the moral culpability...they often kind of accept that the child has criminal capacity... [based on this] they would lessen the sentence...accordingly due to the fact that the child had ADHD” (Interview 10).

A professor of law (participant 12) highlighted that, based on academic experience, ADHD is considered to be the most prevalent psychiatric disorder found to influence criminal conduct and contribute to petty offences in child offenders. This opinion highlighted the importance of criminal capacity assessments being case specific, especially for child offenders with psychiatric disorders. In respect to the influence of a psychiatric disorder, such as ADHD, on more serious offences, participant 12 was of the following opinion:

“I don’t think that a child who suffers from that disorder [ADHD] will naturally have the tendency to rape and murder” (Interview 12).

Professor A Skelton (participant 6) concurred with the majority opinion and added that children who suffer from ADHD are more likely to act in an anti-social manner due to impaired impulse control.

“All the others [ADHD, ODD, CD], yes they are more likely to commit crime, not because they...have a criminal intent but because the disorders cause them to...the categories [psychiatric disorder categories] that you’re

mentioning [ADHD, ODD and CD] are far more likely to be aggressive, likely to break things” (Professor A Skelton: Interview 6).

In the response, Professor A Skelton (participant 6) elaborated that, whether the reason for anti-social behaviour is an attempt to gain attention, a lack of impulse control or a combination of these reasons, children with ADHD who struggle with the regulation of social behaviour and impulse control are predisposed to criminal involvement.

In contrast to the other participants, participant 4 was of the opinion that the prevalence of ADHD, in child offenders, was not high.

“I’ve seen one or two [cases of child offenders with ADHD] ...a small number of children who have come through with ADHD but again not many” (Interview 4).

“There is no reason to believe that they [children with ADHD] would have a higher propensity to get involved with criminal behaviour” (Interview 4).

The majority of participants, with the exception of one, concurred that ADHD was frequently found in child offenders. The influence of this disorder was found to increase vulnerability and predispose children to come into conflict with the law.

- **ASD**

According to literature reviews discussed in chapter 3, ASD has been found to increase the risk of criminality, victimisation and influence the criminal capacity of children (Bishop, 2008:3; DeAngelis, 2011:1). However, as mentioned, the participants’ opinions on the prevalence of ASD found in child offenders differed from the literature reviews. The majority of participants were of the opinion that there was a low incidence of crime and criminal tendency for children with ASD. However, some participants indicated that due to the characteristics of ASD, such as a deficit in communication skills, impaired understanding of social behaviour and restricted

social-emotional reciprocity, children with ASD might unintentionally commit a crime, be coerced into criminal activity or become a victim of crime.

“...there is no association between the symptoms of ASD and criminal behaviour. ASD symptoms do not include a disregard for others or the law” (Interview 4).

“ASD in itself is not a common disorder...in two years of doing criminal capacity reports...maybe one a year, maybe two in all, with possible as autism spectrum” (Interview 1).

“I haven’t worked with any of them [child offenders with ASD]” (Interview 9).

“I haven’t met all that many children with ASD in the criminal justice system” (Professor A Skelton: Interview 6).

In commenting on impaired social skills and the inability to understand social cues, the researcher identified that those types of behaviours could increase an ASD child’s risk of becoming a victim to crime. In light of this opinion, Professor A Skelton stated:

“...very much so... [impaired social skills and the inability to understand social cues could increase an ASD child’s risk of victimisation]” (Professor A Skelton: Interview 6).

According to participant 2, a possible explanation for the low incidence of child offenders with ASD could be that the symptoms of the disorder are more recognisable. Should a child therefore exhibit characteristics of ASD, he/she will be attended to more appropriately, in comparison to children with other, less acute psychiatric disorders.

Criminologist, Ms M Human (participant 7), social worker, Ms A Smith (participant 5) and a professor of law (participant 12), were of the opinion that depending on the

degree of the disorder and the potential cognitive delay, ASD could impact on criminality in children.

“...there will be a degree of a disorder and one might have a milder degree of a certain disorder, which in conjunction with other risk factors will definitely play a big role [in the child’s ability to appreciate the wrongfulness of their behaviour and to act in accordance]” (Ms M Human: Interview 7).

“I think with the autism spectrum...I think there would definitely [contribute to criminal behaviour] there are cognitive delays that go together with that” (Ms A Smith: Interview 5).

“I would say [ASD] untreated, I think it’s got a good contribution to your more serious offences” (Interview 12).

Participant 11 concurred that the incidence of ASD and its relation to criminal behaviour in children are dependent on the degree of the disorder. Children diagnosed with ASD often experience a co-morbidity of IDD and are therefore unable to understand social cues and behave within the norms of society. These factors could predispose children with ASD to come into conflict with the law.

In support of this opinion, participant 11 explained that ASD children lack culpability. This is because they struggle to identify with the norms of societal behaviour, verbalise their experiences and due to memory difficulties or communication impairment, and are unable to testify in court, should the need arise. In light of this opinion, participant 11 provided the following explanation:

“...they [children with ASD] do not understand that it is wrong to show your privates in public so maybe they get a pleasurable sensation from touching themselves or they masturbate in public...It’s that they have poor insight and judgement, so that child [with ASD] is not criminally liable” (Interview 11).

Professor A Skelton (participant 6) agreed with the majority of participants that there is a low incidence of child offenders with ASD. In this respect, Professor A Skelton (participant 6) agreed that symptoms experienced by children with ASD, such as the impaired ability to read social cues and practise socially acceptable behaviour, also increase the risk to become a victim of crime.

In support of the increased risk to victimisation, Professor A Skelton (participant 6) mentioned a case of a child with ASD that she was at that stage working with. According to Professor A Skelton (participant 6), even though the child was not in conflict with the law, she posed a risk to herself to be victimised and coming into conflict with the law due to socially unacceptable behaviour. Examples of the child's behaviour included not paying attention to personal hygiene or allowing other people to assist her with her general hygiene. In addition, the ASD child often removed her clothes and urinated in public, despite the fact that she had full bladder control. According to Professor A Skelton (participant 6), a child who displays such symptoms poses an increased threat to herself because she does not understand social cues and the risks involved with behaviours such as undressing in public.

All of the participants indicated that the prevalence of ASD in child offenders was low. Some participants were of the opinion that, although the prevalence of ASD in child offenders was low, children with this disorder were found to have an increased risk of being criminally victimised or coming into conflict with the law.

- **ODD and CD**

In addition to ADHD, ODD and CD also emerged as the predominant psychiatric disorders found in child offenders. ODD and CD were also identified as the psychiatric disorders that have the most significant influence on criminality and criminal capacity.

“I have quite frequently seen children with CD coming up in the criminal justice system” (Professor A Skelton: Interview 6).

“Most of the CDs...do play a role, some more and some of the lesser degrees” (Ms M Human: Interview 7).

“It [CD] is one of my more focal areas, I quite often [deal] with children with CD...in both the criminal justice system as well as the care systems” (Interview 10).

“I would probably say that 70 per cent of the children that I deal with... [have ODD and CD]” (Interview 10).

“ODD and CD go without saying...but I’m not entirely sure that those are real disorders” (Interview 1).

Participant 2 concurred with the majority of the participants and added to the opinions by raising a concern regarding the treatment of child offenders with ODD and CD.

“A lot of the CD [and] the defiant [ODD] get clumped in with ADD and ADHD and the children are then treated with Ritalin and whatever drugs...instead of the correct medication...which actually worsens it [the influence of the disorder] and criminalises them more because out of frustration they act out and they create more problems” (Interview 2).

As discussed in chapter 3 of the study, it is natural for children to test boundaries in order to learn the rules and limits by which they need to abide (Delmage, 2013:105-106). However, children with psychiatric disorders may test these boundaries on a more defiant and aggressive level (Grisso, 2008:146). In this regard, participant 11 was of the opinion that children with psychiatric disorders, as well as those without disorders, could exhibit challenging and what is labelled as ‘naughty behaviour’, as a means of testing the boundaries. According to participant 11, issues regarding defiant behaviour could emerge when the boundaries are tested and there is a lack of rules, structure, parental intervention and a care system in place to guide appropriate behaviour. The result of this is that the defiant behaviour exhibited by the

child becomes a behavioural pattern and subsequently a behavioural disorder. Another point that was raised by participant 11 was that children with CD are ostracised and usually experience neglect, child maltreatment and an unstable home environment, which contribute to a career of defiance and criminal conduct. In lieu of this opinion, the participant 11 stated:

“...it is very easy to say somebody is a criminal. Conduct behaviour disorder or having a CD is not the same as a child has got that behaviour [criminal behaviour]” (Interview 11).

Although the majority of participants were in support of ODD and CD contributing to criminal behaviour and influencing criminal capacity, some participants dictated alternate opinions.

“The impulse issue...for me it goes back to the actual physical development of the child...of the brain. Any child up to a certain age...we know developmental...frontal lobe development and the actual biology only happens complete by the age of 25/26...So for me if the child cannot sit still, cannot concentrate, if the child is bored...there’s an actual cognitive issue; like impairment” (Ms A Smith: Interview 5).

“Our law presumes them [children below the age of 14] to lack criminal capacity...If they are below the age of 14, I think that any of these disorders [ADHD, ODD and CD] would be very significant in deciding if they have criminal capacity and what should lead in favour of them being found to lack it [criminal capacity]” (Professor A Skelton: Interview 6).

According to the opinions raised by Ms A Smith (participant 5) and Professor A Skelton (participant 6), it is clear that the determination of a child’s criminal capacity should be more concerned with impulse control issues and cognitive development. Both the participants (Ms A Smith: participant 5 & Professor A Skelton: participant 6) reflected that although ODD and CD are prevalent in child offenders, it is more important to consider the level of cognitive development and the influence that the psychiatric disorder has on the child’s development. Based on these opinions, Ms A

Smith (participant 5) touched on the aspect of physical brain development, in respect to the present legislation in the Child Justice Act (S10 & 11) that functions on the presumption that children between the age of 10 and 14, who have “normal levels of maturity”, lack criminal capacity (*doli incapax*). The presumption of *doli incapax* is applied, unless the state can prove beyond reasonable doubt that the child possesses above average levels of maturity, in other words deemed to be more mature than his or her peers with regard to having the capacity to differentiate between right and wrong and to act in accordance with this understanding.

In addition to the opinions on cognition and brain development, Professor A Skelton (participant 6) was of the opinion that children below the age of 14 are more significantly affected by impaired cognitive development due to the levels of immaturity, in comparison to children above the age of 14. With the identification of age, brain maturity and the presumption of criminal capacity, as per section 11 of the Child Justice Act, it can therefore be assumed that children that exhibit ‘normal’ levels of maturity struggle to comprehend the impact of their actions. This challenge, to appreciate the impact of behaviour, is further exacerbated for children with psychiatric disorders, such as ODD and CD. The lack of attention, tendency to get easily bored and under-developed cognitive functioning can further impair the child’s ability to distinguish between right and wrong and subsequently practise self-control.

When asked about the prevalence and influence of ODD and CD on the predisposition to criminal behaviour, participant 1 supported the opinion that both these disorders are prevalent in children who come in conflict with the law, as indicated by the majority of participants. In addition to recognising the influence ODD and CD can have on the behaviour and criminal capacity of child offenders, participant 1 questioned if both these disorders should be viewed as a psychiatric disorder that needed treatment.

“ODD is just a description...it’s simply a description of the child’s responses to the environment” (Interview 1).

“CD is also just a description, it’s not something that’s wrong with the child, it’s something that the child is doing” (Interview 1).

The comments made by participant 1 imply that a child with ODD and/or CD displays anti-social behaviour but no clinical psychosis. It is, therefore, the behaviour associated with the disorders that is problematic. This opinion is similar to the views expressed on ASD, namely that the symptoms of the disorder place children at risk, rather than the disorder itself.

In conclusion, the predominant themes identified in the findings from section 2 highlighted ODD and CD as the most prevalent psychiatric disorders found to emerge in child offenders. These disorders were also identified as having the most significant influence on criminal behaviour and criminal capacity of children.

Findings from this section that explored the prevalence of ADHD, ODD and CD in child offenders, concur with the literature findings as discussed in chapter 3, namely that there is a high incidence of ODD and CD found in child offenders. The symptoms associated with these disorders predispose children to criminality. In addition, participants concurred that the influence of ODD and CD was found to cognitively impair children, thereby impacting on their ability to practise self-control. Findings from this section emphasise the importance of recognising the influence of the psychiatric disorders as predisposing factors that contribute to criminal behaviour. Thus, a concerted effort should be made to advocate for the inclusion of psychiatric disorders in the assessment, as determined in section 11 of the Child Justice Act and section 77-78 of the Criminal Procedure Act.

4.2.3 Section 3: Methods used to determine criminal capacity for child offenders with psychiatric disorders

In section 3 findings associated with objective 5 of the study will be explored, namely the current methods used to determine criminal capacity and whether these methods grant adequate recognition to psychiatric disorders as a factor that could influence the criminal capacity of children in conflict with the law. The aim of this objective was to establish if participants were aware of the influence of psychiatric disorders and the importance of granting consideration to the risks associated with these disorders.

4.2.3.1 Procedures used to assess the criminal capacity of children with psychiatric disorders

As mentioned in chapter 2, the Child Justice Act (S11) and the Criminal Procedure Act (S77-79) dictate that the process of determining the criminal capacity of a child offender with a psychiatric disorder requires that a suitably qualified professional, who is registered under the Health Professions Act 56 of 1974, conduct a detailed assessment. Section 11(ss3) of the Child Justice Act prescribes that criminal capacity assessment should evaluate the cognitive, moral, emotional, psychological and social development of the child, while the psychiatric assessment of criminal capacity, in addition to the aforementioned factors, will provide a thorough investigation of the child's mental health and psychological development, as per section 79 (1A) of the Criminal Procedure Act.

Police officials are the first line of contact in the justice system for children who are accused of committing a crime. Concerns were raised by participant 2 regarding the lack of expertise, professionalism and sensitivity from police officials when dealing with children in conflict with the law, and more so child offenders with psychiatric disorders.

“One must also take cognisance of the fact that policemen are the first person these people [child offenders] are interacting with. They are professionals in their own rights... [but] they are not entirely equipped to deal with... [child offenders]. Sometimes these matters [a child entering into the justice system] fall through the cracks because policemen feel that they can just do whatever and get the matter resolved and don't have to go to court... [Sometimes] they don't even refer the matter [to the probation officer] so we end up not even seeing those children at all”
(Interview 2).

The impact of such actions by police officials negatively affect children in conflict with the law as the proper procedures and services, as mentioned in chapters 2 and 3 of the study, which ought to be provided to children who enter into the justice system, are not provided. Violations highlighted above, pertaining to the rights and services

available to children in conflict with the law, negatively impact on the vulnerability of the child and do not uphold the child's best interest, as stipulated in the Child Justice Act.

When asked about the procedures used to conduct criminal capacity assessments for children who are in conflict with the law, participants 1 and 11 (psychiatrists) and participant 3 (a psychologist), who all undertook criminal capacity assessments, were of the following opinion:

"We do a clinical interview, we get collateral from, preferably, ideally, an involved care taker, so like the primary attachment...who can provide information about pre-incident functioning...We do the mental status first so when we get the account if there is anything that we are concerned might have impacted on the incident we would then ask questions pertaining to that. So we ask about the symptoms...appetite, sleep...mood, social interaction...weight loss, nightmares, disturbance in sleep...voices. We ask about that kind of stuff and we kind of drill down on each one of it; when did it start, since when, for how long, what happened, what happened next" (Interview 3).

"[when one is to determine the influence of a psychiatric disorder on criminal capacity] ...always put the mental illness to the specific criminal deed" (Interview 11).

"We do a full psychiatric evaluation and then you tie up how that might affect criminal responsibility and that comes in two parts; in that the child has to be able to appreciate the difference between right and wrong and also act in accordance with that appreciation. Appreciation is not just superficial knowledge, it's understanding [why the act constituted as a wrong doing]" (Interview 1).

According to the response from participant 1, the criminal capacity assessment conducted by a psychologist or psychiatrist, in addition to the focal areas of the assessment identified by participants 1, 3 and 11, focuses on the identification and diagnosis of emergent psychiatric disorders. Here, the criminal capacity assessment

considers if and to what extent the mental disorder had influenced the child's cognitive and conative functioning, in respect to the criminal capacity.

Feedback from three social workers (participants 2, 5 and 9) indicated that an in-depth assessment is conducted, using the national assessment instrument to assess children in conflict with the law. As mentioned in chapter 2, the probation officer, who is a qualified social worker, is legislatively obliged by section 34 of the Child Justice Act to assess every child who enters the justice system. This assessment, conducted by the probation officer, includes the child's medical information, the educational background and details of the primary caregiver and family. The socio-economic circumstances, such as interpersonal relationships, gang involvement, substance abuse and religious practices are identified and also assessed. Details of the case are identified and an in-depth developmental assessment is conducted which evaluates psychological factors such as belonging, mastery, independence and generosity of the child. Additionally, sections 39 and 40 of the Child Justice Act oblige the probation officer to assess children, between 10 to 14 years of age, to provide an opinion on the criminal capacity and to identify if further investigations are required pertaining to the child's criminal capacity. The assessment not only concludes with an evaluation and opinion of the child's criminal capacity, but also includes a recommendation for diversion, placement or referral to a children's court.

Participant 2 highlighted that probation officers work closely with psychologists to holistically assess the child and present a multi-contextual report. In order to present a holistic report, parents or guardians serve as an important source of information. Participant 2 identified that many children lack parental supervision and parents/guardians do not fulfil the role of the primary caregiver as they are not available to provide support to these children.

"...children, who are alone, due to a lack of parental supervision, fall through the cracks of the system and social workers have to fight and explain to magistrates why such a child with a psychiatric disorder lacks capacity" (Interview 2).

In respect to the procedures used to determine criminal capacity, the participants raised concern regarding the implementation of section 11 (ss3) in the Child Justice Act, which requires an evaluation of the five domains of functioning, namely the cognitive, moral, psychological, emotional and social development, in the assessment of the criminal capacity for children in conflict with the law.

"I think that the vast majority of children under 14 don't have criminal capacity because the law provides for a rebuttable presumption of no criminal capacity in the 10 to 14 year olds. Which means, if you're going to try to prove that the child has got criminal capacity, they must be well above average and so far there hasn't been anybody well above average" (Interview 1).

"...the law, as it stands, requires an evaluation of criminal capacity in five domains; social, emotional, psychological...quite ill defined, in fact not defined at all and probably close to meaningless...cognitive is possibly the only one that actually means anything" (Interview 1).

"The Child Justice Act is ambiguous and difficult to interpret" (Interview 8).

"I think the general problem...or point for me is that there is a legal...definition of criminal capacity as it stands, legal for children is problematic because I find that even people up to the age of 20 or 21 could have a difficulty in appreciating or...acting in accordance of right and wrong" (Ms A Smith: Interview 5).

"No child...up to 18 can necessary act always in accordance with that appreciation" (Ms A Smith: Interview 5).

Professor A Skelton (participant 6) highlighted that presently the justice system is incorrectly applying the criminal capacity legislation to children. As highlighted above, section 11 of the Child Justice Act functions on the rebuttable presumption that children below the age of 14 lack criminal capacity. If the criminal capacity of

such a child is questioned, the onus lies with the state to prove beyond reasonable doubt that the child had the ability, at the commission of the act, to appreciate the wrongfulness of his/her behaviour and to act in accordance with that appreciation. However, according to Professor A Skelton (participant 6) criminal capacity assessments are testing for pathology, in the sense of proving the child to lack criminal capacity, rather than assessing for abnormal levels of maturity that prove the child has criminal capacity. This practice grants an incorrect application of section 11 of the Child Justice Act.

“Our law presumes them [children below the age of 14] to lack criminal capacity” (Professor A Skelton: Interview 6).

“...most of the time when we are doing criminal capacity...assessments, we are doing them on under 14’s who are normal...who don’t have any problems... or issues” (Professor A Skelton: Interview 6).

“I would have thought that mostly it’s done by psychiatrists...My concern... [is that] they [psychiatrists and/or psychologists] will be looking for pathology all the time, whereas the test is, really you should be looking for normality” (Professor A Skelton: Interview 6).

“...the criminal justice system is looking for...can we treat this child normal for that age...and if you are normal for that age then you shouldn’t be found to have criminal capacity. And if you are clever and advanced [exhibiting above average levels of maturity] ...then you might be found to have criminal capacity...which seems unfair as well” (Professor A Skelton: Interview 6).

In respect to children with psychiatric disorders who are in conflict with the law, participants 2 and 3 questioned if the best interest of the child and the consideration of their special needs were granted adequate recognition in the justice system.

“...they [magistrates] will tell you it [their concluding decision] is in the best interest of the child...Remember the Child Justice Act doesn’t just speak

on the best interest of a child. It speaks of three factors... [namely] the child...the impact and seriousness of the crime and what impact it has on the family and community...If one is out of sync in that...triangle and has more weight, they [magistrates] are going to take that as the priority factor” (Interview 2).

“So everything else [child offenders that are not referred for criminal capacity assessments] the magistrates are making the assessments of capacity and they have a very high incidence of finding capacity...Which I don’t understand because the assumption is they [children in conflict with the law] don’t have [the capacity]. So I’m not quite sure how it’s happening, that there’s such a high incidence of these children having capacity” (Interview 3).

Based on the opinions of participants 2 and 3, it was indicated that magistrates do not always consider the special needs of the child, in respect of section 10 of the Child Justice Act. Here (Child Justice Act, S10), the magistrate is mandated to consider, amongst other factors, the impact of the crime on the child, the seriousness of crime and impact on family/community, as indicated by participant 2, in deciding on the prosecution of a child offender. Participants 2 and 3 argued that in spite of this legislative framework, many magistrates do not grant adequate attention to each of the three points stipulated in section 10 of the Child Justice Act.

Findings furthermore highlighted practical challenges experienced during the assessment of a child’s criminal capacity. The main concern raised was the limited time allocated and a lack of trained professionals to conduct criminal capacity assessments for children.

“...the assessment process usually occurs in one morning” (Interview 8).

“In the first place...the system [criminal justice system] has an expectation where things must happen very quickly. In the second place, there is

definitely a shortage of...individuals that are able to do that [conduct criminal capacity assessments] in the sense that we are limited by the fact that they say that...only clinical psychologists or psychiatrists [are designated to conduct criminal capacity assessments] ...I think that limits it definitely” (Ms A Smith: Interview 5).

“I think it’s [criminal capacity assessments] a very rushed process...there is a lack of trained staff to look at this [criminal capacity related issues]. I also think... initially social workers [and], probation officers express a view on the criminal capacity of children” (Ms M Human: Interview 7).

“I think my biggest concern around the whole thing is the time allocated to the assessment process [and] ...staff shortage. There’s...really a big...problem relating to the staff shortages...and trained people to do the assessments” (Ms M Human: Interview 7).

“I also do know they [psychologists and psychiatrists] do not have a special measuring tool...or standardised tool in South Africa that can establish...or is designed to do it [assess criminal capacity]. So they adapt as they go along” (Ms M Human: Interview 7).

The majority of participants reflected that the time in which the criminal capacity assessment is conducted, is often insufficient to determine the full extent of a disorder and its influence on crime. Subsequently, several factors and characteristics of disorders go unnoticed during the criminal capacity assessment. Furthermore, due to a lack of service providers, the process of criminal capacity assessments is delayed. Due to this delay, there is added pressure on the responsibilities of social workers and probation officers to assess the child and express an opinion on the child’s criminal capacity. According to the views expressed by Ms M Human (participant 7), subsequent to the shortage of service providers, the dependency on social workers and probation officers to express an opinion on the criminal capacity of a child who is in conflict with the law, will have long-term negative consequences. This is because social workers and probation officers are not always experts in the

field of child justice and criminal capacity issues, thus, the opinions expressed are not always in the best interest of the child.

Findings furthermore indicated that the procedures used to assess the criminal capacity of children are inadequate. Feedback from the participants indicated that the criminal capacity process is incorrectly applied and is hampered by the legislative stipulations which dictate that the criminal capacity of a child ought to be evaluated under five domains, namely the cognitive, moral, emotional, psychological and social development (Child Justice Act, S11). These domains were identified as inadequate, ill-defined and ambiguous in holistically determining if the child had the ability to appreciate the wrongfulness of the crime and to act in accordance with that understanding. Challenges, which hamper the best interest of the child, were also identified, such as the time allocated, the lack of standardised assessment tools and the shortage in trained experts to conduct criminal capacity assessments for children in conflict with the law.

Predominant themes identified in section 3 highlighted the concern regarding the level of expertise pertaining to certain professionals who deal with children in conflict with the law. Feedback also indicated that participants who undertook criminal capacity assessments, used a similar procedure. These participants (1,3,4,8 and 11), who conducted criminal capacity assessments, identified that the primary tool used to diagnose a psychiatric disorder is the DSM-5 and ICD-10 and the five developmental domains, as identified above in section 11 of the Child Justice Act, are used to determine the criminal capacity. In this section, concern was also expressed regarding the application of section 11 of the Child Justice Act, in respect of its effectiveness in determining criminal capacity for children in conflict with the law.

4.2.3.2 *An analysis to determine if psychiatric disorders receive adequate recognition as a factor that could influence the criminal capacity of children in conflict with the law*

A pertinent question asked in the study was if the current methods used to determine criminal capacity give adequate recognition to the influence of psychiatric disorders on the criminal capacity of a child who is in conflict with the law.

As mentioned previously, section 11 of the Child Justice Act stipulates that when the criminal capacity of a child is questioned, the state is obliged to prove, beyond reasonable doubt, that the child had the ability to appreciate the wrongfulness of his/her misconduct and the ability to act in cognisance with that understanding. Chapter 2 of the study discusses current methods used to determine the criminal capacity of a child offender with a psychiatric disorder. In this respect, reference is made to section 11 of the Child Justice Act as well as section 48 (ss5b) of the Child Justice Act which refers to section 77 to 79 of the Criminal Procedure Act, in terms of dealing with a person who has a mental disorder or disability and is in conflict with the law.

When asked if participants were of the opinion that the current methods used to determine criminal capacity granted adequate recognition to the influence of psychiatric disorders, only one of the participants (4) was of the opinion that the current criminal capacity methods are dealt with correctly.

"...we are looking at normal child development...but in that process what we do is, when we're doing the interview with the child...We get the history and we sometimes would do psychological testing...What we are also looking at is if there is a diagnosable mental disorder...So if there is one, then we will note that but as I said, in most cases that is not the case"
(Interview 4).

In contrast to the opinion above, the majority of participants (2, 3, 5, 6, 7, 8, 9 and 10) were of the opinion that the current methods used to determine the criminal

capacity of child offenders were inadequate and did not grant adequate recognition to the influence of a psychiatric disorder.

"It wouldn't happen as a matter of course, but if you were representing a child and you believe that the child has some kind of a disorder that impairs their criminal capacity...you could call for an assessment and you could heed that evidence...It is possible to do it but I don't think it happens very often. It's possible that every day, children that should be assessed, between 14 and 18 are not being assessed" (Professor A Skelton: Interview 6).

"No [criminal capacity assessments do not give adequate recognition to the influence of psychiatric disorders]" (Interview 3).

"No, I don't think so [psychiatric disorders are not given adequate recognition in criminal capacity assessments]" (Ms M Human: Interview 7).

"During my studies I found it [the criminal capacity assessment] ...to be inadequate and...definitely not in the best interest of the children. So I believe that there, already is the start of failing children. The whole assessment process should be conducted, definitely by including a multi-disciplinary team...and then only once a team has assessed a child...focus should be placed on psychiatric disorders"(Ms M Human: Interview 7).

"I don't think so [psychiatric disorders are not given adequate recognition in criminal capacity assessments], because I don't think that the justice system fully understands what the impact of a psychiatric disorder is on an individual and how that impacts on their behaviour...So no, I don't think that they [the criminal justice system] are dealing with it [criminal capacity of a child with psychiatric disorder] it in the best way" (Interview 9).

"I don't think I've ever actually come across one [child offender with a psychiatric disorder above the criminal capacity age demarcation]"

where...the court hasn't found that they had criminal capacity" (Interview 10).

"I think that the way the criminal capacities are structured, we usually spend say a morning doing that assessment...It's possible that certain undiagnosed mental health disorders such as depression may not be picked up in such a short time...sort of masked depression...and as I say it doesn't really take into account unless one subjectively takes into account a person's background and lack of access to early intervention" (Interview 8).

"Absolutely not! Because one must understand that this particular process [criminal capacity assessment] is supposed to be quite an intensive process and every matter has to be taken based on the evidence provided to the court" (Interview 2).

"I think the process in itself...generally, not even getting to the psychiatric disorders side...I think the process in itself is quite laborious" (Ms A Smith: Interview 5).

"Let me say that in my experience with psychiatric disorders per say...I think there needs to be a much more...multi-disciplinary focus during the process, making sure there is a screen for psychiatric disorders... together with that criminal capacity assessment rather than to just draw out from their point of view" (Ms A Smith: Interview 5).

"I think there is always room for improvement" (Ms A Smith: Interview 5).

In addition, Ms A Smith (participant 5) indicated that it is also important to assess the motivation for the crime in the assessment of a child's criminal capacity. In this light, Ms A Smith (participant 5) mentioned a case of a child with ADHD who killed another child. Illustrated in this case, the 7-year-old (Child X) was symptomatic for ADHD. Child X pushed another child (Child Y) off a bicycle, and Child Y fell and hit his head against the curb of the road, causing death. When Child X was questioned as to why

he pushed Child Y off the bicycle, Ms A Smith (participant 5) highlighted that his responses were:

“I wanted to play with the bike”...“I wanted a turn” (Ms A Smith: Interview 5).

In this case, there was an immediate lack of criminal intention on Child X’s part and the impulse control issues contributed more as a determining factor, rather than the intention to inflict grievous bodily harm. The lack of impulse control might be a consequence of the untreated symptoms associated with psychiatric disorders such as ADHD, ODD or CD, which caused the child to react in a manner that did not consider the consequences and wrongfulness of his actions.

Findings from this section indicated that the majority of participants were of the opinion that the current methods used to determine the criminal capacity of child offenders did not make adequate provision for the impact or consideration of the impact of psychiatric disorders on children who are in conflict with the law.

4.2.3.3 Services available to child offenders with psychiatric disorders

Children who are in conflict with the law require special services that will be in their best interest (Child Justice Act, S2). Furthermore, children with psychiatric disorders, who are in conflict with the law, also require services that address their special needs and uphold their best interest.

In order to determine if adequate attention was granted to the needs of children in conflict with the law, participants were asked what services are available to child offenders with psychiatric disorders, who have criminal capacity as well as for those who do not have criminal capacity. As reflected in chapter 1, participants were recruited from four provinces in South Africa, namely, KwaZulu-Natal, Gauteng, Eastern Cape and Western Cape. Thus, the responses were reflected from a national perspective and all the participants were of the opinion that the services available to children with psychiatric disorders, as well as those without disorders, who were in conflict with the law were limited, if available at all.

"Nothing is specifically done to accommodate children with psychiatric disorders and/or is in conflict with the law, it's about dealing with children who are in conflict with the law" (Interview 3).

"It's a huge problem, every time there's an issue [with a child offender] it lands up...at the local government level...Where people are having a fit because there is nowhere to take the child" (Interview 3).

"...they would just fit into the same as everybody else...The education department youth facilities for children in conflict with the law, those have now been rather tragically shut down because the ones that fall under correctional services and social development do not seem to have the same kind of caring and breaking down of educational stuff into manageable portions and accommodating the needs of the child" (Interview 3).

"...children who have low intellectual functioning [also referred to as IDD] and who have been in conflict with the law are not recognised in the system" (Interview 3).

"I think we have had one [case of a child with IDD] in all the time, who has been in the special unit. And all the rest are just in normal classrooms and the Education Department is just not accommodating these children" (Interview 3).

"We frequently refer to clinics, to Tygerberg Child and Adolescent Unit...and very often to the Education Department and the DSD and sometimes...things have been reported but there's not been any intervention" (Interview 3).

"Basically, these kids are left in the care of their parents...Who, sometimes will act as based on what we provide them with but sometimes... they are so disenfranchised and lack agency and completely behave as though

they have absolutely no power...with these kids it becomes a revolving door...the next time they enter the system its more severe" (Interview 3).

"The availability [of facilities for children in conflict with the law] in the Eastern Cape is not what it is in Cape Town or Johannesburg with regard to possible interventions" (Interview 8).

"There really is a lack of resources...throughout the province" (Interview 8).

"There are not many facilities available [for children with psychiatric disorders who are in conflict with the law]. Children are referred to CYCC for children awaiting trial" (Ms M Human: Interview 7).

"Children with these disorders [ODD and CD] fall into a group that is forgotten" (Interview 11).

"I must say I find it quite difficult to find a placement and I know that other social workers do too, to find a programme for those children [child offenders with psychiatric disorders]. Generally, I know NGOs out there that do some diversions for example, because children also can't be diverted if they don't have capacity...The NGOs and programmes available...as far as I am aware of and as far as I know, don't actually make space for children with psychiatric disorders. I know for example in NICRO, specifically, our general diversion programmes would not be able to accommodate those children [with psychiatric disorders] because I don't think those people that run the more generic diversion programmes are necessarily trained to deal with these children [with psychiatric disorders]. I think it's difficult to find a programme for these children [with psychiatric disorders] per say" (Ms A Smith: Interview 5).

"None [there are no services available to child offenders with psychiatric disorders] ...they often end up in jail [child offenders over 14] or in CYCC" (Interview 10).

Professor A Skelton (participant 6) concurred that there is a lack of facilities available to address the special needs of child offenders with psychiatric disorders. She elaborated that children who are found to have criminal capacity are eventually referred to CYCC or in certain instances (children above the criminal capacity age) are referred to correctional state facilities. The majority of these facilities fail to address or inadequately deal with the special needs of children in conflict with the law, and children with psychiatric disorders. In her opinion, private CYCC are more inclined to provide appropriate facilities that address the special needs of children in conflict with the law. In this response, mention was made of NGOs in Krugersdorp and particularly NGO James House in the Western Cape, for the effective programmes that attended to the individualised needs of child offenders.

“...there’s this fantastic facility, absolutely brilliant in the Western Cape, called James House, which does this really interesting programme of a four month intensive residential placement, with a full assessment and they involve the parents or caregivers in this process as well...over a period of time...and then train either the parents or the...caregiver...So that when the child is placed back in their normal environment there’s follow up and there are new skills” (Professor A Skelton: Interview 6).

Participant 12 was of the opinion that there are services available to child offenders with more severe psychiatric disorders.

“...when you are talking major psychopathy...there tends to be a lot of treatment facilities...When you are talking about your ADHD’s...those are not so recognised as contributing to criminal conduct” (Interview 12).

Participant 1 emphasised that the delinquent behaviour of children, who are *doli capax* as well as those who are *doli incapax*, ought to be attended to and addressed from an early age.

“I think that children without criminal capacity should have access to diversion programmes” (Interview 1).

Participants 2 and 9 identified that the services considered for child offenders will be dependent on the nature and seriousness of the crime. Based on this determination, the child could be referred to children's courts, which will investigate the case and make a referral for diversion, or to the DSD. Here, both participants (2 and 9) concurred that the DSD may help children in need of care and protection through counselling services and sex offender and life skills programmes. In the context of the present study, although the services mentioned by participants 2 and 9 are general services that are applicable to children in conflict with the law, these programmes will also be of value for children with psychiatric disorders, since these programmes aim to teach child offenders how to regulate social behaviour and to conform to social norms. Hence, programmes of this nature, although generalised, may pertain to the needs of child offenders with psychiatric disorders, who struggle with the regulation and ability to conform to social norms.

Pertinent to the study, participant 2 identified that the DSD also employs the services of social workers who are experts in the mental health sector to address the unique needs of children and child offenders with psychiatric disorders.

"...the function of social work [both, social workers who specialise in mental health care and those who do not] speaks to the behaviour of the child and can identify the behaviour of a psychiatric disorder" (Interview 2).

In respect of the services available to child offenders with psychiatric disorders, or a lack thereof, Professor A Skelton (participant 6) highlighted that for many medical professionals who work with children with psychiatric disorders, CD is not considered a psychiatric disorder that requires attention and treatment. In her experience, Professor A Skelton stated that medical professionals, who are expected to deal with this vulnerable group of children, were of the following opinion:

"...children with CD are bad and not mad" (Professor A Skelton: Interview 6).

A similar opinion, namely that ODD and CD are behavioural issues rather than mental disorders, was also mentioned by another participant in section 4.2.2.4. Exploring the validity of the opinion if ODD and CD should be recognised as psychiatric disorders, fall outside of the scope of the present study. However, within the context of the study, ODD and CD are recognised as psychiatric disorders since they are classified as such in the DSM-5 (2013:462-464, 469-70).

The general attitude is that children with acute cases of psychiatric disorders should receive preferential treatment and medical assistance, in comparison to children with CD and other psychiatric disorders who require behavioural intervention in addition to medical treatment. Perspectives, in which the legitimacy of a disorder, such as CD is questioned, could result in instances where children with acute, more severe forms of psychiatric disorders are given preference in state facilities. As a result, there is a lack of need-directed services for children with psychiatric disorders such as ODD and CD, who come into conflict with the law.

Findings from section 3 emphasised that children in conflict with the law, and more so child offenders with psychiatric disorders, do not receive the services as intended in the Child Justice Act; in that there is a lack of provision for need-directed services. As mentioned in chapter 2 of the study, according to section 28 of the Constitution of South Africa (Act no 108 of 1996), the Children's Act (S11) and the Child Justice Act (S3h, S35 and S50), the nature of services delivered to a child offender with a psychiatric disorder ought to consider the circumstances of the child as well as the circumstances under which the alleged crime was committed. The danger of not adequately addressing the needs of children in conflict with the law, who suffer from psychiatric disorders, is that the influence of the disorder which predisposes the child to criminal conduct, will not be addressed. Thus, child offenders with psychiatric disorders are vulnerable to an increased risk of recurrent criminal behaviour, due to a lack of appropriate care to address the symptoms and other psychosocial deficits associated with a psychiatric disorder.

4.2.4 Section 4: Recommendations for improving on methods to deal with child offenders with psychiatric disorders

In this section, participants were asked to make recommendations on how to improve on the methods used to deal with children in conflict with the law. The majority of participants were in accord about the challenges, experiences and recommendations to improve services to children in conflict with the law, who suffer from psychiatric disorders. Two prominent areas of legislative recommendations and service recommendations emerged, which will be discussed below.

4.2.4.1 Legislative recommendations

Participants 4, 6 and 8 indicated that raising the minimum age of criminal capacity would be a step in the right direction towards dealing with children in conflict with the law.

“I think that we should raise it [age of criminal capacity] up to 14 instead of 12 and then maybe focus on the children that have reason to doubt their criminal capacity...So in other words let’s look at the children who really need our attention” (Professor A Skelton: Interview 6).

“It’s not often that we’d find a 10 to 12 year old responsible [for a crime] ...just based on their age and level of maturity...the closer it [the age of criminal capacity] gets to 14, the more likely it is for somebody to be found criminally responsible” (Interview 8).

“Firstly the age of criminal capacity in this country is too low...if you look at other countries where the minimum age of criminal capacity is 18...We, in this country have two ages of criminal capacity...there are only a few countries in the world that operate like that; where you have a minimum and a rebuttable presumption...So, that’s the one thing that I feel is wrong, we should do away with that rebuttable presumption...We shouldn’t have that...we should have a much higher age of criminal capacity” (Interview 4).

“Brain development is not complete until the child is into the early 20’s...So if you are wanting to hold an older child criminally responsible, then you should be holding an individual criminally responsible only when their brain development is complete...So they have complete responsibility for the actions...So obviously one can’t put criminal responsibility age to 20...nobody is going to like that. So one needs to have some kind of...median between our current age of 10 and...20” (Interview 4).

According to participant 4, the consideration of the minimum age of criminal capacity should bear in mind aspects relating to brain development and maturity, in respect of the ability to appreciate the wrongfulness of one’s actions and the ability to act in cognisance with that understanding. Participant 4 furthermore emphasised that the aforementioned opinions do not imply that the crimes committed by children who are below the particular criminal capacity age are to be ignored, but rather dealt with in a system that does not incorporate harsh practices or criminalise child offenders, as is done in the justice system.

In a different perspective of legislative recommendations, participants 1, 3 and 10 were of the following opinion:

“I think that any child who is in conflict with the law, at any level should have a mental health evaluation and I don’t know how the departments are going to do that...a good clinical psychologist can do it...it’s got to be someone that is licensed to diagnose because as you say these disorders can be seriously problematic” (Interview 1).

“Children in conflict with the law should not enter the justice system at all...there ought to be alternate methods of addressing and assisting children” (Interview 10).

“So everything else [child offenders that are not referred for criminal capacity assessments] the magistrates are making the assessments of capacity and they have a very high incidence of finding capacity...Which I

don't understand because the assumption is they don't have [the capacity]. So I'm not quite sure how it's happening, that there's such a high incidence of these children having capacity. But...there's reason why that might be beneficial; when they enter the system [justice system] again...there's a tracking history...The kids that don't have a record, that don't have capacity, there should, none the less, be a tracking system...not as children offenders or a criminal record but these are vulnerable children. There should a system that tracks, that follows up...not a policing kind of thing but a...like a benevolent potent parental function [that tracks all children who have had encounters with the law]" (Interview 3).

The majority of participants viewed increasing the minimum age of criminal capacity as a positive start to improve legislations used to deal with children in conflict with the law. This is because children who are older are more likely to have a better understanding of their actions. Additionally, it was recommended that an individualised approach should be adopted when the criminal capacity of a child is determined. As such, the psychosocial functioning of the child and the nature of the criminal offence within the particular context should be taken into consideration. The justice system ought to move away from conducting criminal capacity assessments for the sake of conducting them, and rather assess children above the age of 14 years who are presumed to have criminal capacity, to ensure that these children receive appropriate intervention to prevent reoffending. Additionally, recommendations were made to implement a system that tracks all children who come into conflict with the law in order to evaluate the effectiveness of interventions as well as offer continued support to these children.

Concerns were also raised by participants (3 and 12) pertaining to the general assessment of criminal capacity in terms of sections 77 to 78 of the Criminal Procedure Act, for children with psychiatric disorders who are in conflict with the law. In this regard the opinion was that:

"...you can't treat [in terms of legislative procedures] an adult and child the same way" (Interview 12).

Participants 3 and 12 were of the opinion that children in conflict with the law are exposed to the same mental capacity testing as that of an adult. Here, participant 12 made recommendations to establish a specific legislative framework in the Child Justice Act that makes procedural provisions to specifically deal with child offenders with psychiatric disorders. Previous findings under section 4.2.3.1, that referred to the criminal capacity legislative framework in the Child Justice Act as inadequate and ambiguous in its application, supports the views of participants in this section, in that attention is needed pertaining to the flaws and challenges in the legislative framework used to deal with children in conflict with the law.

4.2.4.2 Services recommendations

As discussed previously in section 4.2.3.3, participants raised concern regarding the lack of services that are available to children in conflict with the law and child offenders with psychiatric disorders. Based on these concerns the following recommendations were identified:

“Children who have capacity and who don’t have capacity...they really actually do need intervention and they really should receive it and it should be a multi-systems intervention. It should be the DoE, DSD, DoJCD...DoH [a holistic approach]” (Interview 3).

“What is needed is a functional social development system...social developmental workers who can actually put the alcoholic father in a rehab programme...who can apply for the grants that the mother did not know she could get, who can somewhere along the line, someone teach somebody some parenting skills...But a lot if it is getting the child appropriate education or placement” (Interview1).

“The DJCD should consider the employment of psychologists within the justice system; this will take pressure off the health departments and also allow for a more holistic psychological forensic assessment” (Interview 1).

“The fact that you are in conflict with the law shows you that your support system has big problems or in the relationship with your parents...So these children should all...be...identified and...help [provided to] their parents” (Interview 11).

“Helping with parent management training, and then also if they haven’t got money or they need something or violence in the marriage or maybe there is a mother with depression or a father with alcohol abuse, you need to go into the families and try and stabilise the family. You also need to go to the schools and speak to the parents and get the parents to...use a consistent behaviour programme at home and also to use the same at school. The most important thing that I think is being happening is that parents...are...very stressed, they haven’t got time or they haven’t got so much money or they’ve lost their jobs so they not very nurturing parents because of the stress” (Interview 11).

“We can’t just leave these children... to continue on what they have been doing” (Interview 11).

“We feel that even if a child is found to not have criminal capacity that they do need to do interventions...because early onset behaviour...the earlier it’s dealt with the better it is for the child so that they don’t continue on that path [of criminal behaviour]” (Interview 9).

“I think that they need to be dealt with as soon as possible because we found that often children are hanging in the system because of the length of time...they wait to be assessed to have the criminal capacity assessment done...I think it [delayed criminal capacity assessments] has quite a negative impact on kids...What happens is, the professional doing the assessment has to do the assessment retrospectively. They then need to evaluate the child of that time when they committed the offence. Whereas, now the child...at the point when you do the assessment, the child is repeatedly being told by various individuals, one is parents, one is school, by social workers, by police, that what they did was wrong...So

now they will automatically tell you that what I did was wrong but if you are going into it with them and you start discussing around the issue with them, why they saying its wrong, they don't fully understand that what they did was wrong and what the impact of it is and what the consequences are and could be" (Interview 9).

"On the one hand, it's saying, that child can't be held accountable if there's no capacity. But my argument is, it's our work to help these children to develop that responsibility...So if you deprive a child because you feel you can't hold the child criminally responsible and you don't get the child into a specialised programme that focuses on, yes the criminal behaviour. Because...there's particular aetiology when it comes to the development of criminal behaviour" (Ms A Smith: Interview 5).

"Don't just say the child doesn't have capacity...but rather look at how do we then, as a criminal justice system...assist that child to start to develop that responsibility in the long run without them necessary having to clog up the system" (Ms A Smith: Interview 5).

"Professionals such as occupational therapists, forensic criminologists and clinical social workers who are trained in the field of working with children in conflict with the law would be able to address the needs in the criminal capacity assessments" (Ms A Smith: Interview 5).

Ms A Smith (participant 5) was of the opinion that child offenders with psychiatric disorders are a vulnerable group in need of care and protection. Based on her opinion, Ms A Smith (participant 5) highlighted the importance of providing adequate services that address the individualised needs of children in conflict with the law, as well as that of children with psychiatric disorders who come into conflict with the law. In this respect, approaching child offenders from a multi-dimensional team of service providers who address the needs and vulnerability of this group of children, will assist in reducing the child's risk of reoffending, thereby reducing the number of children in the justice system

In light of adopting a multi-disciplinary approach to deal with child offenders, Ms M Human (participant 7) was of the following opinion:

“There is a fragmented service delivery where they [probation officers] actually handle anything from to divorce to psychiatric disorders” (Ms M Human: Interview 7).

“Each professional has their own speciality field that they look into...There needs to be taken into consideration the way criminologists look at criminal behaviour, taking into account all factors that contributed to the offence...We [criminologists] do take everything into account...even psychiatric disorders” (Ms M Human: Interview 7).

Due to the shortage in service providers, lack of resources and overload of work, participants highlighted that many children are only assessed after they have had several encounters with the law. The shortage in staff renders many service providers with an overload of work. As a result, they are multi-tasking in order to meet the needs of the children they are working with. According to the opinion of Ms M Human (participant 7), probation officers are providing fragmented services when dealing with children in conflict with the law.

The findings from this section emphasised the need to improve on legislation and services pertaining to the special needs of child offenders, both with psychiatric disorders as well as those without psychiatric disorders. The legislative recommendations drew attention to the minimum age of criminal capacity and the lack of procedural framework in the Child Justice Act used to conduct criminal capacity assessments for child offenders with psychiatric disorders. In this respect, a recommendation was made to increase the age of criminal capacity and to implement a legislative framework that specifically pertains to the criminal capacity assessments of child offenders with psychiatric disorders.

The service recommendations voiced the participants' concerns regarding the scarcity of professionals and services in state facilities that address the special needs of this vulnerable group of children. In this regard, the recommendations that

were made included the implementation of added service providers and facilities from a multi-disciplinary approach, which would improve on the current challenges experienced in the justice system. Participants identified that governmental departments, such as the DSD, ought to address the functional development of children and establish programmes that teach improved parenting skills, appropriate educational facilities and facilities that address aspects of neglect and exposure to violence. This is because, as mentioned, many South African children are faced with these factors and are consequently predisposed to defiant behaviour and negative encounters with the law. The aim of an early intervention programme is to address the issues that predispose children to criminal behaviour and to prevent criminal conduct. In implementing preventative and early intervention measures for child offenders, participants indicated that it would be beneficial to collaborate with mental health and child and adolescent institutes for an informed decision on the best methods used to address the needs of children with psychiatric disorders who are in conflict with the law.

Participants also identified that there is a challenge concerning the lack of specialised service providers to attend to child offenders. Here, recommendations highlighted that the inclusion of more specialised professionals, who are recruited from a multi-disciplinary approach that outlines clear and effective lines of communication amongst the various professionals and governmental departments, would be beneficial to conduct criminal capacity assessments. The aim of implementing a multi-disciplinary network of service providers that promotes corroboration and communication amongst the professionals and departmental facilities that deliver services to children in conflict with the law, will assist with the early onset identification of risk factors and with the a holistic approach to treatment that caters to the best interest of the child.

Additionally, it was suggested that practitioners who deliver services to child offenders are provided with further training in aspects relating to child justice and mental health issues for children in conflict with the law. In this regard, participants identified probation officers who are involved in child justice procedures. This is because probation officers conduct the initial assessment with the child offender and should therefore adopt a trained eye to the various factors, such as psychiatric

disorders, that could predispose children to criminal behaviour and influence their criminal capacity.

4.5 CONCLUSION

The contents of this chapter analysed and provided a detailed interpretation of the data that were collected during the semi-structured interviews. The general theme that emerged, by the majority of participants, supported the fact that psychiatric disorders influence criminality and the criminal capacity of children in conflict with the law. In addition to the impact of psychiatric disorders, the influence of environmental and societal factors was also highlighted as a predisposition that contributed to criminal behaviour in children. The predominant psychiatric disorders, identified in the study to be found in child offenders, were ADHD, LD, ID, ODD and CD.

The findings from the study indicated that the current procedures used to determine criminal capacity for children do not grant adequate recognition to the influence of psychiatric disorders. The application of section 11 of the Child Justice Act was not being applied correctly in determining criminal capacity; these legislative concerns do not uphold the best interest of the child. Furthermore, it was established that the assessment tools and procedures used, as well as the lack of available professionals and services, severely hamper the best interest of the child. Recommendations for improvement on the methods used to deal with children in conflict with the law included that the minimum age of criminal capacity should be raised. The implementation of specific services that address the needs of child offenders with psychiatric disorders, and the implementation of a multi-disciplinary approach that consists of a range of professionals who specialise in child justice and mental health issues, were also identified. The following chapter will provide interpretations of the data, conclusions and research recommendations of the study.

CHAPTER 5

SUMMARY OF THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

“To demand justice for children is not just to require that they are not abused at the hands of those who are meant to enforce the law. It is to require that society recognises and addresses the reality of children’s lives and the root causes of their offending and seeks to put in place real, long-term solutions that children themselves have identified and can recognise as their own” (Martin & Parry-Williams, 2005:5).

5.1 INTRODUCTION

This chapter outlines conclusions drawn from the findings of the study culminating in the formulation of recommendations. In an attempt to reach the research aim, which will be discussed below, the literature review and empirical data found in the study were measured against the research objectives and questions, as presented in chapters 1 and 4 of the study.

Pertinent to addressing the objectives of the study, as mentioned in chapters 1, 2 and 3, are the legislations found in the Children’s Act (S1-3 & S150) regarding the rights of children with mental disorders and children who are in need of care and protection. Legislation found in the Child Justice Act (S11 & 48) and the Criminal Procedure Act (S77-79) is also pertinent, since it provides a framework under which the criminal capacity of child offenders with psychiatric disorders is dealt with.

This chapter will give a summary of the research methodology, limitations of the study and an interpretation of the findings, as presented in chapter 4. It will conclude with recommendations and areas identified for further research.

5.2 SUMMARY OF RESEARCH METHODOLOGY

Based on the aim of the study, namely to explore the criminal capacity of children with psychiatric disorders, who are in conflict with the law, four objectives were

formulated (section 1.5). These objectives explored if psychiatric disorders influence criminal behaviour and the criminal capacity of a child who is in conflict with the law. The risks that psychiatric disorders cause as a predisposing factor for criminal behaviour and the impact these have on the criminal capacity of a child, were examined. An analysis was done of the methods used to determine criminal capacity for child offenders with psychiatric disorders. Lastly, recommendations were presented of good practice for dealing with children with psychiatric disorders who come into conflict with the law.

As discussed in chapter 1, although international research is available about the criminal capacity assessments of child offenders, there exists a national and international dearth of research regarding the influence of psychiatric disorders on the criminal capacity of child offenders. Against this background, the study aimed to add to this knowledge base. In addition, the research aimed to be of a practical value pertaining to criminal capacity issues for child justice practitioners. In this light, it is anticipated that the findings from this study will emphasise the influence that psychiatric disorders may have on the child's predisposition to criminal behaviour, and that subsequently the impact of these disorders will be taken into consideration when one is to determine the criminal capacity of a child offender with a psychiatric disorder.

The study commenced with literature reviews that explored if and to what extent psychiatric disorders influence the criminal capacity of child offenders. The study identified the prevalent psychiatric disorders that were found to influence criminality and criminal capacity. Furthermore, a review of the Children's Act and the Mental Health Care Act provided the legislative framework on the rights pertaining to children with psychiatric disorders, who are in conflict with the law. The Child Justice Act and the Criminal Procedure Act provided the legislative framework for dealing with and determining the criminal capacity of a child offender with a psychiatric disorder. The literature discussed in chapters 2 and 3 was followed by the empirical study discussed in chapter 4 and summarised in the present chapter of the dissertation.

An exploratory, qualitative approach was followed in the study. Data were collected with the aid of a semi-structured interview schedule (Annexure B), through individual telephonic and face-to-face interviews with child justice experts who specialise in criminal capacity and mental health issues pertaining to children in conflict with the law. The findings from this explorative study have a practical application in addressing social issues, namely the assessment of criminal capacity for children with psychiatric disorders, which is distinctive of applied research. As mentioned, the data collected were analysed and interpreted according to the aim and objectives of the study.

5.3 STUDY LIMITATIONS

Baron (2008:4) defines the limitations of a study as the features of design or methodology that influence the data collection, data interpretation and the generalisability of the research findings, which are out of the researcher's control. The limitations experienced in terms of the methodology and practicality in this study will be discussed below.

5.3.1 Methodological limitations

5.3.1.1 *Lack of previous research in South Africa*

As mentioned above, amidst the fact that international research addressed issues pertaining to the influence of psychiatric disorders on a child's criminal capacity, the lack of South African research on this topic meant that there were limited guidelines to follow in the development of the research problem, from a South African perspective.

Based on this limitation, international literature was used to identify psychiatric disorders that were found to be of relevance in criminal capacity assessments. In an attempt to create focus and scope for the study, the researcher focused on the disorders identified in literature found to have influenced delinquent behaviour in

children. A comparison was done between the literature and findings from the study in order to identify similarities and differences.

5.3.1.2 *Sample size*

The initial process of reaching potential participants with whom to conduct interviews was found to be challenging. This was due to a limited number of experts in South Africa who deal with child offenders with psychiatric disorders. Although passionate about their field of work, many participants seemed reluctant to discuss legislative frameworks and criminal capacity issues.

In addition, time restraints were a factor mentioned by potential participants as a reason for not being available for interviews. Snowball sampling was found to be an effective manner to overcome this challenge, since experts who participated in the study were able to refer the researcher to other participants and they ‘spread the word’ about the study to other child justice experts who were interested in participating in the study.

5.3.2 *Practical limitations*

5.3.2.1 *Financial constraints*

In order to overcome the challenge of limited experts in South Africa, in addition to adopting the snowball sampling technique, the researcher realised that the sample had to be drawn nationally in order to improve the generalisability of the data. Although a UNISA Master’s and Doctoral bursary funded the study, data collection costs, namely telephone and travel costs, were not covered. In order to overcome this challenge, it was considered feasible to conduct telephonic interviews with experts from KwaZulu-Natal, Gauteng, Eastern Cape and Western Cape. The majority of participants were interviewed telephonically, with the exception of one interview, which was conducted face-to-face in KwaZulu-Natal.

5.4 SUMMARY OF THE RESEARCH FINDINGS

The findings identified in chapter 4 will henceforth be summarised to highlight the most pertinent themes from which conclusions were drawn. The following conclusions were drawn from the research findings, in respect to the objectives of the study.

5.4.1 OBJECTIVE 1: The extent to which psychiatric disorders influence criminal behaviour and the criminal capacity of a child who is in conflict with the law

Objective 1 of the study focused on the extent to which psychiatric disorders influence criminal behaviour and furthermore the criminal capacity of children in conflict with the law. In order to achieve the first objective of the study, questions were asked regarding the most prevalent psychiatric disorders found in child offenders, the risks and functional consequences associated with the prevalent psychiatric disorders and the influence of these disorders on criminality and criminal capacity for children in conflict with the law. The conclusions relevant to each objective will henceforth be discussed.

5.4.1.1 *Psychiatric disorders are a risk factor associated with the causation of criminal behaviour*

Findings from the study confirmed that psychiatric disorders were viewed as a risk factor associated with the causation of criminal behaviour. This concurs with the literature discussed in chapter 3 of the dissertation, which identified the impact and influence of psychiatric disorders as a risk factor that predisposes children for coming into conflict with the law.

5.4.1.2 *The prevalence of a psychiatric disorder is an aspect that needs to be taken into consideration during the determination of criminal capacity for children in conflict with the law*

The second theme identified under objective 1 confirmed the existence of a significant correlation between psychiatric disorders and criminality. Participant feedback indicated that ADHD, ID, LD, ODD and CD are associated with impaired cognition, impaired social and communication skills, increased levels of impulsivity, defiant and anti-social behaviour, which are all risk factors associated with the causation of criminal behaviour.

As a result, these risk factors and functional consequences associated with psychiatric disorders could impair the child's ability to understand the wrongfulness of his or her behaviour and act in accordance with this understanding. It can, therefore, be concluded that psychiatric disorders could potentially influence the criminal capacity of child offenders. Hence, it is a factor that should be considered in the assessment of a child's criminal capacity. The influence of psychiatric disorders on the child's cognitive development is of specific relevance to the study and will be discussed in more detail under objective 2 below.

5.4.1.3 *Environmental and societal factors should also be taken into consideration in the assessment of the criminal capacity of children with psychiatric disorders*

In addition to psychiatric disorders, findings from the study emphasised that environmental and societal factors should also be taken into consideration during the assessment of a child offender's criminal capacity, because environmental factors could increase the risk of criminal involvement and predispose children to developing psychiatric disorders.

These factors, which were identified as potential risks in the environment for the development of psychiatric disorders, included exposure to substance abuse, malnutrition due to poverty, violence and parental neglect. The findings reflected in this

section concur with information from the literature review in which environmental factors such as poverty, violence, substance abuse and parental neglect were highlighted as factors experienced by many South African children, that not only contribute to the development of mental illnesses, but also create a predisposition to a career of crime (Burns, 2011:102-105; Ward et al, 2013:1, 56, 57).

Based on these findings, recommendations were made to adopt a holistic approach when the criminal capacity of a child is assessed. In this light, such an assessment ought to focus on the psychosocial and environmental factors influencing the child's behaviour in relation to delinquency and criminal capacity.

5.4.2 OBJECTIVE 2: The influence (impact and risks) of psychiatric disorders, such as ADHD, ASD, ODD and CDD on the child offender and criminal capacity

Objective 2 of the study focused on the impact and risks associated with psychiatric disorders and criminal behaviour of children in conflict with the law. In order to achieve the second objective of the study, questions were asked regarding the risks and functional consequences associated with the prevalent psychiatric disorders and the influence of these psychiatric disorders on criminality and the criminal capacity of children in conflict with the law.

5.4.2.1 *ADHD, LD, ID, ODD and CD were the most prevalent psychiatric disorders found to be present in children who come into conflict with the law*

Findings from the study identified ADHD, LD, ID, ODD and CD as the most prevalent psychiatric disorders in child offenders. In addition, substance induced bipolar disorder and depression were also identified as disorders that are present in South African children who come into conflict with the law.

According to the World Health Organisation (2015:14) behavioural disorders, ADHD, low intelligence and low academic achievement increase the risk of criminal involvement for children. Pelser (2008:5) highlights that there is a distinct relationship between the symptoms of ADHD and risk-taking behaviour. This opinion is supported in the findings of the study which highlighted ADHD and LD as psychiatric disorders that increase scholastic challenges, causing the child to dislike school and increase delinquent activity.

Children who exhibit disruptive and exceedingly defiant behaviour are likely to be symptomatic for CD and/or other behavioural disorders, such as ODD. As mentioned, anger, irritability, defiance, vindictiveness, aggression, destructiveness, deceitfulness and a tendency to violate rules are prominent characteristics of ODD and CD (DSM-5, 2013:462, 470-473). Children with behavioural psychiatric disorders, such as those mentioned above, lack empathy and often lack remorse for their misconduct. Skelton and Badenhorst (2011:49) dictate that when a child has CD, he/she is able to discern between right and wrong but the capacity to feel for others and make decisions based on that understanding, is impaired. The influence of psychiatric disorders were, therefore, confirmed to potentially impact the child offender's criminal capacity, namely the ability to appreciate the wrongfulness of behaviour and the ability to act in accordance with that understanding.

In addition, as mentioned, literature concurred with the findings from the study that a co-morbidity frequently exists between disorders.

5.4.2.2 *The emphasis, when assessing a child's criminal capacity, should not solely be on the psychiatric disorder, but on the influence the disorder and associated symptoms have on the child's criminal capacity*

It was concluded from the study that different psychiatric disorders will influence the child's predisposition to criminal behaviour and criminal capacity to varying degrees. Hence, when assessing a child's criminal capacity, the emphasis should not be on the psychiatric disorder by itself, but rather on the influence of associated symptoms

of the disorder on the child's ability to appreciate his or her behaviour, namely the cognitive function, and to act in accordance with that appreciation, namely the conative function.

As mentioned, symptoms such as aggressiveness and psychological impairments manifested as impulsivity, emotional immaturity, hyperactivity, conduct problems and self-control issues, associated with psychiatric disorders, are risk factors for the causation of criminal behaviour. Such symptoms could also impair children's ability to understand that a criminal act is a wrongdoing as well as to understand why the act is perceived to be wrong. In addition, even if a child has knowledge of what behaviours are perceived to be anti-social and/or criminal, symptoms such as impulsivity, emotional immaturity and limited social skills could impair the child's ability to act in cognisance that an act is criminal. Findings thus confirm that psychiatric disorders may impair the child's psychological development, thereby affecting the cognitive and conative function. This deficit would impair the child's ability for logical thinking, planning, comprehension and self-control, which are factors that are of importance when the criminal capacity of a child is assessed.

In light of the aforementioned findings, the need was emphasised to refrain from conducting single-dimensional criminal capacity assessments and to move to a multi-dimensional criminal capacity assessment approach, which holistically assesses all factors influencing the child's criminal capacity. This will be discussed in more detail under objective 3. Literature discussed in chapter 3 of the study supported the research findings in that a multi-dimensional criminal capacity assessment would be beneficial to holistically evaluate the complexities which exist between the biological and environmental factors that affect the child offender (Schoeman, 2016:6).

5.4.3 OBJECTIVE 3: Current methods used to determine the criminal capacity of child offenders with psychiatric disorders

The third objective explored the current legislation and procedures used to determine criminal capacity for child offenders with psychiatric disorders.

5.4.3.1 *Legislative requirements and operational challenges negatively influence the criminal capacity assessment of children in conflict with the law*

From the findings it is concluded that the present legislative framework, pertaining to the criminal capacity of children in conflict with the law, hampers the best interest of the child. Findings highlighted that section 11 in the Child Justice Act is incorrectly implemented as it seems that currently criminal capacity assessments focus on proving that a child lacks criminal capacity (*doli incapax*) rather than to prove that a child has criminal capacity (*doli capax*). This legislative application is incorrect, since section 11 (Child Justice Act) already stipulates that a child between the age of 10 and 14, who comes into conflict with the law, is presumed to lack criminal capacity (*doli incapax*). Should the criminal capacity of a child, within this age bracket, be questioned, the obligation rests on the state to prove beyond reasonable doubt that the child has above average levels of psychological and cognitive maturity and can therefore be held liable for his or her criminal conduct (Child Justice Act, S11).

Concerns were also raised about the appropriateness of the five developmental domains, stipulated in section 11 of the Child Justice Act, which should be assessed to determine criminal capacity. In this regard it was questioned if an assessment of a child's cognitive, emotional, moral, psychological and social development is adequate to determine criminal capacity, since it does not present a holistic assessment of the child's psychosocial functioning.

It was furthermore concluded that operational challenges, such as a lack of standardised instruments and inadequate time allocated to conduct assessments, hamper the effectiveness of the criminal capacity process. As a result, these challenges could negatively affect children who are in the justice system. This would happen when a child, who may lack criminal capacity due to the influence of a psychiatric disorder, may be found to have criminal capacity without recognition being granted to the influence of the disorder and without provision made to provide the needed services for such a child who is in need of care and protection, as stipulated in section 150 of the Children's Act.

5.4.3.2 *Adequate recognition is not given to the impact and symptoms related to psychiatric disorders in criminal capacity assessments*

Findings from this section indicated that adequate consideration is not given to the influence of psychiatric disorders on the criminality and criminal capacity of a child who is in conflict with the law. Findings from the study agreed with Swanepoel (2015:3245), namely that when the criminal capacity of a child with a psychiatric disorder is questioned, it is more important to assess the child's level of functioning, in relation to the influence of a psychiatric disorder, than to determine a diagnostic label of a psychiatric disorder. This is because the impact of the disorder will influence the child's level of functioning, namely the cognitive and conative functioning, thereby influencing criminal capacity.

5.4.3.3 *The lack of services available to child offenders with psychiatric disorders, as well as child offenders without psychiatric disorders, hampers the best interest of the child*

Findings highlighted a lack of services and service providers across four provinces in South Africa, namely KwaZulu-Natal, Gauteng, Eastern Cape and Western Cape, that deal with child offenders with psychiatric disorders, who were found to have and to not have criminal capacity. Child justice practitioners are challenged with large caseloads, resulting in fragmented services, where the criminal capacity assessments are not case specific and the needs of individual children are not adequately taken into consideration.

It was also concluded that a general lack of services exists, resulting from the psychosocial and developmental needs of children with psychiatric disorders not being addressed. In this respect, Breen (2011:6) states that "...children with mental health disabilities seem to remain in a limbo situation when it comes to provisions being made for services to them". The lack of services available to child offenders with psychiatric disorders not only hampers the best interest of the child, but also violates the child's rights to have access to basic health care and social services that cater to the special needs of this vulnerable group who are in need of care and

protection (South African Constitution Act no 108 of 1996, S28; Children's Act, S2, 11, 150; Child Justice Act, S29 & 50).

5.4.4 OBJECTIVE 4: Identify good practice and make recommendations on how to improve procedures in dealing with children who have psychiatric disorders and are in conflict with the law

The fourth objective identified good practice in child justice procedures and recommendations were made by participants on how to improve on procedures used to deal with children who have psychiatric disorders and are in conflict with the law. Findings were divided into two prominent themes, namely legislative recommendations and service recommendations.

5.4.4.1 *Legislative recommendations*

Findings that emerged in this section, pertaining to legislative recommendations, placed emphasis on the age of criminal capacity and the legislative framework as areas that can be improved in the procedures used to assess the criminal capacity of children in conflict with the law, who suffer from psychiatric disorders.

- **Criminal capacity age**

Participants recommended that a single age of criminal capacity, instead of the current practice in which a minimum age as well as rebuttable age of criminal capacity for children in conflict with the law, is used. It was furthermore recommended that the minimum age of criminal capacity should increase in order for South African legislation to align with the stipulations in the UNCRC (1990a) and recommendations found in research relating to age and brain development in children. In light of this, it was identified that the older a child is, the more likely he/she is to have a better understanding of behaviour and the consequences related to that behaviour. Therefore, increasing the age of criminal capacity would be a step towards non-discriminatory practice, concerning legislative procedures to deal with children in conflict with the law.

- **Legislative ambiguities in the Child Justice Act pertaining to the procedures used to determine the criminal capacity of child offenders with psychiatric disorders should be addressed**

In this section a recommendation was made to implement specific legislative procedures in the Child Justice Act, pertaining to the determination of criminal capacity for child offenders with psychiatric disorders, instead of the current practice, in which the determination of criminal capacity for a child offender with a psychiatric disorder refers to legislative framework under the Criminal Procedure Act, subjecting children to the same mental testing used for adult offenders with psychiatric disorders.

These findings concur with the literature discussed in chapter 3 concerning the fact that the current practice used to determine the criminal capacity of children who suffer from psychiatric disorders and are in conflict with the law, do not address the child's special needs and are therefore not in the best interest of the child. Additionally, these findings also correlate with the participants' opinions under objective 3 regarding the inadequate recognition granted to the influence of psychiatric disorders in the determination of a child's criminal capacity.

It is proposed that the implementation of a legislative framework – that specifically deals with criminal capacity issues for child offenders with psychiatric disorders – would be an improvement in addressing the vulnerability and special needs of children who suffer from psychiatric disorders.

5.4.4.2 Service recommendations

Findings highlighted the need for case-specific and need-directed services that address the special needs of child offenders, for those with psychiatric disorders as well as for those children without psychiatric disorders. Feedback from participants highlighted the need for a holistic assessment that is conducted by a multi-disciplinary team, which includes various role players who are experts in the field of child justice, criminal capacity and mental health issues. It is proposed that a multi-disciplinary team of experts would be able to give attention to the environmental and

societal circumstances, the psychological development and influence of psychiatric disorders, thereby holistically addressing the needs of a child offender who suffers from a psychiatric disorder.

Findings in this section emphasised that service providers, such as probation officers who are currently conducting criminal capacity assessments, should be trained in aspects relating to child justice issues. This is because probation officers conduct the initial assessment with the child offender for the preliminary inquiry and should, therefore, be knowledgeable about factors such as psychiatric disorders that could influence a child's criminal capacity.

In addition, findings also highlighted the value of early intervention programmes to proactively address the psychosocial and developmental needs of children who are vulnerable and at risk. The implementation of support systems and skills development for parents/guardians of child offenders was also recommended.

5.5 RECOMMENDATIONS

5.5.1 The prevalence of a psychiatric disorder is an aspect that needs to be taken into consideration during the determination of criminal capacity for children in conflict with the law

Findings from the study confirmed that a significant number of children who come in conflict with the law exhibit symptoms of psychiatric disorders. It was furthermore confirmed that psychiatric disorders such as ADHD, ID, LD, ODD and CD affect the cognitive functioning of the child and therefore cause impairments in the social, communicative and conative development. These impairments were found to increase impulsivity, aggression and anti-social behaviour in children. Based on the findings in the study, impairments found in the cognitive and conative functioning will negatively influence the child's ability to understand the wrongfulness of his or her behaviour, and to act in accordance with this understanding.

It is, therefore, recommended that standardised procedures should be put in place to assess children who are in conflict with the law, to determine the presence of psychiatric disorders. This can be achieved by the development and utilisation of an assessment tool to screen children who come into conflict with the law for psychiatric disorders.

5.5.2 Aspects that need to be taken into consideration in the assessment of the criminal capacity of children with psychiatric disorders

As mentioned, South African children are constantly faced with environmental and societal challenges such as substance abuse and exposure to violence; and are often victims of abuse, parental neglect and malnutrition due to poverty. In addition to assessing child offenders for psychiatric disorders, section 5.4.1.3 highlighted that these environmental and societal factors, to name a few, equally affect the child's predisposition for criminal involvement and also contribute to the development of various learning and behavioural psychiatric disorders.

Based on the findings, it is therefore recommended that standardised procedures should be implemented to thoroughly investigate the environmental and societal factors affecting children who are in conflict with the law. It is also recommended in this regard that the criminal capacity of a child should not only focus on identifying if a child has a psychiatric disorder, but also on the influence the disorder and associated symptoms have on the child's criminal capacity. This can also be achieved by the development and utilisation of a standardised assessment instrument to screen and holistically assess children who come into conflict with the law; thereby promoting the holistic assessment of the child that includes aspects relevant to the criminal capacity of a child.

The assessment instrument should also be developed in a manner that enables the assessment of the extent to which the disorder influenced the cognitive and conative functioning of the child. Additionally, it is recommended that a multi-professional strategic plan should be developed to address the psychosocial and developmental needs of children with psychiatric disorders who come into conflict with the law. In

addition to delivering need-directed services, the strategic plan will aid with the prevention of reoffending and also reduce the risk of developing additional disorders, which predispose children to criminal involvement.

5.5.3 Legislative requirements and operational challenges that negatively influence the criminal capacity assessment of children in conflict with the law

Findings in section 5.4.3.1 identified various legislative and operational challenges which were found to negatively influence the criminal capacity assessment of children in conflict with the law. In this section, concern was raised regarding the minimum age of criminal capacity, the incorrect application of *doli incapax* and the criteria used to assess the criminal capacity of child offenders with psychiatric disorders, namely the five developmental domains stipulated under section 11 (ss3) of the Child Justice Act and the legislative framework found under section 77 to 79 of the Criminal Procedure Act.

Based on the findings, and as recommended by the experts in section 5.4.6.1, it is recommended that the age of criminal capacity is raised. The implementation of this practice will reduce the number of children entering into the justice system for criminal capacity assessments. The benefit of this is twofold. Firstly, criminal capacity assessments will be conducted on 'older' children in conflict with the law, who are found to be more aware of their actions and the consequences of their actions. This will reduce the risk of children entering into the justice system and being exposed to harsh and negative circumstances unnecessarily. Secondly, this will reduce pressure on departmental facilities to conduct criminal capacity assessments on a large case load, with limited service providers. This will automatically improve the quality of services and time allocated to criminal capacity assessments for children who are in need of such services.

Recommendations were made to review and improve the legislative framework, namely section 11 (ss3) of the Child Justice Act and sections 77 to 79 of the Criminal Procedure Act, used to assess child offenders with psychiatric disorders. This can be

achieved by conducting an evaluation on the effectiveness of the current criminal capacity assessment criteria used for children in conflict with the law.

It is recommended that adequate recognition should be given to the influence of psychiatric disorders on a child's criminal capacity. This can be achieved by the implementation of a legislative framework in the Child Justice Act that specifically pertains to the procedures used to deal with child offenders with psychiatric disorders, instead of the current legislation that refers to the Criminal Procedure Act. The practice of increasing the age of criminal capacity and improving on legislative frameworks pertaining to children in conflict with the law, will allow South African child justice legislation to align with international practices, thereby abiding by the obligations under the ratification of the UNCRC (1990a).

5.5.4 The lack of services available to child offenders with psychiatric disorders, as well as child offenders without psychiatric disorders, hampers the best interest of the child

The lack of services available in South Africa to child offenders with psychiatric disorders was highlighted in section 5.4.3.3 of the study. State facilities are unable to provide services to a large number of children in conflict with the law due to a limited number of service providers. This strain is further exacerbated on state departments due to the stipulation under section 11 of the Child Justice Act, obliging probation officers (in addition to a general assessment), to also assess the criminal capacity of children between 10 and 14 years of age. Although this stipulation is intended to uphold the best interest of the child by reducing administrative delay and exposure to the justice system, time frame criteria stipulated under section 11 (ss4) of the Child Justice Act set an unrealistic goal, especially due to the shortage in services providers.

It is, therefore, recommended that the nature of services and number of facilities per province be increased in order to provide adequate services to child offenders. In addition to general services, specialised services should also be developed to

address the specific needs of children with psychiatric disorders. This can be achieved by funding NGOs to deliver specialised services to child offenders.

In order to address the specific needs of child offenders with psychiatric disorders, it is recommended that a multi-disciplinary approach is adopted to assess children in conflict with the law. Here, the expertise of child justice practitioners in the medical, psychological, legal, criminological as well as the academic field should be utilised in child justice matters. In this light, experts will be able to conduct holistic and case-specific assessments, from a multi-contextual perspective, thereby taking into consideration the psychosocial and environmental factors that influence the child's behaviour and criminal capacity, instead of the single-dimensional approach that is currently used. The benefits of this practice will ensure that the special needs of a child offender with a psychiatric disorder are addressed and the necessary services are provided based on the child's specific needs. The implementation of a multi-disciplinary team will also reduce the strain on governmental service providers and create job opportunities for suitably qualified child justice practitioners in South Africa.

Additionally, as recommended by the experts in section 5.4.4.2, it is also recommended that training programmes should be developed to equip service providers, who are already working in the justice system, with the necessary multi-disciplinary context. Such training is especially important for probation officers as they conduct the initial assessment during the preliminary inquiry and are responsible for the initial recommendation on the child's criminal capacity as well as referrals for additional services the child might require.

Recommendations by the experts in section 5.4.4.2 highlighted the implementation of early intervention programmes to reduce the risk of children coming into conflict with the law. As emphasised in the contents of this dissertation, due to their circumstances South African children do not always reach full cognitive, conative, emotional and moral development. This impaired development predisposes children to develop psychiatric disorders and increases their risk of coming into conflict with the law. This is significant to the study, since these are factors which are considered when determining the criminal capacity of a child. In this respect, it is recommended

that an early intervention strategy, focusing specifically on children who are symptomatic of psychiatric disorders, be developed. The purpose of such a programme will be to develop emotional intelligence, moral reasoning, and pro-social behaviour. Such a programme should be included as a compulsory subject at a scholastic level for all children.

In order to improve on the present challenges experienced by South African children, such as a lack of parental supervision, exposure to violence, substance abuse and malnutrition due to poverty, it is recommended that NGOs, in conjunction with the support of governmental departments, educate parents and caregivers on child-rearing practices and raise awareness on the services that are available to them and their children. The first step to achieving this is through developing and implementing a national drive; here attention and awareness should be raised on the issues facing South African children, which increase their risk of criminal involvement. Thereafter, provincial support groups, educational programmes and awareness campaigns should be implemented in every province.

In addition to the implementation of the early intervention programmes, it is also recommended that the effectiveness of these programmes are evaluated from a provincial level to determine if the intended aim is achieved, namely to deliver need-directed programmes and to reduce the risk of children coming into conflict with the law.

5.6 ADVOCACY

As discussed under section 5.5, the improvement of the present legislative framework in the Child Justice Act, pertaining to the age of criminal capacity and the procedures used to deal with child offenders with psychiatric disorders, should be adjusted and aligned with international practices, namely the UNCRC (1990a).

Based on the findings of this study, it is imperative that a new legislative framework pertaining to the procedures used to deal with child offenders with psychiatric disorders is developed and included in the Child Justice Act. This will address the

legislative ambiguities identified in the study and ensure that the criminal capacity assessment procedures, used to deal with child offenders with psychiatric disorders, are case specific and address the special needs and circumstances of the child as intended by the Children's Act and the Child Justice Act.

5.7 FURTHER RESEARCH

Recommendations focusing on legislative and procedural inadequacies were made based on the findings from the study. In addition to this, the following areas have been identified for further research.

- An investigation into aspects pertaining to brain development and maturity, in respect of establishing an appropriate age of criminal capacity.
- An evaluation on the suitability of the five domains used to conduct criminal capacity assessment, as stipulated in section 11 of the Child Justice Act.
- An investigation and recommendation of valid developmental domains that holistically and effectively assess the criminal capacity of child offenders.
- A holistic review of the legislations in the Child Justice Act that deal with criminal capacity procedures for assessing child offenders with psychiatric disorders.
- A study recommending the most effective tools to determine the criminal capacity of children in conflict with the law.
- A study in which a standardised assessment tool is developed for the criminal capacity assessment of child offenders.
- An evaluative study into gaps in the services provided by governmental and NGOs to child offenders with psychiatric disorders, as well as those without disorders.
- A study that implements improvements for a 'needs-based' and individualised facility for child offenders with psychiatric disorders.
- A study that explores the challenges experienced by the families of child offenders with psychiatric disorders.

- An evaluation on the benefits of establishing a multi-disciplinary approach to deal with children in conflict with the law, as well as for child offenders with psychiatric disorders.

5.8 CONCLUSION

This study emphasised the vulnerability of child offenders with psychiatric disorders and confirmed that these children are in need of care and protection. The concluded findings from the study reflected that the influence of psychiatric disorders may increase the risk of criminal behaviour and may affect the criminal capacity of a child offender with a psychiatric disorder.

Factors identified in the study depicted challenges in criminal capacity assessment procedures as well as services available to child offenders with psychiatric disorders. Although the legislative framework in the Child Justice Act promotes the best interest of the child and aims to improve on child justice procedures for children in conflict with the law, there are still numerous areas of legislative concern that need to be addressed. The limitations of the study were highlighted and recommendations were made to improve on the methods used to deal with child offenders. Lastly, recommendations for future areas of research were identified, where more insight was needed in child justice and criminal capacity issues.

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ANNEXURE A

INFORMED CONSENT LETTER

**The University of South Africa
College of Law
Department of Criminology and Security Sciences**

Researcher: Leandre' Christina Geoffrey

Title of study: An exploration on the criminal capacity of child offenders with psychiatric disorders

Dear prospective participant

My name is Leandre' Christina Geoffrey and I am doing research in the Department of Criminology and Security Science towards a Master's Degree in Criminology at the University of South Africa. You are invited to participate in a study entitled:
An exploration on the criminal capacity of child offenders with psychiatric disorders

WHAT IS THE PURPOSE OF THE STUDY?

The aim this research is to establish if psychiatric disorders influence the criminal capacity of a child offender. In order to achieve this, I will focus on the potential impact of psychiatric disorders, such as attention deficit hyperactivity disorder (ADHD), autism spectrum disorder (ASD), oppositional defiant disorder (ODD) and conduct disorder (CD), on the criminal capacity of children in conflict with the law.

WHY AM I BEING INVITED TO PARTICIPATE?

You have been recognised as an expert with experience in working with children who have psychiatric disorders and who are in conflict with the law. The method that was used to obtain your information stemmed from and was guided by the 'snowball' sampling technique used in this qualitative exploratory investigation. The principles of the snowball sampling technique require the researcher to identify a single participant who is involved in the research phenomenon, who in turn will then suggest other experts who can be approached for the purposes of the study. All participants in the study will thus be asked to recommend other experts for me to approach. In using this sample method, I aim to achieve a sample of approximately 10 research participants.

WHAT IS THE NATURE OF MY PARTICIPATION IN THIS STUDY?

You will be required to participate in telephonic interviews, that with your permission will be recorded. The interview will be conducted using a semi-structured interview schedule, thereby creating an informal, flexible atmosphere to do an in-depth exploration of the research themes and other information relating to the research topic. The interview will focus on your perceptions, experiences and opinions about the criminal capacity of child offenders with psychiatric disorders (such as ADHD, ASD, ODD and CD) and the influence that these psychiatric disorders may have on the child offender's ability to appreciate the wrongfulness of his/her action. The potential risks associated with the psychiatric disorders in relation to delinquency will also be explored. Lastly, the challenges experienced during the assessment of the criminal capacity of this group of children will be explored. The expected duration of the interview should not exceed 30 minutes. The guidelines for the semi-structured interview can be made available upon your request.

CAN I WITHDRAW FROM THIS STUDY EVEN AFTER HAVING AGREED TO PARTICIPATE?

Your participation in this study is voluntary and you may withdraw from the study at any time. In the event that you may wish to withdraw participation, the data from your interview will be destroyed. The researcher and her supervisor will be the only individuals who will have access to the raw data from the interviews, thereby ensuring that the data will be treated as confidential and your anonymity will be ensured. With your permission, the interview will be audio-recorded. The recorded interviews will be transcribed and your responses (both audio and transcribed) will maintain anonymity and confidentiality. All identifying information will be deleted or disguised in any subsequent publication or presentation of the research findings.

WHAT ARE THE POTENTIAL BENEFITS OF TAKING PART IN THIS STUDY?

There are no direct perceivable benefits for participating in this study. However, it is the researcher's hope that the conclusion of this study will add a valuable contribution to the scientific research community and to individuals/institutes that deal with children with psychiatric disorders who are in conflict with the law. In addition, it is also the researcher's hope that the findings from the study will also assist you when you work with this vulnerable group of children.

ARE THERE ANY NEGATIVE CONSEQUENCES FOR ME IF I PARTICIPATE IN THE RESEARCH PROJECT?

There are no perceivable risks identified in participating in the study. As highlighted above, all collected data and published findings will be done in a manner that supports the participants' confidentiality and anonymity.

WILL THE INFORMATION THAT I CONVEY TO THE RESEARCHER AND MY IDENTITY BE KEPT CONFIDENTIAL?

As mentioned, you have the right to anonymity and confidentiality if you participate in this study, unless you waive the right of anonymity by indicating that you wish to be identified in the study. Your name will not be recorded anywhere and no one, apart from the researcher and study supervisor, will know about your involvement in this research. The audio recorded interview and transcribed data (from your interview) will be given a code number or a pseudonym that will be used to refer to you in the report of all research findings. In addition, please note that the data from the research may be used for journal articles and/or conference proceedings. Your anonymity and confidentiality will be protected in a similar manner as in the original study.

HOW WILL THE RESEARCHER(S) PROTECT THE SECURITY OF DATA?

The audio recordings and hard copy of transcribed notes will be stored in a lock-up safety box for a period of five years at the researcher's offices in Durban, KwaZulu-Natal, after which it will be destroyed. Electronic information will be stored on a password protected computer with a back-up of electronic information stored on a hard drive under an alias file name. Any future use of the stored data will be subject to further research ethics review and approval if applicable.

WILL I RECEIVE PAYMENT OR ANY INCENTIVES FOR PARTICIPATING IN THIS STUDY?

There will be no incentives or payments made for your participation in the study. In addition, you, the participant will not incur any financial costs by participating in the study. The acceptance of your participation will only require approximately 30 minutes of your time, as highlighted above.

HAS THE STUDY RECEIVED ETHICAL APPROVAL?

This study has received written approval from the Research Ethics Review Committee of the College of Law, UNISA. A copy of the approval letter can be obtained from the researcher if you so wish.

HOW WILL I BE INFORMED OF THE FINDINGS/RESULTS OF THE RESEARCH?

Findings from the study will be available online once the examination process of the dissertation has been completed. If you would like to be informed of the final research findings or other information regarding the study, you are welcome to contact the researcher at the contact details listed below. Should you have concerns

about the way in which the research has been conducted, you may contact Professor MI Schoeman (researcher's supervisor) on the contact details listed below. Alternatively, you may contact the research ethics chairperson of the UNISA Research Ethics Committee on the details listed below.

Researcher:

Name and surname: Leandre' Christina Geoffrey

Telephone: (+27) 723532479

Email: leigh.geoffrey@yahoo.com / 44281897@mylife.unisa.ac.za

Research supervisor:

Name and surname: Professor Marelize Schoeman

Telephone: (+27) 12433 9491

Email: schoemi@unisa.ac.za

College of Law Ethics Review Committee Chairperson:

Name and surname: Professor B Haefele

Telephone: (+27) 124339477

Email: haefebw@unisa.ac.za

Thank you for taking the time to read this information sheet and for participating in this study.

Leandre' Christina Geoffrey (Researcher)

INFORMED CONSENT FORM

Consent to participate in this study

I, _____ (participant name), confirm that the researcher asking my consent to take part in this research has told me about the nature, procedure, potential benefits and anticipated inconvenience of participation.

I have read (or had explained to me) and understood the study as explained in the information sheet.

I have had sufficient opportunity to ask questions and am prepared to participate in the study.

I understand that my participation is voluntary and that I am free to withdraw at any time without penalty.

I am aware that the findings of this study will be processed into a research report, journal publications and/or conference proceedings, but that my participation will be kept confidential unless otherwise specified.

I agree to the audio recording of the telephonic interview.

I have received a signed copy of the informed consent agreement.

I acknowledge that I was chosen to participate in the study because of my expertise in child justice. The views expressed are therefore my personal professional opinion and do not represent the views of the department of organisation I am employed at.

Please choose one of the options:

- I would like to remain anonymous and my identity not made known in the study
- I wave my right to anonymity and have no objections to my identity being made known in the study.

Participant name and surname:

Participant signature:

Date.....

Researcher's name and surname.....

Researcher's signature

Date.....

ANNEXURE B

SEMI-STRUCTURED INTERVIEW SCHEDULE

Research topic: **An exploration on the criminal capacity of child offenders with psychiatric disorders**

Good Day Mr/Mrs/Miss/Dr

Researcher: Thank you for taking the time to participate in the research investigation on the 'exploration of the criminal capacity of child offenders with psychiatric disorders'. This is a semi-structured, informal interview; therefore you are welcome to divulge into related topics that I may have not mentioned which, in your opinion, may be of relevance to the research subject. I will now commence with the interview.

Biographical information:

- How many years of experience do you have working with children in conflict with the law?
- How many years of experience do you have working with child offenders with psychiatric disorders?
- Have you, or are you involved with the criminal capacity assessment of children in conflict with the law?

The influence of psychiatric disorders on criminality and the criminal capacity of children in conflict with the law:

- Based on your experience, have you noted any psychiatric disorders that are prevalent in child offenders?
- Do you think that psychiatric disorders are a risk factor that can contribute to criminal behaviour in children?
- Which psychiatric disorders could influence/result in children not having criminal capacity?
- In your opinion, to what extent do psychiatric disorders impact on a child offender's criminal capacity?
 - Please explain or elaborate on the answer above; examples of cases or experiences.
- How do you determine if a child offender has a psychiatric disorder and if it influenced his/her criminal capacity at the time he/she committed the offence?

- In your opinion, to what extent do ADHD, ASD, ODD and CD impact on criminality in child offenders?
- Please explain or elaborate on the answer above; examples of cases or experiences (to follow up on each disorder).
- What services are available for child offenders with psychiatric disorders, who were found to have criminal capacity?
- Are there specific services available for children with psychiatric disorders, who were accused of committing a crime and found to not have criminal capacity?
- Do you think the current methods of determining criminal capacity gives adequate recognition to psychiatric disorders as a factor that could influence the criminal capacity of children in conflict with the law?
- In your opinion, do you think the presence of psychiatric disorders, as highlighted in the study, could influence the assessment of a child's criminal capacity?
- If so, please elaborate.
- Please provide recommendations, from your expert experience, on how the child justice system should deal with a child offender who has a psychiatric disorder?
- Do you have any additional information of areas which you would like discuss?

Thank you for your time, assistance and valuable expert contribution in the study.

ANNEXURE C

College of Law Ethics Certificate



COLLEGE OF LAW RESEARCH ETHICS REVIEW COMMITTEE

Date: 2016/05/06

Reference: ST1

Applicant: L. Geoffrey

Dear L. Geoffrey
(Supervisor: Prof M Schoeman)

DECISION: ETHICS APPROVAL

Name	L. Geoffrey
Proposal	An analysis on the criminal capacity of child offenders with psychiatric disorders
Qualification	MA Criminology

Thank you for the application for research ethics clearance by the College of Law Research Ethics Review Committee for the above mentioned research. **Final approval is granted.**

The application was reviewed in compliance with the Unisa Policy on Research Ethics.

The proposed research may now commence with the proviso that:

1. *The researcher will ensure that the research project adheres to the values and principles expressed in the Unisa Policy on Research Ethics which can be found at the following website:*

http://www.unisa.ac.za/cms/sys/staff/contents/departments/res_policies/docs/Policy_Research%20Ethics_rev%20app%20Council_22.06.2012.pdf

2. *Any adverse circumstances arising in the undertaking of the research project that is relevant to the ethicality of the study, as well as changes in the methodology, should be communicated in writing to the College of Law Ethical Review Committee.*



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