

CRIMINAL CAPACITY OF CHILDREN

by

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I declare that Criminal Capacity of Children 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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(vi) **SUMMARY:** In this project the various International Instruments, namely the United Nations Convention of the Rights of the Child; 1989, the Beijing Rules and the African Charter, relating to the guidelines of the establishment of a minimum age for criminal capacity are furnished. The developments regarding the issue of criminal capacity since 1998 in Australia, the United Kingdom and Hong Kong are highlighted. The historical position and the current position in South African law with regard to the issue of criminal capacity are discussed as well as the implementation thereof by our courts. The statistics on children under 14 years in prison over the past five years are furnished. The introduction of the Child Justice Bill, 2002 by Parliament and the deliberations following the introduction, focusing on the issue of criminal capacity is highlighted. The proposed provisions of the Child Justice Bill, 49 of 2002 codifying the present common law presumptions and the raising of the minimum age for criminal capacity are furnished. The evaluation of criminal capacity and the important factors to be assessed are discussed as provided for in the Child Justice Bill, 49 of 2002. A practical illustration of a case where the criminal capacity of a child offender was considered by the court is, discussed and other important developmental factors that should also be taken into consideration by the court are identified and discussed. Important issues relating to criminal capacity, namely, time and number of assessments, testimonial competency of the child offender, evolving capacities and age determination are discussed and possible problems identified and some solutions offered. The research included an 11-question questionnaire to various professionals working in field of child justice regarding the issue of criminal capacity and the evaluation thereof.

Juvenile offenders; Child Justice; criminal capacity of juvenile offenders; assessment; evaluation; *doli incapax*; common law presumptions; Child Justice Bill, 2002; children

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CHAPTER 1

INTRODUCTION AND METHODOLOGICAL FOUNDATION

1.1 Introduction

With this research the relevant provisions relating to the establishment of a minimum age for criminal capacity in the International Instruments will be highlighted and explained. An overview of the recent developments on the topic of criminal capacity in Australia, the United Kingdom and Hong Kong will be furnished and a limited illustration on how this concept is being dealt with by their Courts will also be furnished.

Furthermore, the issue of criminal capacity and the presumption of criminal incapacity applicable to children between the ages of 7 and 14 years are described. The present position in South Africa's criminal justice system, the practical implementation and assessment of the concept of criminal capacity of children by our Courts and the statistics of children under the age of 14 year in prison over the past 5 years will be discussed and furnished.

The proposed provisions in the Child Justice Bill, 2002 regarding the codification of the common law relating to criminal capacity of children, the presumption of *doli incapax* and the evaluation of criminal capacity in children will be discussed. A practical illustration where the criminal capacity of a child offender aged 12 years where decided upon by the Court will be furnished. Other important factors, that should also be taken into account when assessing and deciding on the criminal capacity of children will be identified and discussed.

Issues linked to criminal capacity, that might pose problems in this regard will be highlighted and solutions will be offered, where relevant.

The approaches of the various professionals involved with children in conflict with the law, regarding the issue of criminal capacity and the assessment thereof will also be analyzed and described.

All of the above will be implemented – where applicable – to develop a model for adjudicators to assess the criminal capacity of children under South African law.

1.2 Methodological Foundation

1.2.1 Goal of the Research Project and Guiding Principle

With this research the present position in South Africa's criminal justice system regarding the minimum age for criminal capacity, the common law presumption of *doli incapax* applicable to children between the ages of 7 and 14 years, is described and it is explained how this concept is being dealt with in the Courts. The important factors to be taken into account when doing an assessment on the criminal capacity of a child will be highlighted and the views of a selected group of the various professions (social workers, lawyers, criminologists and psychologists) on the issue of criminal capacity and the assessment thereof will be discussed to ascertain whether there is any difference in their approach to the issue of criminal capacity and to ascertain their informed opinions regarding *doli incapax* and related issues. A further goal of the research is to determine if there are any relevant criminological contributions or insights that can be added to this judicial concept of criminal (in)capacity of children.

The guiding principles of the research were twofold: In the first place it was to look for differences and similarities between the views of the selected professionals. In the second place it was to look for cues from them to enhance the existing judicial position on *doli incapax*.

1.2.2 Rationale

Since the ratification of the United Nations Convention on the Rights of the Child, 1989 by South Africa on 16 June 1995, our country became obliged to comply with the various provisions in the said Convention. One of these provisions (Article 40(3)(a)) includes the

establishment of a minimum age below which children should be presumed not to have the capacity to infringe the penal law. In terms of the common law in South Africa, all children under the age of 7 years are irrebuttably presumed to be *doli incapax* and can therefore never be prosecuted. Children between the ages of 7 – 14 years are rebuttably presumed to be *doli incapax* and if any such child is to be prosecuted, the prosecution must prove beyond reasonable doubt that the child offender had the required criminal capacity at the time of committing the crime. The issue is now in the process of being included in legislation in the form of the Child Justice Bill, 2002 and therefore a closer look into the assessment and establishment of criminal capacity of juvenile offenders between the ages of 10-14 years are necessary. The role of the relevant professionals, including criminologists, in this regard also needs to be investigated and highlighted.

1.2.3 Delimitation

Regarding literature, the focus was exclusively on the Criminal Procedure Act, 1977 (Act 51 of 1977); Child Justice Bill, 2002 (Bill 49 of 2002) and International Legal Instruments. All the above and other relevant and applicable research articles and books available on the research topics are listed in the bibliography.

Furthermore, the empirical part of the research was limited to professionals working in the field of crimes committed by children and who, according to the knowledge of the researcher, are well-informed regarding *doli incapax* and the applicable related issues. Because the empirical data are limited to the views of selected professionals only, it is clear that the data gathered from them can only be generalized as is the case with this type of research, to include the *universum* as explained in paragraph 1.2.4.

The key concepts will be explained in the relevant chapters to indicate the denotation and connotation of such terms for the purposes of this research.

1.2.4 The Respondents

Initially, the selection of the respondents was conducted by utilizing the membership list received from the South African Professional Society on the Abuse of Children (SAPSAC). 132 Professionals in the field were selected, out of 160 members on the list, based on the specialized field indicated in the membership list as lawyers, social workers, criminologists

and psychologists. During the pilot study, it became clear that police officials would not respond. One senior police official commented that police officials are only called on to apply the law and therefore are reluctant to give opinions on it. This is why no police official was included in the list from the members of SAPSAC. The rest of the members were selected due to the fact that all the professionals selected are in private practice and thus well-informed about *doli incapax* – thus comprising a purposeful sample. The rest of the members are medical professionals, nurses, teachers and other professionals like police officials, that were not included in this study.

The questionnaire with 11 open-ended questions was sent to them via e-mail on 11th July 2005 and 29th September 2005. To secure appointments with them would pose a problem and some of them stay in provinces far away from Gauteng, posing time, financial and logistical problems. Therefore, e-mail was used.

However, this posed a problem. The problems in securing responses included the fact that some of the e-mail addresses on the membership list were incomplete, the addresses changed, the recipients were unavailable for a period of time due to long leave and some of the e-mails were undeliverable due to service provider problems. Furthermore, various professionals did not furnish an e-mail address to be included into the membership list. Another problem was that 54 of the professionals did not furnish their e-mail addresses with a result that only 78 e-mails were sent out to the selected group of 132. Of this group of 78, 29 e-mails were returned undeliverable due to the fact that the user is unknown or the unavailability of the mailbox, reducing the response group to 49. Of the remaining 49, two responded *via* automatic response that they are on long leave, one indicated that she did not feel competent to complete the questionnaire and one resigned. Therefore the final group consisted of 47 only.

For the purposes of this research the *universum* is 49 of which 17 (34,69 percent) responded with completed questionnaires. Seaberg (De Vos 2002:200) and Grinnell and Williams (De Vos 2002:200) state that in most cases a sample of 10 percent should be sufficient.

1.2.5 The Research and Data Collection Process

Starting Points

To start off, Kerlinger (De Vos 2002:45) states that scientific work is systematic and controlled. This means it is so ordered that investigators can have critical confidence in its outcomes. It also means that it is empirical. Being about empirical refers to the fact that the scientist must put his belief to a test outside himself, that is, subjective belief must be checked against objective reality. Two basic research styles are available for criminologists to ascertain objectivity, namely the quantitative and the qualitative approaches. The quantitative works with the ideal of random sampling to ensure representativity of the *universum* and utilized closed-ended questionnaires (Strydom & Venter 2002:203–206; Delport 2002:165–196). The qualitative approach's approach differs significantly from the quantitative approach. These differences are specifically based on how big the samples are and on the data collection techniques. The samples are much smaller and the data collection technique is based on collection styles like interviews, participant observation and the like (Strydom 2002:278–290; Greeff 2002:291–320). It is also a well-established fact that the data gathered by means of the qualitative approach cannot be generalized.

Data Collection

The data collection technique that was chosen for the purposes of this research was based on the quantitative approach and a sample of 34,69 percent of the *universum* could be secured. A semi-structured questionnaire with open-ended questions was utilized and the data was collected by means of e-mail.

It should also be remembered that this research is explorative by nature. As far as it could be ascertained, *doli incapax* has not yet been researched in Criminology by a South African criminologist. Therefore the research is explorative. The semi-structured interview schedule was utilized due to the fact that the research is limited to *doli incapax* and related issues only.

The first stage of the research consisted of literature research. The literature research was used to systemize the research report into chapters and to compile the questionnaire.

The Structure of the Questionnaire

The questionnaire consisted of 11 questions, which followed cues of the literature relating to criminal capacity, the assessment thereof, the position regarding this issue in Australia, the United Kingdom and Hong Kong and the provision in the proposed Child Justice Bill, 2002. The questionnaire that was used is attached as an addendum.

1.2.6 Compilation of the Report

To secure a logical train of thought, this research report is compiled as follows:

Chapter 2 highlights the various International Instruments furnishing guidelines regarding the establishment of a minimum age for criminal capacity and the interpretation thereof, the developments regarding criminal capacity since 1998 in Australia, United Kingdom and Hong Kong are discussed and these countries' implementation thereof.

Chapter 3 deals with a brief history of the concept of criminal capacity, the present position in our criminal justice system regarding the minimum age for criminal capacity, the presumption of *doli incapax* applicable to the children between the ages of 7 and 14 years and to illustrate how the Courts deal with this issue. Statistics on children under 14 years in prison over the past 5 years are also furnished.

Chapter 4 deals with the proposed provisions in the Child Justice Bill, 2002, the introduction of the Child Justice Bill, 2002 in Parliament, the deliberations and the present status of the Child Justice Bill, 2002. The issue of criminal capacity as provided for in the Child Justice Bill, 2002 and the provisions relating to the evaluation of criminal capacity in children are also discussed.

Chapter 5 gives a practical illustration of a case where the criminal capacity of a child offender was considered by the Court and decided upon on the merits and facts of the case. Other important factors that should also be taken into account when assessing the criminal capacity are highlighted.

In Chapter 6 other important issues linked to criminal capacity are discussed and possible problems are highlighted and some solutions are offered.

Chapter 7 contains the findings, conclusions and recommendations of this report.

1.3 Summary

In this chapter the reader was introduced to the research topic and the methodological foundation. Therefore attention was given to the goal, rationale and delimitation of the research.

In the next chapter the relevant provisions relating to criminal capacity in the International Instruments protecting the rights of children will be highlighted. A comparative study on the different approaches of Australia, the United Kingdom and Hong Kong on the issue of criminal capacity will also be conducted.

CHAPTER 2

INTERNATIONAL INSTRUMENTS AND COMPARATIVE STUDY ON CRIMINAL CAPACITY IN AUSTRALIA, UNITED KINGDOM AND HONG KONG

2.1 Introduction

In this chapter the general guidelines for the establishment of a minimum age for criminal capacity, as provided for in the International Instruments will be highlighted. A brief summary of the different approaches on the issue of criminal capacity and the practical interpretation thereof in Australia, the United Kingdom and Hong Kong will also be furnished. These countries were chosen because all of them recently investigated the issue of criminal capacity of children and made some changes to the laws governing the criminal capacity of children, and because the law relating to the criminal capacity of children was and is in some instances still similar to our law in this regard. The law relating to the criminal capacity of children before it was reconsidered will be furnished for each country, the reasons why the law was reconsidered will be summarized and the current position will be highlighted.

2.2 International Instruments

Van Bueren (1995:173) points out that one of the basic principles enshrined in international law is that the concept of criminal responsibility should be related to the age at which children are able to understand and appreciate the consequences of their actions.

Article 40(3)(a) of the Convention on the Rights of the Child, 1989 (1989:16) provides as follows :

“State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;”

When establishing minimum ages for criminal capacity, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985:4) (hereinafter referred to as the Beijing Rules) endeavour to provide guidance for States when exercising their discretion. Skelton (1996:186) explains that although the Beijing Rules, 1985 were written before the Convention on the Rights of the Child, 1989, a number of the fundamental principles have been incorporated into the Convention on the Rights of the Child, and the Beijing Rules are expressly referred to in the preamble of the Convention on the Rights of the Child.

Rule 4 of the Beijing Rules provides that “In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”

In the Commentary to the Beijing Rules (1985:4) it is stated that “.... the minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of his/her individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities. Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.”

Van Bueren (1995: 173) indicates that the Beijing Rules links the establishment of a minimum age below which children should be presumed not to have criminal capacity to infringe the penal law, to the child's development and maturity.

The African Charter on the Rights and Welfare of the Child (1990:6) in Article 17.4 also deals with the establishment of a minimum age for criminal capacity. South Africa ratified the African Charter on the Rights and Welfare of the Child on 18 November 1999.

Article 17.4 provides: "There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." The wording is in all material aspects the same as those in the Convention on the Rights of the Child, 1989.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (1990) are not discussed since no reference is made to the concept of criminal capacity.

The UNICEF Innocenti Research Centre (1999:4) also points out that there is no clear international standard regarding the age at which responsibility can be reasonably imputed to a child and indicates that the disparities in the minimum age for criminal responsibility from one country to another are astounding. This fact is borne out by the following:

At present there is wide disparity in the minimum age for criminal capacity, not only globally, but even within the same Continent. Van Bueren (1995:173) refers to Europe where criminal responsibility begins at 7 years in Ireland, at 14 years in the Ukraine, and at 15 years in Sweden. Such a range raises the question whether children mature at such different paces even within the same Continent.

In the USA different States have adopted different ages for criminal responsibility, with the lowest reportedly being 10 years (Burchell & Milton 1991:200). Burchell and Milton (1991:200) states that in England children less than 10 years of age are not criminally responsible and in Germany the limit is 14 years of age (Burchell & Hunt 1997:158). In certain countries, for example the Netherlands and Belgium, there is no fixed age below which children are criminally unaccountable (Labuschagne 1978:265; 2001: 199; Van den Wyngaert 1993:1).

Progress of Nations (1997:8) states the in at least 15 countries, 7 year old children can be held responsible for criminal actions.

2.3 Criminal Capacity in Australia

2.3.1 Introduction

Australia, an island as well as a continent consists of six states and two territories. As of July 1995 it had a population of approximately 18.3 million inhabitants (Atkinson 1997:29). Urbas (2000:2) points out that most prosecutions of children under the age of 15 in Australia are for property offences. Killing by children in this age group are relatively rare. Children tend to commit crimes in groups (often with older juveniles or adults) rather than alone and there is anecdotal evidence of deliberate use of children below the age of criminal responsibility in organised thefts.

According to the New South Wales Commission for Children and Young People (1999:2) “... the laws applicable to children in the earliest stages of Australia’s colonial development were the laws of England. Children who committed offences were tried in the same Courts as adults and were generally subject to the same penalties. There were no special measures of dealing with them. The most important concessions which the English law made to children were expressed in two common law presumptions. There was the irrebuttable presumption that a child under the age of 7 years was incapable of committing a crime and a rebuttable presumption to the same effect regarding children between the ages of 7 and 14 years of age. During the nineteenth century it was accepted that the presumption as to capacity applied regardless of the type of offence charged” (Bennion 2001:2).

All the Australian states gradually gave statutory form to the irrebuttable presumption regarding children under the age of 7 years. Most states rose the age of criminal responsibility to 10 years (New South Wales Commission for Children and Young People 1999:2; Bennion 2001: 2).

The Australian Law Reform Commission (1997:4) recommended that the age of criminal responsibility in all Australian jurisdictions should be 10 years and that Tasmania and the Australian Capital Territory should enact legislation to this effect since the age of criminal responsibility was 7 and 8 years in these two jurisdictions respectively.

2.3.2 Statutory Minimum Age

Urbas (2000:1–6) points out that at present in all Australian jurisdictions the statutory minimum age of criminal responsibility is 10 years. Between the ages of 10 and 14 years, a rebuttable presumption (*doli capax*) operates to deem a child between these ages incapable of committing a criminal act. Only if the prosecution can rebut this presumption, by showing that the accused child was able at the relevant time adequately to distinguish between right and wrong, can a contested trial result in a conviction (New South Wales Attorney-General's Department 2000:2).

As indicated above, in terms of the common law the minimum age of criminal responsibility, often called the age of discretion, was 7 years. However, the harshness of criminal penalties imposed on convicts made it clear that further protections such as the *doli incapax* presumption were needed. The *doli incapax* presumption survives in all the Australian jurisdictions either in statutory form (Commonwealth, Australian Capital Territory, Tasmania, Northern Territory, Western Australia and Queensland) or as part of the common law (New South Wales, South Australia and Victoria) (Urbas 2000:3).

Urbas (2000:4) states that "... several basic propositions have been recognised by the Courts governing the operation of *doli incapax*. The first is that evidence adduced to show that a child had sufficient appreciation of the wrongness of an act must be strong and clear beyond all doubt and contradiction. The second is that such evidence must not consist merely of evidence of acts amounting to the offence itself. To these may be added the requirement that the evidence must show the accused to have appreciated that the act in question was seriously wrong as opposed to something merely naughty or mischievous".

The Supreme Court of Queensland Court of Appeals, in the matter of R v Folling: Ex Parte A-G 1998QCA97 looked at the test for evidence which must be applied to rebut the presumption of *doli incapax*. In this matter, the accused was charged with the following offences: assault with the intent to do bodily harm, breaking and entering with the intent to commit that offence, and armed robbery. The evidence adduced at the trial and relied on by the prosecution to prove that the accused had the capacity, at the time of the commission of the alleged, to know that he ought not to commit those acts was the following: firstly, evidence of circumstances surrounding the commission of the offence, secondly evidence of a false alibi given by the accused, and thirdly, evidence of his

educational standard together with the proximity of his age to that of 15 years. The evidence of events of the second charge proved that the accused and another young person entered the victim's house in the early evening whilst he was asleep, woke him, assaulted him, demanded drugs from him, bound and blindfolded him. One of the offenders, it is not clear who, cut the complainant's telephone cord before leaving. In the course of a video recorded interview with the police, the accused said that he was in another suburb with some people whom he named from about three o'clock on the afternoon that the incident took place, until well after the time that the offences of that day were committed. He denied being at the victim's house on that night. It may be accepted for the purpose of this instance that his alibi was false. Finally the prosecution relied on evidence of the accused's educational qualifications. He was educated to Grade 9 standard and in addition he had done some other educational programmes which appear to be trade programmes; instruction in the use of laser machinery and nickelling machinery. The prosecution did not rely on the video recording of the accused's interview with the police in order to show his level of comprehension and maturity and consequently the relevant capacity. The Court stated that the prosecution can call evidence in order to rebut the presumption, or draw inferences from:

- (i) the accused's age and education;
- (ii) false denials of the accused, admitted without objection which asserts a false alibi; and
- (iii) the surrounding circumstances of the offence included rendering the complainant incapable of identifying the perpetrator and/or summoning assistance during the commission of the offence.

The Court again reaffirmed that evidence of the accused's age alone cannot rebut the presumption, but must be considered together with evidence of the accused's education, the surrounding circumstances of the offence, and with observation of the accused's speech and demeanor. However, the Court noted that the older the accused and the more obviously wrong the conduct, the easier it would be for the prosecution to rebut the presumption (New South Wales Commission for Children and Young People 1999:27). The Court also stated that the prosecution is permitted to lead evidence, to rebut the

presumption, of previous dealings with the police and also that of previous convictions (R V Folling (*supra*); New South Wales Attorney-General's Department 2000:2).

Urbas (2000:1-6) points out that "..... it has been observed that in attempting to rebut the presumption of *doli incapax*, the prosecution is allowed considerable evidentiary concessions whereby normally inadmissible, highly prejudicial material is deemed admissible. Often this evidence takes the form of admissions by the accused during police interviews, notably including admissions in relation to earlier acts of misconduct. Evidence of previous criminality is rarely admissible to prove an issue in a criminal trial. However, in relation to *doli incapax* such evidence is regularly admitted to prove criminal capacity. Even where an accused makes no admission showing a consciousness of wrongdoing, the prosecution may introduce evidence of surrounding circumstances from which such consciousness may be inferred. This may include evidence of attempts to run from the police or to hide facts. In more serious cases, expert psychiatric assessment of a child's mental development may be conducted".

According to Bradley (2003:9) in reality, the presumption is rarely pleaded. This is because under the operation of the rules of evidence, it works to the disadvantage of the juvenile when compared with an adult defendant. As indicated above, considerable evidentiary concessions have been allowed by the Courts.

Cashmore (2000:2) also states that the defence of *doli incapax* is often not raised by defence lawyers, especially in rural areas, but there are no figures to indicate how often it is raised or how often it is successful. However, it is only applicable where the child pleads not guilty and 80-90 percent of children plead guilty. There is no evidence therefore that the existence of the presumption prevents most children from being held criminally liable for their actions in New South Wales.

In the case of The Queen v M 1977(16)SASR589 the Court stated that the rule excluding evidence of past misbehaviour yields when that evidence is relevant to prove one or more of the elements of the crime in issue. In this case the accused, who was 12 years of age, murdered a younger boy by hitting him on the head with a brick. The accused then concealed the body and misled searchers who were looking for the boy. The accused was questioned by police about this and other matters, including assaults on other children, stealing, arson and breaking and entering. The accused told police that he knew that in

committing those prior offences he was doing seriously wrong acts. Most juveniles admit guilt regardless of available defences. Yet where *doli incapax* is in issue, a pre-court police interview has gravity beyond that experienced by an adult defendant (Bradley 2003:9). To illustrate this point further Bradley (2003: 9) notes that both the nature of the alleged offence and the defendant's conduct upon apprehension have been used to demonstrate the defendant knew right from wrong. This generally occurs without the admission of defendant-specific psychological testimony. In the matter of C v DPP 1995(2)WLR383 the fact that the defendant ran from the police upon apprehension was sufficient for the presumption to be rebutted. The accused was aged 12 and was seen by police officers using a crowbar to tamper with a motorcycle in a private driveway.

Bradley (2003:9) points out that "The testimony of forensic or developmental psychologists is rarely tendered when considering *doli incapax*. In a questionable extension of the opinion rule, it is more likely for the prosecution to subpoena the defendant's schoolteacher or parents to give evidence of a moral education. For example a schoolteacher might be called, in a case where a child is charged with homicide because he/she dropped rocks from a freeway overpass, to give evidence that throwing rocks was prohibited in school." Bradley (2003:9) is of the opinion that "As the primary law mechanism for protecting child defendants, *doli incapax* in its contemporary form, provides very limited refuge. Most importantly for a human rights analysis, *doli incapax* can provide no assistance to the State in meeting its obligation to provide the defendant with a fair trial. *Doli incapax* is not concerned with trial procedures or the capacities of the child in the context of criminal adjudication and this is the standard against which the State will be judged. More cogent measures are required to compensate for the disadvantaged position of child defendants within the criminal justice system."

The Australian Law Reform Commission (1997:5) also points out that *doli incapax* can be problematic for a number of reasons mentioned above, including the fact that the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage. The Australian Law Reform Commission, however, considered the principle of *doli incapax* a practical way of acknowledging young people's developing capacities and indicates that it has the merit of making the police, prosecutors and the judiciary stop and think about the degree of responsibility of each individual child.

Urbas (2000:5) states that the legislative uniformity recently achieved across Australian jurisdictions in relation to the minimum age of criminal responsibility is encouraging. He indicates that further uniformity is possible in relation to the operation (whether in statutory or common law form) of the *doli incapax* presumption. Whether more radical reform or even abandonment of this mechanism is desirable in the longer term, depends to a large extent on future assessments of the value of subjecting children and young people to the formal imposition of criminal liability and penalties. The Australian Law Reform Commission (2001:1) indicates that the age for criminal responsibility has been increased to 10 years in the Australian Capital Territory by the Children and Young People Act 1999 and in Tasmania by the Justice Act 1997.

Bennion (2001:4) is of the opinion that Australian law, with regard to age and criminal responsibility, has always taken some account of the different stages of development of children. That is the reason why the rebuttable presumption of *doli incapax* is still part of the Australian law.

Crofts (2003:9) states that “The presumption of *doli incapax* is a recognition of the fundamental nature of childhood, that children are not naturally equipped with an ability to understand the wrongfulness of criminal acts but develop this gradually, at different and inconsistent rates. The presumption is flexible and practical. The assumption of absolute incapacity for children under ten is an expression of the conviction that they are not ever developed enough to be held criminally responsible. For children aged ten but not yet fourteen, it is acknowledged that some may be able to form a guilty mind. The presumption of incapacity can therefore be rebutted if there is proof to the contrary. This affords protection to those who are not developed enough to be criminally responsible while at the same time allowing the conviction of those who are able to understand the wrongfulness of what they have done. The claim that the presumption is stopping children from being dealt with by the Courts must also be put into perspective. Firstly, the rebuttable nature of the presumption should be borne in mind and, secondly, there is no evidence that the presumption is in fact hindering prosecutions. The objections to the presumption seem to be based on a misunderstanding about the nature of the presumption and about its practical application. It may slow down proceedings in requiring the prosecution to consider the development of the child, but it does not stop prosecution if there is proof of understanding.” The presumption is therefore one of the possible methods of ensuring that Australian law complies with Article 40(3)(a) of the United Nations Convention on the

Rights of the Child. It is also in line with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) (Crofts 2003:10).

Mackie (2002:2) argues that a child can still be charged with a criminal offence at a very young age and that the presumption rule simply requires the prosecution prove that the child involved had the mental capacity to understand what he or she did was wrong, a task that is neither onerous nor contentious.

Phillips (2000:1) reports that on 3 December 1999, a New South Wales Supreme Court jury in Sydney in the matter of R v LMW (1999)NSWSC1109 rejected a charge of manslaughter laid against an 11 year old boy. The trial followed after the accidental death of Corey Davis on 2 March 1998. Davis drowned after being pushed in a local river by the boy. According to Phillips (2000:1) the trial was held after Nicholas Cowdery, the NWS Labor government's Director of Public Prosecutions, issued an *ex-officio* statement overruling a Senior Children's Court Magistrate, who had dismissed manslaughter charges against the boy, who was 10 years old at the time of the commission of the offence. One of the two expert defence witnesses testified that the boy was intellectually and socially immature for his age and was incapable of understanding the consequences of pushing the other boy into the river (Phillips (a)1999:1; (b)1999:4; Phillips & Mc Dermid 1999:3).

2.3.3 Excerpts from Case Law

The following are examples of how the Australian Courts have dealt with the issue of *doli incapax* (New South Wales Commission for Children and Young People 1999:28–30; Johnston 1999:1-18; Children's Court Victoria 2005: 1-19; Labuschagne 1997: 168-173).

(i) In the case of R (a child) v Whitty (1993)66A Crim R462 (Supreme Court of Victoria) the child defendant had admitted to a police officer that she went into a department store and stole a pair of jeans. It was held that by using the word stole in her admission, no other conclusion is reasonably open but that the defendant used it deliberately and appropriately and knew what it meant. Accordingly, she knew what she was doing was wrong in terms of her appreciation of the true nature and quality of her act, and this was not just reliant on the facts relating to the theft, but also on the admission she had made to the police. In this way, the prosecution successfully rebutted the *doli incapax* presumption.

(ii) In the matter of R v CRH (Unreported No. 60390 of 1996) Supreme Court of NSW Court of Criminal Appeal, the 12 year old defendant was charged with two counts of sexual assault on his 6 year old cousin. The prosecution sought to rebut the *doli incapax* presumption with evidence that on one of the occasions, the defendant had forced his cousin to have oral sex with him in the family lounge room, by forcing her head into his lap. Upon hearing a noise, and being disturbed by the cousin's older sister, the defendant pulled a blanket over the cousin's head. The prosecution relied upon the furtive nature of the conduct of the defendant in waking his young cousin in the dead of night, taking her into the lounge room, and then seeking to hide his cousin when they were disturbed. The prosecution submitted that this indicated knowledge on the part of the defendant that what he was doing was particularly wrong. On appeal, it was held that this was not sufficient to rebut the *doli incapax* presumption, as the defendant's conduct may have revealed nothing more than mere embarrassment, as opposed to knowledge that his conduct was wrong.

(iii) In the case of JM (a minor) v Runeckles (1984)79Cr App R 225 Supreme Court of Victoria, the 13 year old defendant attacked and stabbed another girl with a broken milk bottle. Her account of events when she was interviewed by the police was not dissimilar to that of the victim. She had gone to the victim's home, knocked on the door and threatened to break in. She then taunted the victim, stabbed her and then ran away. On her way from the attack she was seen by the police, who pursued her. She ran away from them but once caught, made admissions. The Court held that evidence of her running away from the scene and her statement to the police after her arrest was sufficient to rebut the presumption. The Court further held that the prosecution must show that the act was seriously wrong and not just something that would invite parental disapproval (Labuschagne 1997: 170).

(iv) In the matter of The Queen v M (*supra*) the 12-year-old defendant was charged with murder, following an assault on another child which led to the death of that child. He had been questioned by the police as to offences of stealing, breaking and entering, assault on other children, and arson, which had previously been committed by him. He had admitted to the police that when committing these offences, he knew he was doing wrong. The prosecution was able to lead evidence of the police questioning and the defendant's admissions, to show that the child knew he was doing wrong when he committed the assault which led to the death of the other child, and that this successfully rebutted the presumption of *doli incapax*.

(v) In K v Rooney (July 1996) unreported Supreme Court of New South Wales, a 12-year-old defendant was charged with sexual assault of a 10 year old in the poolroom of a Juvenile Justice Centre. The defendant had threatened to assault the 10 year old if he did not pull down his pants, and then the defendant proceeded to sexually penetrate the victim. The magistrate held that the actions of the defendant were so intrinsically wrong, that no further explanation was required by the prosecution in order to rebut the presumption. The Supreme Court subsequently decided that the magistrate was incorrect, and that in this case, the presumption had not been successfully rebutted merely by the nature of the defendant's actions.

(vi) In the case of R v ALH (2003)VSCA239 (4 September 2003) the Court dealt with whether acts constituting the offences and applicant's age may be sufficient on their own to discharge the onus. It was held that acts surrounding the offence could be used. In this case, the child offender and victim were siblings. The child offender was charged with two counts of indecent assault and two counts of sexual assault/rape occurring on four different dates. The age range was from 13 and 8 months, to 12 days before his fourteenth birthday. All four incidents occurred whilst the child offender and his sister were home alone. Their mother and mother's partner were at alcoholics anonymous. The victim was 12 years old at the time, described as isolated and vulnerable and cried throughout the incidents. The child offender had no prior record. The Court held that acts may be so serious, harmful or wrong to properly establish requisite knowledge in the child; others may be less obviously serious, harmful or wrong, or may be equivocal, or may be insufficient. The correct position is that proof of the act themselves may prove requisite knowledge if those acts established beyond reasonable doubt that the child knew that the act or acts themselves were seriously wrong.

2.4 Criminal Capacity in the United Kingdom

2.4.1 Introduction

Britain comprises of Great Britain (England, Wales and Scotland) and Northern Ireland. Britain is densely populated and has a population of over 59 million people. According to Gelsthorpe and Kemp (2002:128) different arrangements exist for dealing with young offenders in the three jurisdictions: England and Wales, Scotland and Northern Ireland and

the approach of each with regard to the issue of criminal capacity will be dealt with individually.

2.4.2 England and Wales

Gelsthorpe and Fenwick (1997:77) point out that under the common law the age of criminal responsibility was 7 years until 1933. In England and Wales, juveniles between 7 and 14 years were presumed incapable of crime and it was for the prosecution to prove that they knew that their conduct was wrong. Such proof, however, was usually forthcoming. It was felt that sparing the penalties of law merely on account of age would have weakened the deterrent force of the law. Accordingly, in the eighteenth and early part of the nineteenth century, juveniles accused of crimes were treated as adults at both trial and disposition stages – they could be imprisoned or executed.

The age of criminal responsibility was raised to 8 years in 1933 and subsequently to 10 years in 1963 (Gelsthorpe & Kemp 2002:130).

As a result of Court cases in 1994 and 1995 (most notably the case of V and T v UK (2000)Crim LR 187 ECHR wherein Thompson and Venables, aged 10 years were tried for killing 2 year old James Bulger) the principles governing the criminal responsibility of children between the ages of 10 and 13 years were reviewed. Children between the 10 and 13 years were presumed in law to be *doli incapax* and this presumption had to be rebutted by the prosecution before they could be convicted. In order to rebut the presumption, the prosecution had to show beyond all reasonable doubt that the child appreciated that what he or she did was seriously wrong as opposed to merely naughty or mischievous. Turner (1994:735) points out that in this case, a Home Office forensic psychiatrist testified unequivocally that Venables did know the difference between right and wrong. Another psychiatrist however testified that she could not say categorically whether he did know the difference, but that on the balance of probabilities she thought that he did.

Moffatt (2002:45) indicates that both Thompson and Venables were tested extensively and found to be of sound mind, suffering no mental illnesses. If the boys had committed the crime six months earlier, the law would have supposed that they were incapable of formulating wrongful intent, but since both boys had passed their tenth birthday they were

tried as adults. Court experts said that the boys fully understood the implications of their behavior prior to the crime, but the author argues that this is impossible. Understanding the permanence of death is not an all-or-nothing issue, rather, it is progressive

The judgment in V and T v UK (*supra*) was delivered on 16 December 1999 by the European Court of Human Rights. Thompson and Venables had an average to below average intelligence and came from families in which they had suffered great social and emotional deprivation (Turner 1994:737). In 1993 they abducted 2-year-old James Bulger from a suburban shopping centre, having previously tried to abduct at least two other young children. They assaulted the child over a four kilometer walk to a railway line, beat him to death and left him on the track. The abduction was recorded graphically on a security video. The boys' trial followed when they were 11 years old and both were convicted of murder. The Court rejected the United Kingdom Government's argument that the *doli incapax* presumption provides adequate protection for juvenile defendants. It drew a clear distinction between the boys' capabilities of crime at common law and the standards required in international law. The Court regarded *doli incapax* as insufficient protection for the applicants' human rights and unsatisfactory in differentiating their capabilities from those of adult defendants. In relation to the age of criminal responsibility the Court rejected the applicants' argument that imposing criminal responsibility on a 10 year old was itself, a breach of international law (Labuschagne 2001:198; Scott 2005:1-30; European Court of Human Rights 1999:1-39).

According to the final report of the Youth Justice Task Force (Home Office 1998:1) the majority of the members of the Task Force favoured abolishing the presumption of *doli incapax* in England and Wales on the grounds that it leaves the youth justice system unable to deal with some young people who regularly offend. A small minority preferred the status quo, on the grounds that abolishing the presumption would leave children between the ages of 10 and 14 years open to the full force of the criminal law at a much younger age than in many comparable countries where children of this age were below the age of criminal responsibility.

In a consultation document (Home Office 1997:1) it is stated that the UK Government believes that there is no case for the retaining of the presumption of *doli incapax* in England and Wales. In 1995 the House of Lords recommended that Parliament should review this presumption, which had been inconsistently applied and was capable of

producing inconsistent results. The arguments for reforming the presumption of *doli incapax* were based on three contentions: that it is archaic, that it is illogical and that it is unfair in practice. The doctrine is considered out of date in at least two main aspects. First, it assumes not only that a child under 14 is less morally culpable for his or her actions than an adult, but that in general, a child under 14 cannot differentiate right from wrong. While it is true that a child's understanding, knowledge and ability to reason are still developing, the notion that the average 10 to 14 year old does not know right from wrong seems contrary to common sense in an age of compulsory education from the age of 5, when children seem to develop faster both mentally and physically. Secondly, the doctrine assumes that children under 14 need special protection from the harshness of criminal punishment. At the time the doctrine developed the need for protection was undoubted – the death penalty was available for children, for crimes less serious than murder. But the criminal law is now very different and for most young offenders, the Court's emphasis is as much on preventing re-offending as on punishment for the crime. The presumption is also criticised as illogical. For a child aged 10 to 14 years to be convicted of an offence, the prosecution must rebut the presumption by showing that the child knew that what he or she was doing was seriously wrong. In practice, the presumption can be rebutted if the prosecution produces evidence that the defendant is of normal mental development for his or her age. But the doctrine itself presumes that children of that age normally do not know right from wrong, so to rebut the presumption by proving the child's normality is logically inconsistent (Home Office 1997:1).

It is further pointed out that the doctrine is also said to be unfair in practice. It may be impossible in some cases for the prosecution to provide the evidence necessary to show that a child knew his or her act was seriously wrong. To rebut the presumption, the prosecution must produce evidence separate from the facts of the offence – for example, of the defendant's response to police questioning, or reports from his or her teachers. Such evidence may simply not be available. Sometimes there may be previous convictions which the prosecution wants to use as evidence that the defendant knows right from wrong. But this gives rise in turn to legal difficulties over whether previous convictions should be admissible in Court. Accordingly the UK Government believes that the difficulties with the *doli incapax* presumption stop some children who ought to be prosecuted from ever appearing in Court. The interests of justice and of the victims of crime are not served if cases which ought to come to Court are discontinued because the prosecution knows that it will not be able to rebut the presumption of *doli incapax*. Nor is

such discontinuance in the young offender's best interests, if it means that the opportunity is missed to take appropriate action to prevent re-offending. The UK Government agrees that the law should not treat a child in the same way as it treats an adult. But it believes that the presumption of *doli incapax* is wrong in principle and in practice. It believes that justice is best served by allowing the Court to take account of the child's age and maturity at the point of sentence, not by binding them to presume that normal children are incapable of the most basic moral judgments (Home Office (a)1997:2). Labuschagne (1997:173) agrees with the objections raised against the presumption of *doli incapax* in England and predicts that in time all age limits will disappear and criminal liability will be determined with reference to each individual's insight and abilities.

Accordingly the UK Government (Home Office 1997:3) had two options for reform namely: abolition of the presumption or reversal of the presumption. Firstly the presumption could be abolished and this would mean that a child of 12 years, who was accused of a crime, would be in the same position as one aged 14 to 17 years. If the offence was one which required a particular criminal intent the prosecution would have to prove beyond reasonable doubt that the necessary intent existed. But they would not separately have to show that the child knew that what he or she was doing was seriously wrong. Secondly the presumption could be reversed and this would mean the Court would start with the presumption that a child of 10 years and over but less than 14 years was capable of forming criminal intent. But such a child would be acquitted if the defence could prove on a balance of probabilities that he or she did not know that what they were doing was seriously wrong. If such a defence were made, to secure conviction, the prosecution would have to show beyond reasonable doubt that the child did indeed know that the action was seriously wrong. The UK Government favoured the first option of abolishment (Home Office 1997:2).

Gelsthorpe and Kemp (2002:145) point out that in 1998 this rebuttable presumption was repealed by section 34 of the Crime and Disorder Act, 1998. Section 34 of the Crime and Disorder Act, 1998 provides that the rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.

This provision came into effect on 30 September 1998 and has the effect that children between the ages of 10 and 13 years will be treated in the same way as other juveniles aged between 14 and 17 years (Home Office 1998).

Crofts (2002:84) states that without the presumption of *doli incapax* there is no regard paid to the fact that children are still in the process of maturing at this stage of life and may not yet be developed enough to understand the wrongfulness of all criminal acts.

2.4.3 Scotland

The Scottish Law Commission (2002:4) indicates that the position in Scots law with regard to criminal responsibility of children below 14 years were uncertain. Children above 14 years had full capacity and were liable for their actions. During the 19th century it became accepted that children below 7 years could not be subjected to criminal punishment though there was no definitive statement of this rule as one relating either to *mens rea* or to immunity to prosecution. An important development was the introduction of juvenile Courts by the Children Act, 1908 which sought to separate young offenders from adults within the criminal justice system. In 1928 a Committee on the treatment of young offenders in Scotland made various recommendations designed to bring about modifications on the existing system of juvenile Courts. In addition the Committee recommended an alteration to the age of criminal responsibility, that the age be raised by statute from 7 years to 8 years. The effect was that Scots law on this subject was placed on a statutory basis and the age raised from 7 to 8 years. The next stage in the development of the law on age of criminal responsibility was the Committee on Children and Young Persons in Scotland, chaired by Lord Kilbrandon which reported 1964 (Scottish Law Commission 2002:6). The Committee recommended that all juveniles under the age of 16 should in principle be removed from the jurisdiction of the criminal Courts. This was subject to the overriding discretion of the Crown. The Committee also recommended that any rule of law or statutory provision establishing a minimum age of criminal responsibility should be repealed.

The bulk of the Kilbrandon Committee's recommendations were implemented but no effect was given to recommendation in respect of the age of criminal responsibility.

Section 41 of the Criminal Procedure (Scotland) Act, 1995 provides that it shall be conclusively presumed that no child under the age of 8 years can be guilty of any offence (Scottish Law Commission 2002:7).

Section 42(1) of the Criminal Procedure (Scotland) Act, 1995 provides that no child under the age of 16 may be prosecuted for any offence except on the instruction of the Lord Advocate, or at his instance.

In the case of Merrin v S 1987SLT193 the Inner House by a majority held that the referral of a child to a children's hearing on the ground that the child committed an offence, could not apply to a child under the age of 8 years (Scottish Law Commission 2001:24).

On 31 October 2000 the Scottish Law Commission (2002:1) received an instruction from the Scottish Minister to investigate the age of criminal responsibility and related matters. In their final report the Commission (2002:16) recommended the following:

(i) Abolition of the rule in section 41 of the Criminal Procedure (Scotland) Act, 1995 that a child under 8 years of age cannot be guilty of an offence, and its common law equivalent.

The Scottish Law Commission is of the opinion that with the introduction of the children's hearing system in 1971 and the experience of the workings of that system, there is no need for the rule in section 41. The Commission, however, emphasized that it is not a consequence of this proposal that children of any age, even children below 8 years, would necessarily be liable to criminal prosecution. Instead their point is that the issue is better characterised as one relating to prohibition or restriction on prosecution rather than about the capacity to commit crimes.

(ii) Amendment to section 42 of the Criminal Procedure (Scotland) Act, 1995 by providing that a child under 12 years of age cannot be prosecuted.

Include Youth (2002:8) (a non-government organization) states that the age of criminal responsibility must be raised significantly and is of the opinion that the Scottish Law Commission's proposal of 12 years is too low as it takes insufficient account of children's different rates of development and the difficult circumstances which many of these children have to deal with. It is proposed that in the best interests of children that the age for criminal responsibility be raised to 16 years.

The Scottish Law Commission (2002:19) noted that they are of the view that the existing statutory provisions which allow the prosecution of children less than 16 years should be retained. The Commission indicates that they are of the opinion that the existing controls on the Lord Advocate's discretion are in general terms adequate to ensure that children under 16 years are subject to prosecution only in rare cases where required in the public interest, but they now recommend that children under the age of 12 years should be totally immune from prosecution. The Commission points out that the following controlling factors which limit the discretion of the Lord Advocate in deciding whether the public interest calls for the prosecution of children under 16 years of age, are in place:

(a) In the first place, (apart from cases of strict liability) the Crown must always prove that the accused acted with the requisite *mens rea* for the offence. In the case of children who are accused of crime, there might be formidable difficulties in proving the criminal capacity of the child. This requirement would have the effect that in practice very young children would not be prosecuted.

(b) Secondly, the effect of the European Convention on Human Rights is that when a child is to be subject to prosecution in the criminal Courts, the procedure must be modified to reflect fully the child's capacity to understand and to participate effectively in the proceedings against him. The younger the child the more modifications to the procedure there will have to be.

(c) Thirdly, the Crown's discretion is subject to guidelines on when it is appropriate to prosecute children under 16. The Crown Office has published a Prosecution Code which sets out the general criteria for prosecution decision-making. These criteria include the nature and gravity of the offence, and the impact of the offence on the victim. Another criterion includes the age of the accused. The Code also refers to the range of options available to the Crown when considering alternatives to prosecuting in the criminal Courts.

(iii) Reversal of the decision in Merrin v S (as discussed in paragraph 2.4.3 *supra*) so that a child may be referred to a children's hearing on the ground of having committed an offence even if the child could not be prosecuted for that offence (Scottish Law Commission 2002:16).

Children in Scotland (2001:4) supports this recommendation and states that children of whatever age, who are engaged in criminal conduct, are exhibiting behaviours that need expert consideration and may well benefit from statutory supervision.

The Scottish Law Commission (2002:24) indicates that the effect of the decision of Merrin v S is that there are cases of children under the age of criminal responsibility who are not subject to the children's hearing system despite having committed offences. The nature of proceedings under the Children (Scotland) Act, 1995 is centrally concerned with the welfare of the child and not the prosecution and punishment of crime.

The Scottish Law Commission (2002:26) furthermore proposed that no equivalent to the *doli incapax* presumption should be introduced into Scots law.

McAra (2002:448) states that the age of criminal responsibility in Scotland is currently set at 8 years, and this is the first age at which children can be referred to the Children's Hearing System on offence grounds. Scotland has one of the lowest ages of criminal responsibility in Europe. The recommendations by the Scottish Law Commission have not been enacted in legislation at this stage and therefore the position with regard to criminal responsibility in Scotland remains unchanged:

- (i) no child under the age of 8 years can be guilty of an offence;
- (ii) no child under the age of 16 years may be prosecuted for any offence except on the instruction of the Lord Advocate, or at his instance; and
- (iii) no child under 8 years may be referred to a children's hearing on the ground that he/she committed an offence.

2.5 Criminal Capacity in Hong Kong

2.5.1 Law Reform Commission

Most of the information furnished under this sub-heading was obtained from the report by the Law Reform Commission of Hong Kong (2000) on the issue criminal responsibility. In their report the Law Reform Commission of Hong Kong (2000:1-139) made references to

the guidelines in the International Instruments for the establishment of a minimum age for criminal responsibility, the positions in other countries, the debate in the United Kingdom on the Crime and Disorder Bill 1997 (wherein the presumption of *doli incapax* was eventually abolished in section 34 of the Crime and Disorder Act, 1998) (United Kingdom Parliament 1997:4), the case law in England and Wales as well as the report by the South African Law Commission (2000). The participants and contributors of submission were acknowledged at the end of the report with no specific reference to their contributions or reference to the specific material from where the contributions were obtained from. However, the contents of the report were carefully considered and judged to be sufficient for the purposes and aim of this chapter, which is to furnish a brief overview on the history of the concept of criminal capacity of children in Hong Kong, the recent developments in the law in this regard and an indication of how the Courts in Hong Kong deal with this concept.

Hong Kong is located on the coast of southern China. At the end of 1999 the total population stood at 6,974,800 and Hong Kong qualifies as one of the most densely populated places in the world (Traver 2002:207).

The development of juvenile justice in Hong Kong was anything but the result of a gradual evolutionary process. Instead, Hong Kong's juvenile justice system emerged fully developed in 1932 when the Juvenile Offenders Ordinance was enacted. The motivation for the establishment of a system of juvenile justice came from the British colonial administration, which was legally obligated to see that the laws in Hong Kong were more or less in line with English law. The 1932 Juvenile Offenders Ordinance was basically transferred from English law and grafted into Hong Kong Society and law, with little or no thought about how well it might fit with local circumstances (Traver 1997:118).

2.5.2 Historical Background and Present Position

Traver (1997:113; 2002:207) points out that Hong Kong has been a British colony since 1842 and became a Special Economic Region of the People's Republic of China on 1 July 1997. The law of Hong Kong has therefore largely been influenced by the law of the United Kingdom, as indicated in the following paragraphs.

The Law Reform Commission of Hong Kong (2000:4–14) indicates that, while 7 years has been fixed by statute as the minimum age of criminal responsibility in Hong Kong since 1933, the age finds its roots in medieval England.

According to the Law Reform Commission of Hong Kong (2000:4–14), in its formative years, the common law provided no definite points as the age at which a child would be held criminally responsible. Early records show that different treatment was meted out to children below the age of 7 years, according to whether or not they were considered able to distinguish right from wrong. Thus, up to the seventeenth century in England, it was almost impossible to tell with certainty the age at which a person would be held answerable for a crime committed. It was left to the individual judge in each case to decide whether the child brought before the Court was old enough to be criminally sanctioned. This approach stemmed from the recognition of the severity of the punishments imposed at that time, which were based on vengeance. In an age where a person would be hanged for stealing a sheep, it was considered necessary to protect young children from the full rigours of harsh adult justice. During Anglo-Saxon times, a child could not be found guilty of a crime until he attained the age of 12. By the time of Edward I, the law had become more severe and the age of criminal responsibility was reduced to 7. This marked the beginning of an era where, until that age was attained, no evidence that the child knew that his conduct was wrong would avail. This was based upon the notion that a child within that age group should not be punished as he or she had yet to acquire adequate discretion or understanding of the crime. Although the Year Books 30, 31 Ed. 1 recorded that a child of tender years was incapable of committing a crime, the Register of Writs refers to a precedent of a pardon to a child under 7, and so implies that children under that age were still on occasions prosecuted. The controversy as to the age at which criminal responsibility should commence continued until the age of 7 was confirmed as well as the common law rule that children between the ages of 7 and 14 were presumed to be *doli incapax*, though this presumption was capable of being rebutted by evidence to the contrary.

As mentioned earlier, the minimum age of criminal responsibility in England and Wales has twice been adjusted upwards, with the present minimum age now set at 10 years. Hong Kong has made similar attempts at reform but without success. In 1973, an attempt was made to raise the minimum age of criminal responsibility from 7 to 10 through the Juvenile Offenders (Amendment) Bill, 1973. The Bill foundered as it was thought that

children below the age were old enough to be manipulated by undesirable characters for unlawful purposes. There has been pressure for change since. In May 2000 the Law Reform Commission of Hong Kong (2000:84–86) recommended that the minimum age of criminal responsibility be raised to 10 years of age, and that the rebuttable presumption of *doli incapax* should continue to apply to children of 10 and below 14 years of age. The recommendations have been enacted in legislation and implemented during March 2003 in the Juvenile Offenders (Amendment) Ordinance (6 of 2003) (Law Reform Commission of Hong Kong 2000:4–14). Section 3 of the Juvenile Ordinance states that “it shall be conclusively presumed that no child under the age of 10 years can be guilty of an offence (Hong Kong Ordinances 2003:1)

2.5.3 Implementation of the *Doli Incapax* Presumption in Hong Kong

The Law Reform Commission of Hong Kong (2000:5–10) makes the following remarks on the manner in which the *doli incapax* presumption has been implemented in practice in Hong Kong:

- (i) The presumption can be rebutted by the prosecution on proof beyond reasonable doubt that, at the time of the offence, the child was well aware that his or her act was seriously wrong, and not merely naughty or mischievous. When this presumption is rebutted or removed, full criminal responsibility will be imposed on the child who may then be charged, prosecuted and convicted for any offence allegedly committed.

- (ii) The child must be presumed to be *doli incapax* in the absence of evidence that at the time of the offence he knew the particular act constituting the offence was seriously (and not merely naughty or mischievous) wrong. Under this rebuttable presumption, it follows that once it is proved beyond reasonable doubt that the child knew the act to be seriously wrong, in the sense that he was not merely naughty or mischievous, the presumption of *doli incapax* will be rebutted. The child will thus become *doli capax* (capable of committing a crime) and will be subject to prosecution and conviction accordingly.

The principle governing this area of the law was explained in R v Gorrie (1918)83JP136 as follows: In the case of persons under 14 years of age, the law presumed that they were not criminally responsible; they were not supposed to have that discretion which would make

them criminally responsible. But in any particular case, if the prosecution could show that although the accused was under 14 the act was done with what was called mischievous discretion, then they could rebut the presumption that the child was not responsible. Therefore, the jury should first of all consider whether it would be their duty to find him guilty if he were over 14, and then consider whether mischievous discretion deprived him of the shelter which he would otherwise have. If it was an assault and not an accident – if, however little he might have meant to do him any harm, he did in fact intentionally stab the other boy with the penknife and thereby caused his death, that was manslaughter. Then they came to the second point. The boy was under 14, and the law presumed that he was not responsible criminally; and if the prosecution sought to show that he was responsible although under 14, they must give them very clear and complete evidence of what was called mischievous discretion: that meant that they must satisfy the jury that when the boy did this he knew that he was doing what was wrong – not merely what was wrong, but what was gravely wrong, seriously wrong. It was for the jury to say whether there was any evidence that this boy when, as was alleged, he jagged the other with the knife in this horseplay, had any consciousness that he was doing that which was gravely wrong.

(iii) The effect of the principle stated in *Gorrie (supra)* is that, in order to secure the conviction of a child aged between the ages of 7 and 14 years, the prosecution must first prove beyond reasonable doubt that the child committed the offence with the necessary *mens rea*. It must also show that the child should be criminally responsible for the alleged offence by proof beyond reasonable doubt that the child had in him or her a mischievous discretion, in the sense that, at the time of the alleged offence, the child knew that the act constituting the offence was gravely or seriously wrong. It is therefore insufficient for the prosecution to prove that the offence was committed by the child. The prosecution has to go a step further to prove that the child knew his conduct was seriously wrong at the material time. Under this principle, the mere proof of the doing of the act charged, however horrifying or obviously wrong the act might have been, cannot establish the requisite guilty knowledge and rebut the presumption.

(iv) Despite the fact that the test laid down for rebutting the presumption of *doli incapax* has been well established, there is as yet no absolute formula for satisfying all the requirements set out in the test. The requirements are that the State must prove beyond reasonable doubt that the child knew the act to be seriously wrong at the time when committing the offence. The reason is that in rebutting the presumption, the Court would

consider the background of the particular child, as well as the unique features of the case, before arriving at its decision as to the knowledge of the child at the time in question. The actual age of the child, though an important factor to be taken into consideration, is not conclusive. However, in most cases, matters such as the circumstances of the case, things said or done by the child both before and after the act, the age of the child, and the individual particulars of the child are matters relevant to the Court's consideration.

(v) Evidence of the circumstances of the case and the child's conduct, statement or demeanour associated with the offence is admissible to prove knowledge of a serious wrong. In R v Li Wai-lun (1989) Mag App 436/89, it was held that the answers provided by the child appellant to questions put to him by police would be a valid consideration upon which knowledge of a serious wrong could be inferred as the child was considered by the Court to be careful enough to avoid giving any incriminating answers.

(vi) It is important to note that although knowledge of a serious wrong, coupled with any necessary implication from the age of the child, can be inferred from the circumstances of the case, a child cannot be presumed to know the nature of the act simply because other children of his age and background would normally be held to possess such knowledge. In rebutting the presumption, the prosecution must prove beyond reasonable doubt that the child himself or herself knew what he or she had done was seriously wrong, and was not being merely childish, naughty or mischievous.

A summary of revised positions on the issue of criminal capacity of children in Australia, the United Kingdom and Hong Kong was furnished to the professionals and they were requested to indicate which country, in their opinion, offered the best protection to child offenders regarding the establishment of criminal capacity and their reasons for it. Their various responses are summarized in table 1.

Table 1: Which one of these countries offers the best protection with reference to the establishment of criminal capacity? Why do you say so?

View	Motivation	Problems	Suggestions/Advice
Subjects 1,3,4, 10,11,12,16 and 17 chose Australia	<p>Subject 1: Gives better understanding of what has to be proved to public. Better protection because can understand what has to be proved instead of having to deal with legal terminology</p> <p>Subject 3: Proper assessments are being done</p> <p>Subject 4: More child-friendly and more leave-way for developmental differences. More individualized process</p> <p>Subject 10: Some children between 10-14 years are so immature that they are incapable for committing a crime. They should be assessed before standing trial</p> <p>Subject 11: Very similar to our own</p> <p>Subject 12: The prosecution must prove all the elements of the charge against an accused</p> <p>Subject 16: Offers the best option to the protection of children's rights</p> <p>Subject 17: 12 years should be the age for criminal capacity. Australia allows for assessment of children under 14 years – thereby affording some protection</p>		
Subject 2 chose UK	<p>Subject 2: Children between 10-13 years are able to operate and carry out crimes with same level of intent as 14-17 year olds</p>		
Subject 7,9,13 and 14 chose both Australia and Hong Kong	<p>Subject 7: Provide better protection. Although presumptions not popular with UN provide mantle of protection if properly upheld by Courts</p> <p>Subject 9: Not much difference between these two</p> <p>Subject 13: These countries raised the minimum age of criminal capacity to 10 years</p> <p>Subject 14: Because of the minimum age and the presumption of <i>doli incapax</i></p>	<p>Subject 7: British writers expressed regret about scrapping of <i>doli incapax</i> presumption</p>	<p>Subject 7: Maybe if minimum age for criminal capacity is increased to 14 there will be no need for presumption</p>
Subject 8 chose Hong Kong	<p>Subject 8: Depend largely on process followed in Court and training of Criminal Justice professionals</p>		

As indicated in table 1, eight subjects chose Australia, one chose the United Kingdom, four chose both Australia and Hong Kong and one chose Hong Kong.

The eight choosing Australia stated that this country's formulation was more clear and there is better understanding on what needs to be proved, there is proper assessments, it is very similar to our own system. One subject stated that the formulation appeared more child-friendly and offered more leave-way for developmental differences. Three subjects are lawyers; two are criminologists; two are social workers and one a psychologist.

The subject who chose the United Kingdom motivated the choice by indicating that children between 10 – 13 years are able to operate and carry out crimes with the same level of intent as children between the ages of 14 – 17 years. This subject is a social worker.

Four subjects (three lawyers and one social worker) chose both Australia and Hong Kong stating that their approaches provides better protection, although presumptions is not popular with the United Nations Committee on the Rights of the Child. One subject indicated that the presumptions offer a mantle of protection if they are properly upheld by the Courts.

One subject, a social worker chose Hong Kong but indicated that it depends on the processes followed by the Courts and on the training of the Criminal Justice professionals.

Mention was made of the fact that some British writers have expressed their regret about the scrapping of the *doli incapax* presumption in the United Kingdom.

It was suggested by one subject that maybe if the minimum age for criminal capacity is increased to 14 years there will be no need for the presumption. It was however stated, that in South Africa such an approach might not be politically sellable.

Both Australia and Hong Kong have rebuttable presumptions of *doli incapax* and the fact that only one subject was of the opinion that the United Kingdom (where the rebuttable presumption has been abolished) offers the best protection for child offenders with reference to the establishment of criminal capacity, is a clear indication the majority of the

professionals, who participated, are in favour of the retention of the rebuttable presumption of *doli incapax*.

Subjects 5, 6 and 15 did not choose a specific country. Two are criminologists and the other is a lawyer.

2.6 Conclusion

It is clear that the issue of criminal capacity is regarded as an important aspect by the relevant International Instruments protecting the rights of children. It is also very clear that the issue of criminal capacity and the manner in which it should be implemented and applied differs vastly from country to country and there are conflicting views on whether or not it really protects children, especially those between 10 and 14 years of age.

All three countries under discussion – Australia, United Kingdom and Hong Kong – recently investigated the issue of criminal capacity and the question whether the *doli incapax* presumption should remain or be abolished. In all three these countries there were developments regarding this issue although different approaches were followed.

Australia decided to keep the *doli incapax* presumption and only amended the minimum age for criminal responsibility to 10 years in all its jurisdictions.

In the United Kingdom of Great Britain there are differences. England and Wales abolished the *doli incapax* presumption and Scotland, although recommendations for changes have been made by the Scottish Law Commission in 2002, has not amended their position.

In Hong Kong the decision was taken to increase the minimum age for criminal responsibility to 10 years and to retain the *doli incapax* presumption for children between the ages of 10 and below 14 years.

In the next chapter a brief history on the concept of criminal capacity, the present position in our criminal justice system regarding the minimum age for criminal capacity, the presumption of *doli incapax* applicable to the children between the ages of 7 and 14 years and the way the Courts deal with this issue will be furnished and discussed.

Statistics on children under 14 years of age in prison during the past 5 years are also furnished.

CHAPTER 3

CRIMINAL CAPACITY: HISTORICAL BACKGROUND AND POSITION IN SOUTH AFRICA

3.1 Introduction

Criminal responsibility in this chapter relates to a child's ability to distinguish between right and wrong and his/her ability to act in accordance with this insight.

Snyman (2002:158) indicates that "... before a person can be said to have acted with culpability, he must have had criminal capacity – an expression often abbreviated simply to "capacity". A person is endowed with criminal capacity if he has the mental abilities required by the law to be held responsible and liable for his unlawful conduct. It stands to reason that people such as the mentally ill (the "insane") and very young children cannot be held criminally liable for their unlawful conduct, since they lack the mental abilities to distinguish between right and wrong and to act in accordance with such insight, which normal adult people have. The mental abilities which a person must have in order to have criminal capacity are:

- (i) the ability to appreciate the wrongfulness of his conduct, and
- (ii) the ability to conduct himself in accordance with such an appreciation of the wrongfulness of his conduct.

If a person lacks one of these abilities, he lacks criminal capacity and cannot be held criminally liable for an unlawful act or omission carried out by him while lacking one of these abilities" (Snyman 2002:158).

In this chapter the historical background of the concept of criminal capacity in the South African context will be discussed. The present position in our criminal justice system with reference to the common law presumption will be highlighted and the application and interpretation thereof by the Courts will be furnished. The statistics regarding children under the age of 14 years sentenced to imprisonment will also be furnished.

The aim of this chapter is to provide a brief overview of the historical background of the concept of criminal capacity in South African law, to simplify the current position of the concept of criminal capacity in our law and to illustrate how the Courts deal with this concept. Although criminal capacity is a juridical concept, the content of this chapter does not focus on a complete and detailed legal comparison of the different views of this concept but rather on a practical illustration and submission for the purposes of explaining this concept to criminologists who do not have a legal background or did not receive legal training. Nevertheless, a brief historical background sets the scene for the understanding of this concept of criminal capacity.

3.2 Historical Background

The general concept of criminal capacity as set out above was unknown in Roman and Roman-Dutch law. Although these legal systems recognised that certain categories of people such as mentally ill and young children (*infantes*) could not be convicted of crimes, this lack of liability was not explained in terms of a general concept of capacity (De Wet and Swanepoel 1985:109). De Wet and Swanepoel (1985:109) further point out that although the Roman jurists did not always reveal clear insights into the issue of criminal capacity, it is clear that they realised that diminished mental abilities can exempt a person from criminal responsibility. It appears that a lack of *intellectus* was regarded as a reason for exemption from criminal responsibility of juveniles and mentally ill persons.

Labuschagne (1993:148) refers to the *Corpus Iuris Civilis* and indicates that children under the age of 7 years, in other words *infants*, were not criminally responsible. A *puberes*, on the other hand was criminally responsible. A *puberes* was a child who reached puberty. Puberty was determined by the physical development of the child. Our common law presumptions originated from the Roman law (Labuschagne 1978: 264; Labuschagne 2003:21-22; De Wet & Swanepoel 1985: 111).

The concept of criminal capacity is likewise unknown in Anglo-American legal systems. In South Africa the concept is usually described as “capacity” or “criminal capacity”, although terms such as “criminal accountability”, “criminal responsibility”, and “imputability” have also been used. The concept of “capacity” hails from the European continent, mainly from German criminal-law theory (Snyman 2002:159).

Snyman (1995:146) refers to the origin of the concept of criminal capacity and indicates that "... before 1970 this concept was largely unknown in South African criminal law, but it has subsequently gradually gained acceptance. One of the most important reasons for its growing recognition was undoubtedly the appearance of the influential Rumpff Report (the Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters) in 1967. This report resulted directly in the formulation of the biological-psychological criterion for the determination of the incapacity of mentally ill persons in section 78(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977) (Rumpff 1967: 72; Visser, Vorster & Maré 1990:325).

Burchell and Hunt (1997:153) point out that "The Rumpff Commission of Inquiry noted that modern psychology conceived of the normal human personality as being made up of three categories of mental function: cognitive, conative and affective. The cognitive function relates to the individual's capacity to think, perceive and reason – the capacity by which humans learn, solve problems, make plans; the conative function relates to the capacity for self-control and the ability to exercise free will (the conative or volitional functions); the affective capacity relates to the capacity for emotional feelings such as anger, hatred, mercy and jealousy (Rumpff 1967:43). A person whose cognitive or conative capacities are impaired in a significant way, the Commission suggested, ought not to be held criminally responsible for his or her actions. Criminal capacity is thus concerned with a person's cognitive and conative functions or, in other words, his or her capacity for insight and self-control. The test for determining whether an accused had criminal capacity thus is: did the accused have the capacity to appreciate the wrongfulness of his or her conduct and the capacity to act in accordance with this appreciation?" (Rumpff 1967:72; Visser, Vorster & Maré 1990:317–325).

According to Snyman (1995:146–147): "It was widely assumed, until about 1981, that incapacity, which is the inability to appreciate the wrongfulness of one's conduct or to conduct oneself in accordance with such an appreciation, could be a defence only if the inability was the result of "biological" factors, namely mental illness ("insanity") or immature age. Up until that time the criterion applied in practice for determining incapacity consisted of two legs, namely first a "biological" leg (that is, either mental illness or immature age) and secondly a "psychological" leg (that is, the inability mentioned above to appreciate the wrongfulness of the conduct or to conduct oneself according to such an appreciation). In 1981 in S v Chretien 1981(1)(SA)1097(A) the Appellate Division held that a person could

lack capacity and accordingly escape liability not only if the (psychological) inability was the result of mental illness or immature age, but also if it was caused by intoxication. Thus the so-called biological factors (first leg of the test) were expanded to include intoxication. After 1981 the important question arose whether there was any reason for limiting the biological leg of the test to the three factors mentioned above, namely mental illness, immature age and intoxication. The question was whether these factors should not be expanded to include, for example, anger resulting from provocation, or factors such as emotional exhaustion, fear, shock or stress. The feasibility of limiting the defence of incapacity to situations in which the (psychological) mental incapacities were the result of only certain circumscribed biological factors was increasingly doubted.”

Snyman (2002:164–165) states that towards the end of the eighties, the appellate division held in a number of cases, of which S v Campher 1987(1)SA940(A), S v Laubscher 1988(1)SA163(A) and S v Wiid 1990(1)SACR561(A) are the most important, “... that incapacity could be a complete defence even if it were not the result of mental illness, immature age or intoxication. For successful reliance on the defence of non-pathological incapacity it is in fact not necessary to prove that the accused’s mental disability was the result of certain specific causes or pathological states; if the accused does not rely on the specific defences of mental illness in terms of section 78(1) of the Criminal Procedure Act, or of immature age, but the Court is nevertheless satisfied on the evidence as a whole that at the time of the act the accused was incapable of appreciating the wrongfulness of his act or of conducting himself in accordance with such an appreciation, he must be found not guilty, irrespective of the cause of his mental inability.”

Against this brief background the current position in South Africa will now be discussed.

3.3 Current Position in South Africa

3.3.1 The Concept of Criminal Capacity

Snyman (2002:159) points out that the position in our law at the moment is as follows: “If a person commits an act which accords with the definition of the proscription of the crime and which is also unlawful, but at the time of the commission lacks the ability (a) to appreciate the wrongfulness of his act or (b) to conduct himself in accordance with his appreciation of the wrongfulness of his act, he is not criminally liable for such an act,

irrespective of the cause of the inability. Because of his lack of capacity he must be found not guilty of the crime.”

Snyman (2002:160) indicates that before any person can be said to have acted culpably, it must be clear that at the time of the act such a person was endowed with criminal capacity. The adherents of both the normative and the psychological theories of culpability admit this. The description of the precise relationship between capacity and culpability depends upon whether one adopts the normative or the psychological theory of culpability. Those who adhere to the psychological theory tend to separate capacity from culpability, and to view the former as merely a prerequisite of the latter. In this regard Visser, Vorster & Maré (1990:305) are of the opinion that criminal accountability is a separate element of every offence. According to these authors criminal accountability may be directly connected to culpability but, in their opinion, it does not form part of culpability. The followers of the normative theory of culpability, on the other hand, always adopt an integrative approach and regard capacity as one of the indispensable components of the culpability concept. It is submitted that this approach is the correct one. To say that a person acted culpably, means that there are grounds upon which, in the eyes of the law, he may be blamed for his unlawful conduct. One of the reasons why he can be blamed is the fact that at the time of the conduct he had criminal capacity. Thus, contrary to what is sometimes alleged, capacity is not an element of criminal liability, which is separate from culpability. It forms part of the culpability requirement (Snyman 2002:160).

Snyman (2002:160) points out that whatever the precise relationship between capacity and culpability, there is general agreement that the need to consider the accused's capacity arises only once it is clear that the accused has committed an unlawful act. It follows that a person who lacks capacity is nevertheless capable of committing an unlawful act. This principle is of practical importance in the following respect: a person may rely on private defence only if he defends himself against an unlawful attack. Since even a person who lacks capacity, such as somebody of immature age, may act unlawfully, an accused may rely on private defence even if he defends himself against an attack by such a young child. If an investigation reveals that the accused lacked capacity at the time of his conduct he escapes conviction due to lack of capacity: it then becomes unnecessary to investigate whether he acted with intention or negligence.

Meintjies (2001:A3–1) states that the provisions of sections 77 and 78 of the Criminal Procedure Act 51 of 1977, although dealing with Capacity to Understand Proceedings: Mental Illness and Criminal Responsibility, are equally apposite when having to deal with the question whether to institute a prosecution with reference to child offenders.

Section 77 provides that the accused must be capable of understanding the proceedings so as to make a proper defence.

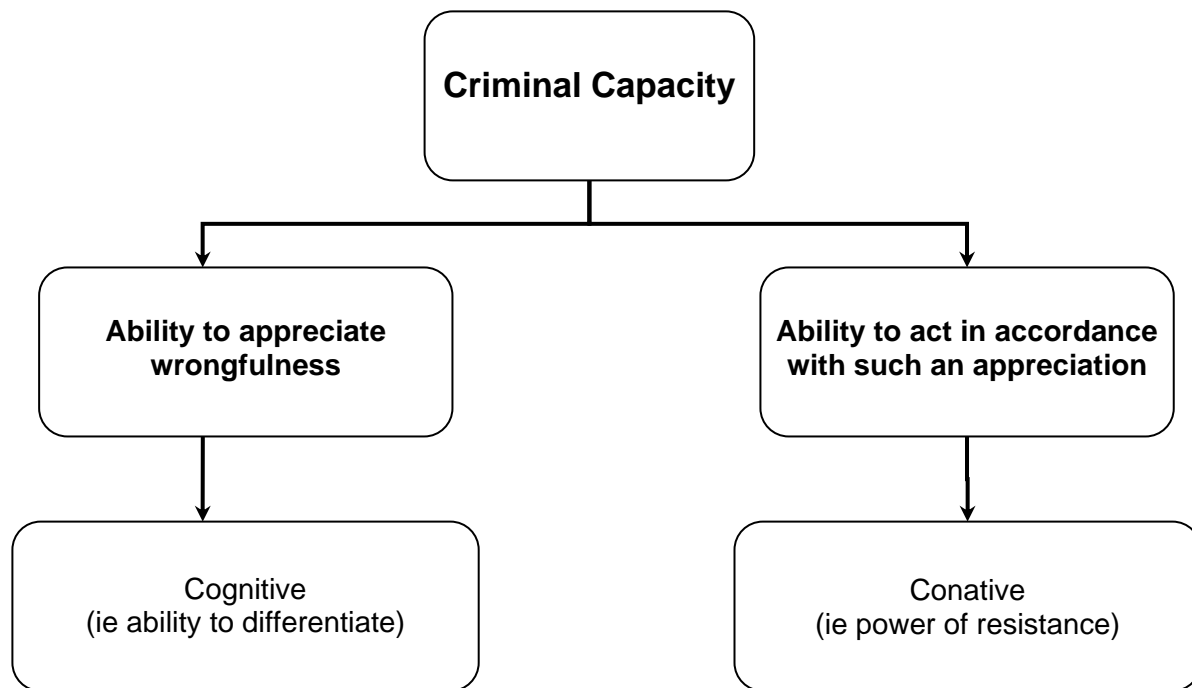
Section 78 provides that if an accused person suffers from a mental illness or mental defect which makes him incapable of appreciating the wrongfulness of his act or incapable to act in accordance with such appreciation, he shall not be criminally responsible for such act.

In terms of the common law presumptions all children under the age of 7 years are irrebuttably presumed to be *doli incapax* and can thus never be prosecuted. Children between the ages of 7 years and 14 years are rebuttably presumed to be *doli incapax* and if any such child is to be prosecuted, the prosecution must prove that the accused had the required criminal capacity at the time of committing the offence (Meintjies 2001:A3–1; Visser, Vorster & Maré 1990:306; Burchell & Milton 2005:364; Burchell & Hunt 1997:159; Van Dokkum 1994:213; De Wet & Swanepoel 1985:111).

Snyman (2002:161–163) discusses criminal capacity as follows: “X’s capacity is determined with the aid of two psychological factors, namely first his ability to distinguish between right and wrong, and secondly his ability to conduct himself in accordance with this insight into right and wrong.”

According to the Rumpff Report (1967:45) these two factors form the basis of a person’s capacity and his responsibility for his conduct. These two factors refer to the two different categories of mental functions (Visser, Vorster & Maré 1990:317).

These arguments can be applied as follows in a diagram:



Snyman (2002:162) explains the two psychological requirements for capacity as follows: “The first function, which is the ability to distinguish between right and wrong, lawful and unlawful, forms part of a person’s cognitive mental function. The cognitive function is related to a person’s reason or intellect, in other words his ability to perceive, to reason and to remember. Here the emphasis is on a person’s insight and understanding.

The cognitive function may be described in different words. Sometimes (as in section 78 (1) of the Criminal Procedure Act, 1977) it is described as the ability to appreciate the wrongfulness of a person’s act. Sometimes it is described as the ability to appreciate unlawfulness of the act, and sometimes as the ability to differentiate between right and wrong. Normally it does not matter what expression one uses; they are simply employed as synonyms.

The second function, which is the ability of a person to conduct himself in accordance with his insight into right and wrong, is known as his conative mental function. According to Snyman (2002:162) the conative function consists in a person’s ability to control his behaviour in accordance with his insights – which means that, unlike an animal, he is able to make a decision, set himself a goal, to pursue it, and to resist impulses or desires to act contrary to what his insights into right and wrong reveal to him. Here, the key word or idea

is self-control. According to the Rumpff Report the conative function implies a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution.

Snyman (2002:163) states than in short, the cognitive and conative functions amount to insight (ability to differentiate) and self-control (power of resistance respectively).

In order to have capacity the child must have both the above-mentioned two psychological functions and abilities. If any one of them is absent, the child lacks capacity.

Snyman (2002:177–178) points out that the test ought to be whether such a child, in spite of his age, is nevertheless capable of appreciating the nature and consequences of his conduct and that it is wrong (this is the cognitive part of the test) and further whether he is capable of acting in accordance with that appreciation (this is the conative part of the test). The fact that the Courts recognize that a child should have the power to resist temptation (the conative part of the test) before he can be considered to have criminal capacity, is evident from the large number of decisions in which the Courts have refused to convict children between the age of seven and fourteen years who have committed crimes under the influence of older persons.

Snyman (2002:177) further points out that in practice a short cut is usually taken by asking whether a child was aware that what he was doing was wrong. Such a formulation of the test is unacceptable for the following reasons: Firstly, the formulation confuses two completely distinct requirements for liability, namely criminal capacity and awareness of unlawfulness. Secondly, the traditional test employed by the Courts involves only one aspect of the accused's knowledge, namely his knowledge of the wrongfulness of the act. His knowledge of the factual nature and consequences of his deed is equally important. Thirdly, the traditional formulation contains no reference to the accused's ability to act in accordance with his appreciation of right and wrong.

The presumption is not rebutted merely by proof that the accused could distinguish between right and wrong. It must be clear that the accused knew that what he was doing

was wrong within the context of the facts of the particular case. All the circumstances of the case, such as the nature of the crime and the conduct of the child, must be taken into account in determining whether the State has rebutted the presumption (Snyman 2002:179).

Burchell and Hunt (1997:153, 160) indicate that persons are responsible for their criminal conduct only if the prosecution proves, beyond reasonable doubt, that at the time the conduct was perpetrated they possessed criminal capacity or, in other words, the psychological capacities for insight and for self-control. The authors warned that the Court should be careful not to place an old head on young shoulders and it must take into consideration the age, knowledge, experience and, what is most important, the judgment of the child in the specific circumstances facing the child at the time of commission of the prohibited act. It is important to acknowledge that children often do act irrationally and sometimes forget what they have been told.

Sapa (2005:1) correctly reports, after a shooting incident involving a six-year-old boy, who allegedly shot and killed a three-year-old girl, with reference to the current position in South African law that the unlawful conduct of a child of this age can never lead to a conviction of any crime.

The questionnaire sent to the various professionals, identified for the purposes of this research, included a summary of the current position in our law regarding the irrebuttable presumption of *doli incapax* relating to children under the age of 7 years and the rebuttable presumption of *doli incapax* relating to children between the ages of 7 and 14 years. They were requested to comment on the statement that the minimum age of 7 years for criminal capacity is too low. Their responses were as follows:

Table 2: The minimum age for criminal capacity is too low.

View	Motivation	Problems	Suggestions / Advice
<p>Subjects 2,6,7,8,9,10,11,12, 13,14,15,16 and 17 agreed</p>	<p>Subject 2: Frustration and aggression do lead to uncontrolled and uncontained emotional reactions in very young children; act out in extremely anti social behaviour</p> <p>Subject 6: Experience shows no prosecution take place of children under 10 years</p> <p>Subject 7: UN criticised minimum age of prosecution under 12 years</p> <p>Subject 8: UN agrees age is too low. UN suggest minimum age of 14 years</p> <p>Subject 9: Should be raised to conform with obligations in terms of the Convention on the Rights of the Child as well as international trends</p> <p>Subject 10: Children too young to be accountable for their actions</p> <p>Subject 11: Must be increased to at least 10 years</p> <p>Subject 12: Most 8,9 & 10 year olds are not capable to distinguish between right and wrong and can not always guide their conduct in terms of this insight</p> <p>Subject 13: Even 10 years as proposed in the Child Justice Bill, 2002 is a compromise</p> <p>Subject 14: Should be raised to at least 10 years</p> <p>Subject 15: Agree, too young to form intent to commit crime</p> <p>Subject 16: Should be increased to 10 years. Unlikely that child of 7 years would understand consequences of his/her actions</p> <p>Subject 17: It is too low</p>		<p>Subject 6: Possibility of proceedings provides tool for intervention – child can be compelled to participate in diversion or other programs</p> <p>Subject 7: Children move from concrete to abstract thinking between 10-12 years. In concrete thinking difficult to have full knowledge of difference between right and wrong, to understand the consequences of behaviour and to be able to control impulses to ensure that acts are in accordance with the understanding</p> <p>Subject 13: Children below 10 years should be treated as children in need of care since they can not fully appreciate the consequences of their actions</p>
<p>Subjects 1,3,4 and 5 disagreed</p>	<p>Subject 1: Even if child is <i>doli capax</i> under 7 years – might be unfit to stand trial – do not understand proceedings</p> <p>Subject 3: Child of 9 years can determine difference between right and wrong</p> <p>Subject 4: Developmental status and abilities of child at that age appropriate.</p> <p>Subject 5: Child of 7 years knows what he/she is doing and many have committed serious crimes</p>	<p>Subject 1: May preclude child from receiving State assistance that will benefit him/her like psychological treatment or removal from parents/streets to place of safety</p>	<p>Subject 1: If changed, severe caveat-principles must apply</p> <p>Subject 4: Individualized process needed</p> <p>Subject 5: Expert and Court must decide in each case</p>

Table 2 indicates that the majority of the subjects (thirteen) were of the opinion that the minimum age for criminal capacity is too low. Four of the subjects disagreed with the statement that 7 years is too low for criminal capacity.

The subjects who agreed with the statement motivated this agreement by referring to the fact that this coincided with the view of the United Nations Committee on the Rights of the Child. One of the subject's motivation referred to the fact that from experience no prosecutions take place of children under the age of 10 years. Another motivation made reference to the uncontrolled and uncontained emotional reactions that can occur in very young children when frustrated and angry. Five subjects suggested that the minimum age for criminal capacity should be raised to 10 years.

The four subjects who disagreed with the statement motivated this by referring to the fact that children older than 7 years can determine the difference between right and wrong and that they know what they are doing and that the developmental status of that age is appropriate. Two of the subjects in this regard are criminologists, one a lawyer and the other a psychologist.

Some of the subjects offered some suggestions and advice in this regard, which included that the possibility of proceedings provides a tool for intervention, that a child can be compelled to participate in a diversion program and that children below 10 years who are in conflict with the law, should be regarded as children in need of care since they can not fully appreciate the consequences of their actions. It was also suggested that if the minimum age for criminal capacity is to be changed, severe caveat-principles must apply. It was furthermore submitted that an individualized process is needed and that experts and the Courts must decide on the issue of criminal capacity.

It is interesting to note that the subjects who disagreed with the statement only referred to the fact that children of 7 years and older know what they are doing and that they know the difference between right and wrong. They only dealt with the first leg of the test for criminal capacity. The second leg requiring that the child must have the ability to act in accordance with this insight into right and wrong at the time of the commission of the offence does not feature in their motivation. Maybe if both legs of the test were taken into account by them their responses would have been different.

From the above it is clear that the majority of the various professionals, who participated, agree on the fact that the minimum age of 7 years for criminal capacity is too low and that it should be raised.

3.3.2 Prosecution - Factors to be Considered

According to the Meintjies (2001:B3-2 – B3-3) the following factors should be considered when prosecutors are confronted with the decision of whether to prosecute a child between ages of 7 to 14 years:

- (i) the child's age (a prosecution will rarely be considered when the child is of tender age \pm 10 and younger);

- (ii) the nature of the crime (the more heinous, the less weight will be given to the age factor, if having acted under the influence of others, the extent of this influence must be considered);

- (iii) the possible benefits of diversion should the child be prepared to plead guilty (it is preferable that the child be made to take responsibility for his/her actions);

- (iv) the possible benefits of prosecution (what sentence would probably be suggested/imposed);

- (v) the views and concerns of the complainant;

- (vi) the interest of the community (is the child a troublemaker, are there previous transgressions?);

- (vii) the result of any assessment of the child (level of maturity, personal circumstances, etc);

(viii) balancing relevant considerations (the relevant children's rights instruments need to be taken into account, the child's best interests to be of paramount importance).

In many cases the facts of the case itself will prove criminal capacity and the child's capacity to follow the proceedings will soon become apparent or, if represented, some objection will be raised by the defence counsel. Although the onus rests on the prosecution to prove criminal capacity, there is no legal obligation to prove this prior to putting charges or at any specific stage of the proceedings. It is simply one of the elements necessary to be proved and needs only be proved prior to closure of the State case. It is, therefore, possible to rely on the evidence presented on the merits for purposes of arguing that this element has, if fact, been proved (Meintjies 2001:B3–3).

Labuschagne (2003:26) states that one of the most difficult aspects regarding the presumption against the criminal capacity of children between the ages of 7 and 14 years must be the decision on which factors to take into account to rebut the presumption. He distinguishes the following factors:

- (i) the age of the accused (the presumption weakens with the advance of the child's years towards fourteen);
- (ii) blameworthiness of the child's conduct (this can also be evident from the circumstances and factors like cruelty, mercilessness and ruthlessness in which the crime was committed);
- (iii) the mindset and state of mind of the child (with reference to the specific circumstances of the case and a specific act);
- (iv) the presence of an older person (the presumption of coercion is important in this regard); and

(v) the conduct of the child after or during the commission of the crime (this should be done with caution because children do not always follow rational patterns).

Van Dokkum (1994:213) refers to the onus on the prosecution to rebut the presumption of *doli incapax* beyond reasonable doubt and indicates that a practice has developed in the lower Courts, whereby the prosecution calls the parent or guardian, who has to accompany the child to Court in terms of section 73(3) and 74 of the Criminal Procedure Act, 1977 (Act 51 of 1977), to testify for the prosecution in this regard. The parent or guardian is usually called to confirm the age of the child offender and to confirm that the child has been taught the difference between right and wrong and whether or not the child had the ability to differentiate between right and wrong at the time when the alleged offence was committed. Van Dokkum (1994:214) describes this practice as unfair and indicates that uneducated persons might believe that they are giving evidence in mitigation. Van Dokkum (1994:219) states that the State should call a teacher or a probation officer, or a psychologist, if the child consented to an interview, to prove criminal capacity. The author is furthermore of the opinion that the practice of calling a parent or a guardian to testify on behalf of the prosecution to prove criminal capacity, could be challenged in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), the common law and public policy, as interpreted by the Courts.

Skelton (1996:180) indicates that in South African law, only children below the age of 7 years are irrebuttably presumed to lack criminal capacity. This represents one of the lowest ages of criminal capacity in the world. Children between the ages of 7 and 14 years are rebuttably presumed to lack criminal capacity. According to Skelton this presumption is designed to protect children under 14, but it is too easily rebutted in our Courts. Skelton is of the opinion that a balanced approach should be adopted in determining an appropriate minimum age for criminal capacity. Skelton submits that the minimum age of 7 years, is unacceptably low. Furthermore, should South Africa wish to retain the *doli incapax* presumption, then better safeguards should be adopted so that the presumption will be more difficult to rebut. This might include a requirement that the State lead expert testimony in order to achieve rebuttal, and thereby protecting child offenders more effectively.

Cassim (1998:335) does not agree with the opinion that the minimum age of 7 years for criminal liability is too low and submits that the aim of a juvenile system should be to make children accountable and responsible for their actions and not to make them untouchable.

The South African Law Commission (2000:22) indicates that the presumption with regard to the criminal capacity of children between the ages of 7 and 14 years was designed to protect children but that it is too easily rebutted and that it does not in fact present an impediment to the prosecution and conviction of young people. For instance, mothers of children are asked to indicate whether their children understand the difference between right and wrong. An answer in the affirmative is often considered sufficient grounds to rebut the presumption of *doli incapax*.

Van Oosten (1993:133) also indicates that in practice the Courts have paid mere lip-service to the criminal capacity test by making the inquiry turn on the child's knowledge of the wrongfulness of his/her conduct in the circumstances under which the act was committed.

Skelton & Zaal (1998:550) also point out that in their opinion the Courts allow the presumption of a lack of criminal capacity to be rebutted too easily. The authors submit that appropriate submissions from a legal representative for the child might make this presumption more difficult to rebut. It is also argued that expert evidence should be compulsory to rebut the presumption and the younger the offender, the more compelling the obligation to call an expert should be.

On the other hand, Labuschagne (1978:265; 1991:119; 1993:152; 1993:104-105; 1997:148; 2003:32) opposes the use of fixed chronological age structures to determine criminal liability and is of the opinion that an individualised approach, focusing on the specific offender should be followed when determining criminal liability. In this regard Labuschagne (1978:263) refers to the legal systems of various countries and distinguishes three approaches with different variants regarding the criminal liability of children, namely:

(i) the undifferentiated-chronological approach where a general age is set and children below this age are not criminally liable and children above this age are criminally liable. Examples of countries following this approach are Japan and Norway where the age is 14 years;

(ii) the differentiated-chronological approach where there is clear chronological and criminal differentiation. South Africa is an example in this regard where children under the age of 7 years is not criminally liable and between the ages of 7 and 14 years the presumption of *doli incapax* comes into operation; and

(iii) the individualised approach where there are no chronological limits on the criminal liability of children. In theory a child of any age can be held criminally liable. The Netherlands is an example of a country following this approach. This approach is also favoured by the author.

Labuschagne (1978:265) is of the opinion that any attempt to tie human abilities, attitudes and judgments to a set chronological age structure will miss human uniqueness and individuality and can therefore not constitute valid and meaningful punishment for human behaviour. Labuschagne (1978:265) is furthermore of the opinion that a child of any age should in principle be criminally liable. It is suggested that a child should be held criminally liable only if he is aware of the legal wrongfulness of his specific act, if he is able to control his actions at the time of the commission of the criminal act and if he intended the consequences of his act.

Labuschagne (1993:152) points out that criminal liability ought to focus on the intellectual qualities of a specific offender and therefore an offender should only be punished if he was aware of the unlawfulness of his act at the time when the act was committed and if he had the ability to act according to this insight. The chronological age of the offender is not a decisive factor in this regard.

According to Labuschagne (1993:105) age limits are arbitrary when determining criminal liability. The author predicts that the individualisation and deconcentration processes will

eventually result in the individual's mental structure being the sole determinant of whether or not he/she is criminally liable. Age limits will still serve as guidelines but will not have the effect of fixed rules (Labuschagne 1997:148; Labuschagne 2003:32).

The professionals were also requested to indicate whether or not they are of the opinion that criminal capacity should be linked to a specific chronological age. Their responses follow.

Table 3: Criminal capacity should be linked to a specific chronological age.

View	Motivation	Problems	Suggestions/Advice
Subjects 1,3,5,7,8,12, 13,14,16 and 17 agreed	<p>Subject 1: Certainty in law is stabilising factor in society</p> <p>Subject 3: Unclear cut-off unwise and have no worth</p> <p>Subject 5: Need to be starting at a point somewhere. Impractical not to link to chronological age</p> <p>Subject 7: Practical reason to have cut-off age</p> <p>Subject 8: Useful to link to a specific age</p> <p>Subject 12: It should however be raised</p> <p>Subject 13: Necessary for purposes of guiding prosecution, it is an alternative option</p> <p>Subject 14: Links should be established on the basis that the chronological age of the child and the cognitive-development age (stage) is at the same level</p> <p>Subject 16: Normally expected that at a particular age a child should have attained a certain level of personal responsibility to be in a position to comprehend the consequences of his/her actions</p> <p>Subject 17: At the age of 12 years a child can be said to have criminal capacity</p>	<p>Subject 1: Courts are very subjective due to amount of discretion allowed. Requiring psychological testing would create uncertainty.</p> <p>Subject 5: Other factors like mental age, emotional age is subjective and difficult to measure</p> <p>Subject 8: If not, young children might be brought to Court and tried unnecessary</p>	<p>Subject 7: Rebuttable presumption of <i>doli incapax</i> for 7–14 year olds allow for flexibility and individual assessment</p> <p>Subject 8: Keep in mind majority of judicial officers have not had training in children’s issues and may come from cultural context where child-adult interaction is limited by norms and culture</p> <p>Subject 13: The issue of age is not only a problem in SA, but also elsewhere in the world</p> <p>Subject 14: Worked with many cases where children of 16 years were functioning on a cognitive-developmental level of 5-7 year old child, and criminal capacity can not be assumed. Although they can distinguish between right and wrong there is no insight into the consequences of their actions.</p>
Subjects 2,4,6,9,10, 11 and 15 disagreed	<p>Subject 2: Difficult to link due to social/emotional, environmental differences and mental capacity</p> <p>Subject 4: Developmental status cannot be linked to specific chronological age</p> <p>Subject 6: Capacity to distinguish between right and wrong varies and is not linked to age alone</p> <p>Subject 9: It is desirable from legal perspective because it creates legal certainty and treats children equally. However, children’s cognitive ages differ individually and retention of common law presumptions seems appropriate as it provides for individual maturity</p> <p>Subject 10: In some instances children differ</p> <p>Subject 11: Discretion is important. Individual assessment necessary. Rebuttable presumption leaves room for individual assessment in uncertain cases</p> <p>Subject 15: The child’s capacities and psychosocial circumstances in its context before and at the time of the commission of the offence should also be taken into account</p>		<p>Subject 2: Perhaps criminal capacity should be linked to EQ and IQ to gauge intent</p>

Ten of the subjects agreed with the statement that criminal capacity should be linked to a specific age and seven disagreed with it.

The ten subjects who agreed, motivated it by stating that it is practical to have a cut-off age, that there need to be a starting point somewhere and that it is normally expected that at a particular age a child should have attained a certain level of personal responsibility to be in a position to comprehend the consequences of his/her actions. One subject indicated that it leads to certainty in the law, which in itself is a stabilizing factor in society.

The seven subjects, who disagreed, motivated their disagreement by stating that it is difficult to link chronological age to criminal capacity due to the social, emotional, environmental and developmental differences which varies in each child. The capacity to distinguish between right and wrong varies and can not be linked to age alone, and that the cognitive development differs from one child to another.

The problems pointed out in this regard included the fact that the Courts are very subjective and psychological testing in each case would create uncertainty. It was also stated that mental age and emotional age is subjective and difficult to measure. Another problem is that if criminal capacity is not linked to a specific chronological age, young children might be brought to Court and tried unnecessary.

It was also pointed out that the rebuttable presumption of incapacity allows for flexibility and individual assessment. Another submission referred to the fact that the majority of judicial officers have not had training in children's issues and may come from a cultural context where child-adult interaction is limited by norms and culture. One subject suggested that criminal capacity should be linked to EQ and IQ.

The fact that ten out of the seventeen subjects were of the opinion that criminal capacity should be linked to a specific chronological age indicates that there is a need to have certainty as to when a child can be held criminally responsible to prevent the unnecessary exposure of too young children to the trauma of appearing in Court.

The professionals who did not agree on the statement that criminal capacity should be linked to a specific chronological age included three lawyers, two social workers, one

criminologist and one psychologist. Those who agreed included four lawyers, three criminologists and three social workers. It is clear that even within the various professions there is a difference of opinion on whether or not criminal capacity should be linked to a specific age. Further research on the desirability and implications of linking criminal capacity to a specific chronological age should be conducted.

Next the focus is on how South African Courts dealt with criminal capacity of children.

3.4 Case Law

Case law where the criminal capacity of children was dealt with by the Courts indicates and illustrates the following:

(i) In S v Kholi 1914CDP840 two boys aged eleven and a half and 7 years respectively, were convicted of theft. On review the Court pointed out that a child between the ages of 7 and 14 years of age is rebuttably presumed to be *doli incapax*. The Court confirmed the conviction of the older boy because there where evidence that the presumption has been rebutted for instance he gave a false account as to where he obtained the stolen goods. The motivation for the Court's decision in this regard is questionable because there could be various reasons why the child told a lie.

(ii) In R v Kaffir 1923CDP261 a child under the age of 12 years was prosecuted on a statutory offence of vagrancy because he walked through a fenced farm without the owner's permission. The Court indicated that in the case of a child under 14, the presumption arises that he is *doli incapax*, but this presumption may be rebutted by evidence. According to the Court it seems that in a case of an offence which is purely statutory, the evidence should be stronger than where the act complained about is *malum in se*. Here there was no evidence to show that this little boy knew that he was doing wrong when he went on to the farm in question. This case is important because it is clear that it is not about the general ability of the child to distinguish between right and wrong but rather whether he knew in this specific instance that he acted wrong. There must be evidence that the child knew that he was doing wrong when he went on the farm.

(iii) In 1924 in the case of the Attorney-General, Transvaal v Additional Magistrate of Johannesburg 1924AD421 the Appeal Court, although *obiter* remarked that the law of South Africa on this subject still is what it always has been, namely that a child under the age of 7 years is conclusively held to be *doli incapax*, and that a child between the ages of 7 and 14 years is presumed to be *doli incapax*, but this presumption is rebuttable on proof of a malicious mind on the part of the child.

(iv) In R v Mahwahwa and Another 1956(1)SA250(SR) the two 13-year-old accused were convicted of lighting a fire in a forest without authority. The fire had spread and caused damage. They both pleaded guilty and were found guilty. They stated that they were playing with matches and set fire to the grass, but that they thought they had put the fire out before they left. The review Court pointed out that there was nothing whatsoever in the evidence that shows that the accused appreciated that they were committing an unlawful act. The Court indicated that it is undesirable that youths of about 13 years of age should be prosecuted for statutory offences, which might often be no more than boyish pranks. The conviction was set aside because there was no evidence to rebut the presumption that the accused were *doli incapax*.

(v) In R v K 1956(3)SA353(A) the Court decided that the State must show affirmatively that the child knew what the reasonable and probable consequences of his act would be. In this matter a child of 13 years of age was charged with murder. According to the evidence, the deceased (accused's mother) was an inmate of a mental institution for about nine years. After her release (about 3 years prior to the incident), she had relapses from time to time and became violent towards members of her family. Whenever that happened the accused's father left his home. He did so on the day of the murder. The accused's sister stated that on the day of the murder, the deceased grabbed the accused and she separated them. The accused ran away and the deceased followed him with a plank. There was another struggle and the deceased fell down, collapsed and died in hospital. The accused ran away. The father testified that the accused had a little pocket-knife for the purpose of sharpening pencils, the accused returned home a day after the murder, that the accused knew the difference between right and wrong, and that he thought the accused appreciated the fact that a knife could be dangerous. The review Court held that the State did not prove that at the time the accused used a sharp instrument in defending himself, knew that he was doing a wrongful act. The fact that the accused ran away may be explicable on the ground that he was too frightened to return to his home when the

deceased might still be awaiting him. The conviction was set aside because there was reasonable doubt whether the accused was *doli capax* and there is reasonable doubt whether, in all the circumstances of this case, his action exceeded the bounds of self-defence.

(vi) In R v Tsutso 1962(2)SA666SR a boy of 10 years pleaded guilty to a charge of culpable homicide and was convicted after he killed the deceased, who had a fight with his father. The only eyewitness was the wife of the deceased. The child stabbed the deceased with a knife and ran away to a pigsty. The magistrate, in his reasons, stated that it was impossible to say with exactitude what the accused thought at the moment of stabbing the deceased, whether his motive was revenge or whether he thought it was his duty to protect his father. According to the magistrate, the accused must have known that a knife is a dangerous instrument and in stabbing someone, he would cause harm to that person. The magistrate considered that fact that the accused ran away after the stabbing, as an indication that the accused knew full well that what he had done was wrong. The review Court differed from this and pointed out that the running away of the accused may also be explicable on the basis of the fright of a young child. The doctor who examined the accused a fortnight after the incident said that when he examined the accused he showed no sign of appreciating the full importance of the allegations. The conviction and sentence were set aside because the State failed to prove beyond all reasonable doubt that the accused's mind was sufficiently mature to understand and that he did understand the wrongful character of his conduct.

(vii) In the case S v Van Dyk and Others 1969(1)SA601(CPD) an eleven-year-old child and two adults were charged with housebreaking with the intent to commit a crime unknown to the State. They all pleaded not guilty and, after evidence had been led to establish the commission of the offence, were all found guilty. The sentence imposed on the child was three strokes with a light cane. The case went on automatic review due to the sentence imposed on one of the adult accused. The review Judge requested reasons from the Magistrate for the conviction and sentence of the child. The Court was doubtful, taking the facts and circumstances of the case into consideration, of the fact that a child of eleven years in the position of this accused, would necessarily have appreciated the wrongfulness of his conduct. Another important factor was that the principal participants were adult persons and the child might have acted under the coercion or influence of the adults. The Court stressed the fact that before convicting a child under the age of 14 years

on a charge of housebreaking, to which he has pleaded guilty, the presumption should be rebutted before convicting the child on his plea of guilty.

(viii) In S v S 1977(3)SA305(OPA) the accused was 13 years of age when he committed the crime of sodomy. The Court decided that a male under the age of 14 years can be convicted on attempt to commit sodomy and the Court found that the State has successfully rebutted the presumption of *doli incapax*. The accused admitted on the day that the offence was committed, that he had intercourse with the complainant (a three year old boy). He testified in the magistrate's Court that he had intercourse with the complainant while the other children were not around and that he waited for them to go home, before he had intercourse with the complainant. He indicated that he waited for them to go home because he was afraid that they might tell the adults. He knew that he would get a hiding and that it was wrong to do what he did. The review judge held that the child planned the offence and that he knew what he was doing because he was afraid of the punishment.

(ix) In the matter of S v Pietersen and others 1983(4)904(ECD) three accused (of which 2 were aged 9 according to the charge sheet) were charged with house breaking with the intent to steal and theft. Accused no 1 was 18 years old. All three pleaded guilty and were questioned in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977. The magistrate asked each of the accused whether they knew that they were doing wrong by breaking into and entering the house and to take stuff from it. All three accused answered this question affirmatively. After the questioning had been completed the prosecutor called the father of accused no. 2 and he testified that he taught his child the difference between wrong and right, that he punished him if he has done something wrong and that he knew that he may not break into other people's homes and steal their property. The Court found that accused no. 2 was criminally responsible. The same procedure was followed regarding accused no. 3 when his mother was called to testify and the Court also found him to be criminally responsible. The review Court held that a proper decision, regarding a child offender's criminal responsibility, could be reached in an appropriate case by questioning a youthful accused, who pleads guilty, in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977. The Court also pointed out that where a child, aged between 7 and 14 years, is associated in the commission of a crime with an adult or even with a youth appreciably older than himself, the relationship between the two and the circumstances under which they both came to be involved, must be investigated before the child can be pronounced *doli capax*. In this case it is clear that no such investigation was

embarked upon nor was the matter given any consideration by the magistrate. The fact that accused no. 2 and no. 3 agreed that they knew it was wrong to break in and steal, does not end the matter, nor does their parents' evidence. The 18 year old companion played a leading role. There must be a strong suggestion that he compelled, coerced or inveigled them into joining him in the crime. The Court stated that prosecuting authorities should appreciate that, when they charge young children of under 14 years together with adults or older youths, they accept the *onus* not only of proving that the children know that what they do is wrongful but also of proving that they do that with which they are charged of their own volition, uninfluenced by their older companions' persuasion. The matter was referred back to the magistrate to deal with it in terms of section 113 of the Criminal Procedure Act, 51 of 1977 (to enter a plea of not guilty and proceed with trial) since the accused have not been sentenced at the time of the review.

(x) In the case S v Mbanda and others 1986(2)PHH108(T) three boys, of whom two were aged 11 and 12 years, were convicted of burglary and theft. The review Court pointed out that there is no indication that accused no. 1 (the 11 year old boy) was *doli capax*. He was only asked whether he knew that it was wrong to break into a place, to enter it and to take the property for himself. It does not prove that accused no. 1, at the time of the commission of the offence, knew that what he was doing constituted an offence. From the welfare reports, it was clear that all three accused were street children, had no place to go to and had no fixed source of food. They saw the cakes and chocolates in the middle of the night and decided to break in. The State submitted that the one year age difference between accused no. 1 (11 years of age) and accused no. 2 (12 years of age) assisted in proving *doli capax* of the accused. The Court pointed out that the difference in the criminal capacity between an eleven year old and twelve year old can barely be measured. The State's submission that the fact that accused no. 1 received a postponed sentence 2 years previously for theft of a bicycle also proved he was *doli capax*, was also rejected by the Court. No investigation was done to establish whether accused no. 1 and no. 2 were not influenced by accused no. 3 (an older boy). The conviction and sentence were set aside.

Van Oosten and Louw (1997:125) are of the opinion that, with reference to the Court's decision in S v Mbanda (*supra*), although the Court reiterated and confirmed the test for criminal capacity of children applied by the Courts, it deviated from the norm by applying additional criteria for the criminal capacity of children between the ages of 7 and 14 years:

(i) Was the accused, at the time of the perpetration of the alleged crime, aware of the fact that he/she acted in contravention of the law or was he/she aware of such a possibility?;

(ii) could the accused, at the time of the alleged perpetration of the crime, control his/her conduct?; and

(iii) did the accused intended the consequences of his/her act or did he/she foresee the consequences as a possibility but acted notwithstanding such foresight?

Van Oosten and Louw (1997:127) submit that this formulation is deficient and confusing because it fails to refer to the child's ability to appreciate the nature and quality of his/her act and the ability to distinguish between right and wrong.

(xi) In S v F 1989(1)SA460(ZHC) the Court strongly censured the acting Attorney-General of Zimbabwe for charging a 10 year old boy with indecent assault of an eight year old girl, and the Magistrate for convicting and sentencing him to four cuts. In this matter the probation officer, after assessing the accused, recommended that the case be withdrawn and the matter settled under his professional counselling. The probation officer also stated that both the accused and the complainant were still too young to appreciate what goes on in a criminal Court of law, and that the accused was incapable of appreciating the wrongfulness of his alleged action. The Court also found that the presumption of incapacity had not been rebutted.

(xii) In a recent case S v Ngobese and others 2002(1)SACR562 three children, one 13 years of age and the other two 14 years of age, were convicted on a charge of housebreaking, attempt to steal and theft. When they were confronted by the complainant they ran away. The review Court held that no evidence of any nature whatsoever was led by the State to prove that the 13 year old accused was *doli capax* at the time of the commission of the crime. The Court points out that in no way was his cognitive capacity (his ability to resist temptation) assessed. The fact that the 13 year old accused was accompanied by two older boys *prima facie* makes the task of the State more difficult in proving that he knew what he was doing, at the time of the commission of the crime, was wrong. The Court found that there is no direct evidence to show that the 13 year old accused knew the difference between right and wrong, that he acted on such appreciation

within the circumstances of the case and that he did not act under the influence of his older co-accused. The Court alluded to four factors relevant to the State when discharging the onus of proving that a child under 14 years is in fact *doli capax* (Community Law Centre (a)2003:1). These factors are as follows:

- (a) the precise age of the child, as the presumption weakens with the advance of years towards 14,
- (b) the nature of the crime itself, as the presumption weakens where the offence is inherently bad,
- (c) the advancement of evidence that the particular accused appreciated the distinction between right and wrong, and
- (d) proof that he or she knew the act which had been committed by him or her was wrong within the content of the particular case.

With reference to the matter of S v Ngobese (*supra*) Pantaziz and Friedman (2002:818) expresses the opinion that the second part of the criminal capacity test, the ability to act in accordance with the appreciation of the wrongfulness of one's conduct, is lost in the judgment.

Skelton (2006:1 – 5) indicates that on 24 May 2006 the Centre for Child Law presented a 13 year old boy in an appeal before the Pietermaritzburg High Court. The question before the Court was whether children below the age of criminal capacity could plead guilty by way of a written statement in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977. The appeal was against his conviction and sentence handed down by the court *a quo*. The child offender (13 years and 3 months) stabbed a 14 year old boy with a knife, and he was charged with murder. The Court rejected the appeal and indicated that the child had been legally represented and this implied that the legal representative had canvassed the issue of criminal capacity before compiling the statement.

The professionals were requested to comment on a statement that enough is being done in our legal system to ensure that all child offenders between the ages of 7 and 14 years

have the necessary criminal capacity before they are prosecuted. Their comments are indicated in table 4.

Table 4: Enough is being done to ensure that child offenders between 7-14 years have criminal capacity before prosecuted.

View	Motivation	Problems	Suggestions/Advice
<p>Subjects 2,4,6,7,8,9,10,11, 13,14,15 and 17 disagreed</p>	<p>Subject 2: SA has insufficient recourses to measure criminal capacity, especially in poorer sectors of society</p> <p>Subject 4: The role of other disciplines in determining criminal capacity is minimal</p> <p>Subject 6: Too little is being done with opposite effect i.e. prosecutions not instituted because they accept child too young and will be difficult to prove criminal capacity without assistance of assessment being done</p> <p>Subject 7: Virtually nothing is being done. It still happens that mother of child is called to testify of child's knowledge of difference between right and wrong</p> <p>Subject 8: Substantive meaning and process of assessment misunderstood. Criminal Justice professionals have too little training in this aspect of the law</p> <p>Subject 9: Insufficient time is spend in Courts to establish criminal capacity</p> <p>Subject 10: Definitely not</p> <p>Subject 11: The decision to prosecute is taken on the statements in the dockets. Child has to appear in Court, if child is very young he/she is diverted.</p> <p>Subject 13: Some Courts don't apply their minds, they just ask the child if he/she understand crime and result thereof. A yes or no answer from the child is not sufficient proof of criminal capacity</p> <p>Subject 14: The actual assessments that are done are ridiculous and no proper time can be spend with these children for assessment as there are too few professionals and a lot of children. The competencies of the people doing the assessments are questionable.</p> <p>Subject 15: Too little knowledge and too little professional people</p> <p>Subject 17: Not correct. A more detailed assessment of emotional and psychological evaluation needed</p>	<p>Subject 7: If young child pleads guilty to charge, often no inquiry into criminal capacity</p> <p>Subject 8: Do not have sufficient well trained professionals but long term costs (financially and socially) of wrongfully convicting children far outweigh putting in place adequate process</p>	<p>Subject 4: Multi-functional and interdisciplinary approach needed. Social worker and psychologist should work together with other legal disciplines</p> <p>Subject 7: Neglected second leg of inquiry for very long time and it is not well handled by Court</p> <p>Subject 8: To protect children: irrebuttable presumption of <i>doli incapax</i> until 12 years, between 12-14 years intensive assessment with professional assistance and between 14-18 years more responsibility to Courts with professional assistance, if necessary. Prosecutors and judicial officers should receive comprehensive training on issue</p> <p>Subject 9: Where there is uncertainty, the evaluation and assessment of a child by experts in child development/psychology should be called for</p> <p>Subject 11: Social worker must be called to testify</p>

From table 4 it is clear that all twelve of the subjects, who answered this question disagreed with the statement that enough is being done in our legal system, to ensure that child offenders between the ages of 7 and 14 years have the necessary criminal capacity before they are prosecuted.

Subjects 1, 3, 5, 12 and 16 responded by indicating that they have not been involved with children in the criminal justice system and are not in a position to comment in this regard. One of these subjects is a lawyer, three are criminologists and one is a social worker.

The twelve subjects who disagreed with the statement submitted that our country have insufficient resources to measure criminal capacity, the role of other disciplines in determining criminal capacity is minimal, too little is being done. One subject went so far as to state that virtually nothing is being done and indicated that mothers are still called by the prosecution to prove their children's criminal capacity. Another subject submitted that the substantive meaning and process of assessment is misunderstood and that Criminal Justice professional have too little training in this aspect of the law. It was also noted that insufficient time is spend in the Courts to establish criminal capacity, that some Courts do not apply their minds, they just ask the child if he/she understands crime and the result thereof.

The problems pointed out in this regard include the fact that if a child pleads guilty, there is often no inquiry into his/her criminal capacity, that there are not enough sufficiently trained professionals in our criminal justice system. One subject stated that the long term costs (financially and socially) of wrongfully convicting children far outweigh the putting into place an adequate process.

The fact that all twelve subjects, who responded to this question, disagreed with the statement that enough is being done in our legal system to ensure that child offenders between the ages of 7 – 14 years have criminal capacity before they are prosecuted, is an indication that we need a change in our criminal justice process to address this problem.

The fact that three criminologists preferred not to answer this question because they have not been involved with children in conflict with the law, in the criminal justice system is an indication that criminologists in general should be encouraged to become involved in this

process as they can offer a valuable contribution to assist the Court in reaching a decision on criminal capacity.

The extent of crimes committed by children, between the ages of 7 years and under 14 years, is also of significance to understand the impact of how *doli capax* and *doli incapax* are applied in South Africa.

3.5 Statistics on Children under 14 years in prison

On 31 July 1995 only one child between the ages of 7 and 13 years was serving a prison sentence and this number increased to 4 children on 31 July 1996 and to 14 children on 30 September 1997 (Sloth-Nielsen 1998:97). On 31 October 1998 a total of 14 children were serving prison sentences (Sloth-Nielsen (a)1999:77).

The Community Law Centre [(b)2003:10] indicates that over the five year period from 1998 to 2003, a total of 74 children between the ages of 7 (inclusive) and 14 (exclusive) years were sentenced to prison. Of these 40 were 13 years old at the time of sentencing, 18 were 12 years old and 16 were between the ages of 7 and 11 years. In 2001, a 12 year old was sentenced to imprisonment for 0-6 months on a charge of reckless and negligent driving and a 9 year old was sentenced to 0-6 months' imprisonment for malicious damage to property. The statistics also indicated that two girls aged 11 years were sentenced to imprisonment during this time – one in 1998 and one in 2001. During the same five year period 89 children under the age of 14 years were awaiting trial in prison.

Muntingh (2005:8) indicates that the total number of children in prison has been reduced to approximately the 1999-level and that the proportion of very young children has steadily decreased, although there are still some children under the age of 13 years in prisons. This does not comply with the spirit of the Convention on the Rights of the Child, 1989.

3.6 Conclusion

From the above position it is clear that the determination of criminal capacity, especially in cases involving children in conflict with the law, is a very important aspect of our criminal justice system. Even though the concept of criminal capacity has been part of our legal

system for quite a long period of time, it is clear from the quoted case law that our Courts do not interpret and implement it uniformly. Although there is some critique on the manner in which the Courts, in some instances, dealt with this concept, it is clear that our Courts do exercise caution in most cases where children between the ages of 7 and 14 years are involved.

In the next chapter the proposed amendments to the common law regarding criminal capacity, by the Child Justice Bill, 2002 will be highlighted as well as the various submissions and the debates in Parliament relating to this issue. The important factors to be taken into account when the evaluation of a child's criminal capacity is done will also be discussed.

CHAPTER 4

CRIMINAL CAPACITY IN THE CHILD JUSTICE BILL, 49 OF 2002

4.1 Introduction

South Africa ratified the United Nations Convention on the Rights of the Child (1989) on 16 June 1995 (Sloth-Nielsen 1995:401, Ehlers 2002:33, Sewpaul: 2000:1; Skelton 1996:180).

According to the South African Law Commission (2000:x), it was requested to undertake an investigation into juvenile justice and to make recommendations to the Minister of Justice for the reform of this particular area of the law, following the ratification of the United Nations Convention on the Rights of the Child. An Issue Paper (South African Law Commission 1997) was published for comment during 1997 which proposed that a separate Bill should be drafted in order to provide for a cohesive set of procedures for the management of cases in which children are accused of crimes. The Issue Paper was the subject of consultation with both government and civil society role-players. Towards the end of 1998 the Commission published a comprehensive Discussion Paper, accompanied by a draft Child Justice Bill, 2002. Wide consultation was held regarding this document, with all the relevant government departments and non-governmental organisations providing services in the field of juvenile justice being specifically targeted for inclusion in the consultation process. The draft Bill encapsulated a new system for children accused of crimes providing substantive law and procedures to cover all actions concerning the child from the moment of the offence being committed through to sentencing, including record-keeping and special procedures to monitor the administration of the proposed new system. The workshops and seminars held regarding the Discussion Paper, as well as the written responses received, garnered substantial support for the basis objectives of the Bill as well as for the proposed structures and procedures (Ehlers 2002:33; Sloth-Nielsen 2003:175).

Sloth-Nielsen [(b)1999:9] reports that a two-day seminar was held at the University of Pretoria, to discuss the issue of a minimum age for criminal capacity and whether or not the presumption of *doli incapax* should be retained in South African Law. The contributors were drawn from a range of disciplines including psychology, education, the judiciary and other branches of the legal profession, social anthropology and criminology. Most of the

participants were reluctant to see a departure from the *doli incapax* presumption and most of them were in favour of raising the minimum age for criminal capacity to 10 years (Davel 2001:605).

In their report on Juvenile Justice, the South African Law Commission (2000:xii) recommends that the common law with regard to children below the age of 14 years be repealed. The minimum age of criminal capacity is raised from 7 to 10 years. The rebuttable presumption of *doli incapax* with regard to children who are at least 10 years but not yet 14 years of age is codified (Davel 2001:605; Burchell & Milton 2005:364).

In this chapter, the proposed amendments to the common law presumption relating to criminal capacity will be highlighted. A brief summary of the submissions made to the Portfolio Committee on Justice and Constitutional Development on the issue of criminal capacity of children will be furnished. An overview of the relevant factors, which the evaluation on the criminal capacity of a child must include, will also be furnished.

4.2 Child Justice Bill, 49 of 2002

The Child Justice Bill, 2002 was introduced into Parliament in August 2002 (Odongo 2003:1; Sloth-Nielsen 2003:175).

Public hearings were held on the Bill in February 2003 and the deliberations on the Bill by the Portfolio Committee on Justice and Constitutional Development followed in March 2003.

With regard to the issue of the minimum age of criminal capacity Odongo (2003:1) reports that the Portfolio Committee required an explanation for the decision to fix this age at 10 years. The Parliamentary Monitoring Group [(a)2003:3] reports that on 20 February 2003 the Chairperson for the Portfolio Committee requested a report on the research conducted to support the increasing of the minimum age for criminal capacity and information on the number of children between the ages of 7 and 10 years that had committed serious crimes during the past five years and the number of those children that have been convicted.

On 25 February 2003 Prof. J. Sloth-Nielsen made a submission to the Portfolio Committee (Parliamentary Monitoring Group (b)2003:1). Sloth-Nielsen (2003:1–7) pointed out that

South Africa incurred an obligation when ratifying the Convention on the Rights of the Child to review the minimum age of criminal capacity and if it was found to be set to low, to raise it. Sloth-Nielsen urged the Portfolio Committee to support the age of 10 years as the minimum age for criminal capacity. With regard to the retention of the rebuttable presumption of incapacity of children aged between 10 and 14 years, Sloth-Nielsen (2003:2) submitted that it is a useful mechanism in ensuring that children do benefit from this protection which exists in the common law at present. It was also indicated that it is especially apposite in a country such as South Africa, where children from different cultures and traditions, and from a wide array of rural, deep rural and urban areas, experience childhood very differently. There are also children with intellectual disabilities who do not mature to full capacity at the same rate as children with normal abilities.

The Restorative Justice Centre (2002:1) also made submissions on 25 February 2003 (Parliamentary Monitoring Group [(b)2003:1]), but it focused on restorative justice issues only.

The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) (2002:3), in its submission on 25 February 2003, supported the increase of the minimum age for criminal capacity to 10 years and the retention of the rebuttable presumption of *doli incapax* for children between the ages of 10 years and below 14 years (Parliamentary Monitoring Group (b)2003:1).

On 26 February 2003 both the Centre for the Study of Violence and Reconciliation and the Child Justice Alliance made submissions to the Portfolio Committee (Parliamentary Monitoring Group (c)2003:1). The Centre for the Study of Violence and Reconciliation (2002) focused on issues relating to Restorative Justice. The Child Justice Alliance (2002:2–3) also supported the raising of the minimum age for criminal capacity to 10 years and the retention of the *doli incapax* presumption. It stated that the measures put into place by the Bill regarding the issuing of a certificate by the Director of Public Prosecutions will ensure that the prosecution properly applies its mind to the prosecution of children between the ages of 10 and below 14 years (Davel 2001:605).

The deliberations are still in process and the Child Justice Bill, 2002 is not yet finalized. Further changes may still be made.

The Minister of Justice and Constitutional Development, Ms Brigitte Mabandla on 20 May 2005, indicated that the Child Justice Bill, 2002 is still pending before the Portfolio Committee and she expressed the hope that deliberations on it will resume in the very near future (Parliamentary Monitoring Group 2005:2).

United Nations (2000:5) indicates that the Committee on the Rights of the Child noted that South Africa has drafted legislation to increase the legal minimum age for criminal responsibility from 7 to 10 years, but remained concerned that the minimum age of 10 years for criminal capacity is still relatively low. It was recommended that South Africa reassess the draft legislation on criminal responsibility with a view to increasing the proposed minimum age even higher (Sewpaul 2000:1–3).

On the other hand, Cassim (1998:336) submits that the age limits for criminal capacity have hindered police efforts to control gangs of youths who exploit their age to commit crimes. It is furthermore submitted that lowering the age limit for criminal capacity will not only prevent exploitation of their ages by juvenile criminals, but it will also prevent manipulation of juvenile offenders by adults who use them to further their own nefarious ends. It will also help police efforts to address juvenile crime.

Section 5 of the Child Justice Bill, 2002 deals with criminal capacity, and the decision whether or not to prosecute a child between the ages of 10 years and 14 years. Section 5 provides as follows:

“Criminal Capacity”

“5.(1) A child who commits an offence while under the age of 10 years cannot be prosecuted for that offence.

(2) A child who commits an offence while under the age of 14 years is presumed not to have had the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation, unless the criminal capacity of the child is proved in accordance with section 56.

(3) If the Director of Public Prosecutions intends charging a child contemplated in subsection (2) with an offence, the Director or his or her delegate must issue a certificate confirming an intention to prosecute.

(4) If the certificate contemplated in subsection (3) is not issued within 14 days after the preliminary inquiry, the Director of Public Prosecutions must be regarded as having declined to institute prosecution.

(5) In issuing a certificate contemplated in subsection (3) the Director of Public Prosecutions may have regard to any relevant information, but must have regard to -

(a) the appropriateness of diversion;

(b) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of such child;

(c) the nature and gravity of the alleged offence;

(d) the impact of the alleged offence upon any victim of such offence; and

(e) a probation officer's assessment report.

(6) The common law pertaining to the criminal capacity is hereby amended to the extent set out in this section.”

With regard to the issuing of a certificate by the Director of Public Prosecutions in terms of subsections (3), (4) and (5), the Child Justice Alliance (2001:6) submits that this will strengthen the operation of the presumption of incapacity and it will prevent indiscriminate prosecution and ensure that the question of criminal capacity is appropriately evaluated.

Section 56 of the Child Justice Bill, 2002 deals with the establishment of criminal capacity and provides as follows:

“Establishment of criminal capacity”

“56.(1)The criminal capacity of a child over the age of 10 years but under the age of 14 years must be proved by the State beyond a reasonable doubt.

(2) The prosecutor or the child’s legal representative may request the child justice Court to order an evaluation of the child by a suitably qualified person to be conducted at State expense.

(3) If an order has been made by the child justice Court in terms of subsection (2), the person identified to conduct an evaluation of the child must furnish the child justice Court with a written report of the evaluation within 30 days of the date of the order.

(4) The evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child.

(5) The person who conducts the evaluation may be called to attend the child justice Court proceedings and give evidence and, if called, must be remunerated by the State in accordance with section 191 of the Criminal Procedure Act.”

In 2001 Ehlers (2002:36) conducted a study to ascertain the opinions of children, at various stages in the criminal justice process, ranging from those who had not had any contact with the formal legal system to those who had been convicted and already carrying out residential sentences, on the Child Justice Bill, 2002. A total of 17 workshops were held in various centers and each group had between 20 to 25 participants (between the ages of 12 to 21 years). Ehlers (2002:41) indicates that 71,5 percent of the participants felt that children of 10 years and under are incapable of planning and carrying out a criminal act on their own.

A brief summary on the provisions of the Child Justice Bill, 2002, regarding the increasing of the age for criminal capacity to 10 years, codification of the rebuttable presumption of *doli incapax* applicable children between the ages of 10 and below 14 years, were furnished to the professionals. The statement that these provisions will adequately protect child offenders was posed to them and they responded as follows:

Table 5: Provisions in the Child Justice Bill, 2002 will adequately protect child offenders.

View	Motivation	Problems	Suggestions/Advice
Subjects 2,3,4,5,6,7,8,9,10, 11,12,13 and 16 agreed	Subject 2: Will protect		Subject 2: In-depth evaluation must be conducted by professional with required knowledge
	Subject 3: Will adequately protect	Subject 3: No need to increase age of criminal capacity	
	Subject 4: Will offer better protection	Subject 4: More child-friendly and more flexible for individual differences	
	Subject 5: With Bill protection will increase	Subject 5: Do not agree with increasing of minimum age for criminal capacity. Will send out wrong message – young children commit serious crimes	Subject 5: Bill will work for “once off” child offenders- not going to benefit children who grow up in environment conducive to crime, who are not held accountable and become repeat offenders
	Subject 6: Will protect better	Subject 6: An order might ensure thorough assessment and not so superficial as at present	Subject 6: Assessment for purposes of taking decisions on whether or not to prosecute, divert, to which program to divert to should be compulsory
	Subject 7: Believe protection will be improved		Subject 7: Bill provides for assessments at State expense
	Subject 8: Improvement on present situation	Subject 8: Change in law not enough – training also needs to be done. If child is <i>doli incapax</i> Court’s responsibility should not stop – crime does not incur in vacuum	Subject 8: Need a process whereby children who are <i>doli incapax</i> are referred to monitored programmes that offer remedial assistance that is appropriate
	Subject 9: The child’s evaluation upon request is greatly supported		
	Subject 10: That is probably a better way to protect children		
	Subject 11: It will create uniformity in the way these cases are dealt with and it provides something to work from		
Subject 12: Agree with proposed provisions			
Subject 13: Definitely better than we have at the moment.			
Subject 16: Ensure child is criminally liable before prosecution			
Subjects 1,14 and 17 disagreed	Subject 1: Protection same	Subject 1: Prosecutor must request evaluation before trial proceeds	
	Subject 14: The provision says may instead of must assess/evaluate. Even before it comes to trial, pre-trial reports on children should focus on this important concept and not just on social circumstances as it is presently the case		
	Subject 17: The evaluation should be automatic and not dependant on request by prosecutor or legal representative		

From table 5 there is a clear indication that thirteen of the subjects agreed with the statement that the provisions in the Child Justice Bill, 2002 regarding criminal capacity will adequately protect child offenders. The subjects who disagreed include two lawyers and one social worker. Subject 15, a criminologist did not respond to this question due to a lack of contact with children in the criminal justice system.

Some of the subjects that agreed with the statement, however, indicated that they are of the opinion that there is no need to increase the minimum age for criminal capacity. One subject stated that a change in law is not enough and that training also needs to be done. Another subject submitted that an order to evaluate a child, might ensure a more thorough assessment being done as the assessments being done at the moment is very superficial.

Further comments by the subjects included the fact that assessments for the purposes of taking decisions on whether or not to prosecute, diversion and to which program to divert to, should be compulsory. The need for a process whereby children who are *doli incapax* can be referred to and monitored was also expressed. One subject was of the opinion that the Child Justice Bill, 2002 will benefit first offenders and not children who grow up in an environment that is conducive to crime, because they are not held accountable for their acts and will become repeat offenders.

One of the subjects (a lawyer) who disagreed with the statement indicated that the protection envisaged in the Child Justice Bill, 2002 is the same as it is at the moment. This subject however, noted that the prosecutor must request an evaluation before the trial proceeds. One subject who disagreed indicated that the provision states that a request for an evaluation may be made but he suggests that the wording should be must assess/evaluate. The other subject stated that the evaluation should be done automatically and should not be dependant on a request by the prosecutor or legal representative.

The fact that the majority of the various professionals, who participated, agreed with the statement that the provisions of the Child Justice Bill, 2002 will adequately protect child offenders is an indication that these professionals are of the opinion that our country needs a separate criminal justice system for juvenile offenders, and that the Child Justice Bill, 2002, in principle, will protect juvenile offenders. The process of getting the Child Justice Bill, 2002 approved by Parliament should therefore be prioritized and expedited.

4.3 Evaluation and Assessment of Criminal Capacity

As indicated above the criminal capacity of a child between the ages of 10 years and under 14 years must be proved by the State beyond reasonable doubt. The presumption, as stated in the common law, remains basically unchanged (except for the increase of the minimum age under which a child cannot be prosecuted to 10 years) and the State still has to prove that the child had the capacity to appreciate the difference between right and wrong and the capacity to act in accordance with that appreciation, at the time when the offence was committed.

In terms of section 56(2) of the Child Justice Bill, 2002 the prosecutor or the child's legal representative may request the Child Justice Court to order an evaluation of the child by a suitably qualified person to be conducted at State expense. If such an order has been made, the evaluation must be conducted and a written report furnished to the Court within 30 days of the order.

The questionnaire contained a statement that the evaluation of the child should be done before he/she appears in the Child Justice Court. The responses to this statement are indicated in table 6.

Table 6: The evaluation should be done before appearance in the Child Justice Court.

View	Motivation	Problems	Suggestions/Advice
<p>Subjects 2,3,4,5,6,7,8,9,10,11,12,14,15,16 and 17 agreed</p>	<p>Subject 2: Would prevent further unnecessary trauma and contamination of the evaluation results</p> <p>Subject 3: Only fair to child</p> <p>Subject 4: If possible absolutely</p> <p>Subject 5: If child do not have criminal capacity best not to expose to Court situation</p> <p>Subject 6: Agreed</p> <p>Subject 7: As soon as possible after commission of the offence</p> <p>Subject 8: Assessment not expertise of prosecutor or judicial officer. Result should be placed before Court with expert to explain</p> <p>Subject 9: Adequate assessment takes time and skilled persons in a better position to place child's background in context than Court officials</p> <p>Subject 10: Yes before he/she is traumatized further</p> <p>Subject 11: One would know what to do with child</p> <p>Subject 12: One should just be careful not to contaminate the child's statements</p> <p>Subject 14: It will be great</p> <p>Subject 15: In cases of child offenders</p> <p>Subject 16: This will help to protect the child from being criminalized before criminal capacity is determined</p> <p>Subject 17: So that the Court is properly informed</p>	<p>Subject 5: Practical arrangements may be difficult. Who will make order?</p> <p>Subject 6: Child should not be assessed unless proceedings are pending</p> <p>Subject 7: in case in PMB evaluation concluded a year after commission of the offence. Psychologist could only guess what child's development and capacity was like at commission of offence, weakened the evidence</p> <p>Subject 8: Needs of <i>doli incapax</i> child may not be addressed and may not be diverted away from pattern of criminal behaviour</p> <p>Subject 14: During the trial a further assessment can be done if necessary</p>	
<p>Subjects 1 and 13 disagreed</p>	<p>Subject 1: Should be done after decision to prosecute has been taken</p> <p>Subject 13: If order for evaluation is made by the Child Justice Court, it will carry more weight as it will be an order of the Court</p>	<p>Subject 1: Child must appear in Court within 48 hours after arrest – may impose on this right. Innocent until proven guilty</p>	<p>Subject 1: Court should order assessment after argument by State and defence</p>

Table 6 clearly indicates that the majority of the subjects (15), who participated, agreed with the statement that the evaluation of the child should be done before he/she appears in the Child Justice Court. The two subjects who disagreed with the statement are two lawyers.

The motivation by the fifteen subjects who agreed with the statement includes that it will prevent further trauma and contamination of the evaluation results, that it will be fair to the child, that if the child is *doli incapax* the child does not have to be exposed to the Court situation, it will ensure that the Court is properly informed and it will prevent the child from being criminalized before criminal capacity is determined.

One of the subjects who disagreed stated that the evaluation should only be done after the decision to prosecute has been taken. It was also submitted that the Court should order an assessment after argument by the State and the defence. The other subject stated that an order for evaluation by the Court will carry more weight.

The problems foreseen in this regard relate to the practicalities of such an arrangement.

One subject pointed out that if the assessment is not done as soon as possible after the commission of the offence, the psychologist or the person who conducts the assessment can only guess what the child's development and capacity was at the time of the commission of the offence.

The fact that fifteen of the subjects agreed with the statement that the evaluation should be done before the appearance in the Child Justice Court is a clear indication that there is a need for the assessment of the child offender as soon as possible to enable all the relevant role players to make the correct and informed decisions about the child offender at the beginning of the process. This will be in the best interest of the child.

Section 56(4) states that, if an evaluation has been ordered, such evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child. The focus will be mainly on the development of children between the ages of 10 years and under 14 years, since this is the age bracket that the provisions relating to the presumption of criminal capacity applies to.

4.3.1 Cognitive Development

In terms of section 5(5) of the Child Justice Bill, 2002, the Director of Public Prosecutions must issue a certificate when he/she decides to prosecute a child offender between the age of 10 years and under 14 years. When making this decision, various factors must be taken into account, amongst others, the cognitive ability of the child. The information furnished here, aims to give general guidelines to assist in this decision and in no way purport to be an absolute and complete psychological explanation on the cognitive development of a child. An assessment of the cognitive development of a child must be done by a psychiatrist and does not fall within the ambit of this document. It is a mere practical guideline and summary to lay persons in the field of psychology, and is meant to assist the Court, prosecutors and other role-players understanding the basic cognitive development of children in general.

As indicated in Chapter 2, Snyman (2002:161–163) pointed out that the ability to distinguish between right and wrong forms part of a person's cognitive mental function which is related to a person's reason or intellect. In other words, a person's ability to perceive, to reason and to remember and the emphasis are on a person's insight and understanding.

Piaget (1967:88–99; Wadsworth 1996:26; Campbell 1976:1–14) give the following summary of Piaget's different stages of cognitive development:

- (i) The stage of concrete operations (7 – 11 years). During these years, the child develops the ability to apply logical thought to concrete problems in the present.

- (ii) The stage of formal operations (11 – 15 years or older). During this stage, the child's cognitive structures reach their greatest level of development and the child becomes capable of applying logical reasoning to all classes of problems.

The chronological ages during which children can be expected to develop and behave and be representative of a particular stage are not fixed. Piaget (1967:88–99; Wadsworth 1996:26; Campbell 1976:1–14) point out that the age spans suggested are normative and denote the times during which the typical or average child can be expected to display the intellectual behaviours that are characteristic of the particular level. One aspect of Piaget's

theory is fixed namely that every child must pass through the levels of cognitive development in the same order. A child cannot move intellectually from the preoperational level to formal operations without passing through concrete operations.

Piaget (1967:88–99; Wadsworth 1996:26; Campbell 1976:1–14) refers to another interesting social and moral topic investigated and that is the development of children's concepts about lying. Before the age of 6 or 7 years, most children view a lie as something that is naughty. In addition, young children usually consider involuntary errors to be lies. Between the ages of 6 or 7 and 10 years or so, a lie is typically viewed as something that is not true. A false statement is viewed as a lie regardless of the intent. If it is not true, then it is a lie. Only after the age of 10 or 11 years do children begin to recognize intentions in relation to lying.

Piaget (1967:88–99; Wadsworth 1996:26; Campbell 1976:1–14) states that during the development of concrete operations (ages 7 – 11 years), a child's reasoning processes becomes logical. Piaget's (1967:88–99) research revealed that children's concepts of justice change as they develop. Preoperational children consider rules as fixed and unchangeable. Just punishments are harsh and often arbitrary (expiatory punishment). During concrete operational development, children construct a better, though not complete, understanding of laws and rules. They begin to consider the role of intentions in deciding what is just. In addition, concrete operational children increasingly come to regard punishment by reciprocity as more appropriate than expiatory punishment.

The child is increasingly capable of evaluating arguments rather than simply accepting preformed unilateral ideas. This is accompanied by an understanding of intentionality and an increased capability of considering motives when making judgments. Growth can be seen in children's moral concepts, such as their understanding of rules, lying, accidents, and justice.

Piaget (1967:88–99; Wadsworth 1996:26; Campbell 1976:1–14) indicates that during the development of formal operations, which typically begins around age 11 or 12, a child constructs the reasoning and logic to solve all classes of problems. There is a freeing of thought from direct experience. The child's cognitive structures reach maturity during this stage. That is, his or her potential quality of reasoning or thought is at its maximum when formal operations are fully developed. After this stage, there are no further structural

improvements in the quality of reasoning. The adolescent with fully developed formal operations typically has the cognitive structural equipment to think as well as adults. This does not mean that the thinking of the adolescent with formal reasoning is necessarily as good as adult thought in a particular instance, although it may be as logical or well-reasoned; it means only that the potential has been achieved. Both adults and adolescents with formal operations reason using the same logical processes. The development of moral reasoning begins with sensorimotor development and reaches its highest levels when formal operations and affective development are fully developed.

Around the beginning of formal operations, at age 11 or 12, most children construct a relatively sophisticated understanding of rules. The rules of the game are seen as fixed at any point in time by mutual agreement and changeable through mutual agreement. The earlier belief that rules are permanent and externally imposed by an authority is no longer present. At this stage, the rules in use are known to all, and all agree on what the rules are. Adolescents recognize fully that rules are necessary in order to cooperate and play the game effectively. There also seems to be an interest in rules for their own sake (Piaget 1967:88–99; Wadsworth 1996:26; Campbell 1976:1–14).

Piaget's theory on the relationship between children's cognitive development and the development of concepts of rules, accidents, lying and justice and can be tabularized as follows (Piaget 1967:88–99; Wadsworth 1996:26; Campbell 1976:1–14):

Table 7: Piaget's theory on the cognitive development of children.

Cognitive Development	Rules	Accidents	Lying	Justice
Concrete operations (7 – 11 years)	Incipient cooperation. Rules observed, though little agreement as to what the rules are	Intentions begin to be considered. Children begin to take the view of others	Lie = not true. Unpunished untruths are lies	Justice based on reciprocity. Equality more important than authority
Formal operations (after 11 – 12 years)	Codification of rules. Rules known to all; agreement as to what the rules are; rules can be changed by consensus; rules of interest for their own sake		Intentions decide whether a false statement is not a lie. Truthfulness viewed as necessary for cooperation	Equality with equity. Reciprocity considers intent and circumstances

Moffatt (2002:51) states that children are incapable of abstract reasoning prior to adolescence. Abstract issues are those that cannot be perceived by one or more of the five senses. Concepts like faith, hope, and wrong and right are abstract issues that can be partially addressed in concrete terms, but their deeper meaning is abstract. Determining right and wrong in a given situation involves more than just knowing the rules. Prior to the age of 12 or 13 years, children cannot fully understand abstract issues.

UNICEF Innocenti Research Centre (2005:9) points out that some of the more dominant theoretical approaches influencing the current understanding of childhood are rooted in assumptions that development is a staged process, whether with respect to physical, moral, social, emotional or intellectual capacity. This traditional approach has often been linked to research methods influenced by the biological and physical sciences. UNICEF Innocenti Research Centre (2005:9) refers to Piaget, who argued that children's development takes place as a series of discrete stages, stated above. Piaget's work has been taken up and reinforced by subsequent generations of researchers, and has had a profound influence on the work of all professions involved with children. UNICEF Innocenti Research Centre (2005:9-10) submits that most of the research on which conventional

theories are based originates in European and North American contexts and reflects presumptions about childhood in those societies. For example these theories assume that childhood is a period of time for nurturing, care, play and learning and free from the demands of responsibility or employment. However, this is not the reality for many millions of children throughout the world. UNICEF Innocenti Research Centre (2005:10) furthermore submits that the model of childhood arising from staged theories is characterised by the assumption of a natural order in which children are dependent and there are incontrovertible rules governing progress towards adulthood. This view takes no account of the impact of factors such as family, age of siblings, culture, power, status or social and economical context on the process of children's development. The assumption of fixed developmental stages also pathologises many children with disabilities whose capacities may, for a variety of reasons, evolve more slowly or in different ways from the majority of children in a given population. The fact of their difference is viewed as evidence of incapacity to develop. These theories have also been developed by researchers observing the very particular childhoods experienced by children in economically advanced Western societies (UNICEF Innocenti Research Centre 2005:11). UNICEF Innocenti Research Centre (2005:12-13) indicates that theories in developmental psychology have moved beyond these traditional prescriptive models to embrace a more cultural, social and contextual understanding of how children grow up. However, these ideas have not sufficiently permeated the wider world to influence law, policy and practice impacting on children's lives. In many areas of social policy, for example early childhood development and juvenile justice thinking remains strongly influenced by overly prescriptive assumptions about children's development.

Van Niekerk (2001) (National Coordinator for Childline, SA) wrote a comprehensive overview in the Child Law Manuel for Prosecutors regarding the general development of a child. Her overview was judged to suffice for the purposes of this research. Van Niekerk (2001:A3-2 – A3-9) gives the following overview of cognitive development:

Cognitive development in all children, as with other aspects of development, follows through certain stages that are generally associated with chronological ages. Elements of the child's physical and emotional environment can affect development of all aspects of a child's growth, including cognitive development.

Children from 7 to 12 years

From about the age of 7 years, children begin to develop a more mature understanding of events in their lives and their ability to think on an abstract level starts to become more complex. Their ability to link cause and effect to less tangible issues increases. At this age, thinking becomes more abstract and children begin to develop the ability to manage more complex cause-effect thinking (Van Niekerk 2001:A3-2 – A3-9).

Children from 13 years to early adulthood

The ability of children at this age to think abstractly becomes more advanced and they are more often able to manage complex thinking processes.

The process of cognitive development that all children go through, has implications for how children will interact with and interpret their experience of the criminal justice system. It is important to remember that children will probably understand very little about the legal process, the role-players, the procedures and the long-term implications of some of the possible outcomes. This may contribute to increased anxiety in the child and underlines the importance of simple education programmes for children who undergo investigations (police and medical) and attend Court (Van Niekerk 2001:A3-2 – A3-9).

Issues relating to memory

Research indicates that the ability of children to recall events and experiences in their own lives is as reliable as that of adult ability to recall childhood events – perhaps more so, as children's life experiences are more limited and therefore memory may not be as distorted or overlaid by connections to other life experiences. However, there are some very important factors to remember when trying to access a child's memory of events (Van Niekerk 2001:A3-2 – A3-9).

(i) The more anxious the child, the less able the child will be to access information in memory. The more relaxed the child in the situation of recall, the more likely it is that the child will be able to retrieve the required information from memory. It is thus essential that the interview/questioning environment be relaxed, the interviewer be relaxed, and some

time be spent in developing rapport with the child. It may also be important for a support person to be present to reduce anxiety.

(ii) The cues that enable a child to access memory and produce information about an event need to have meaning for that child. It is therefore essential to use language that the child understands.

(iii) Young children – like adults – are vulnerable to distortions created by suggestion.

(iv) Memories of young children may be susceptible to fading. However, fading may be reduced if the child has superior knowledge of the subject matter, if the event has significance for the child, and if actions are central and familiar to the child.

(v) Memory may be affected by trauma. Sometimes an event may be so overwhelming to the child's psyche that the child may actively or subconsciously suppress, repress or distort memory to facilitate coping.

(vi) Factors that affect recall in children (and adults) include: delay; stress; the interviewing technique; the interviewing environment; the presence or absence of a support person; the status of the interviewer as perceived by the child; and visual cues or questions used to help the process of recall.

A good interviewing environment in which recall of an event is required should not be cluttered or distracting but warm and comfortable. It should not be a play environment although limited play material may be present to help the child relax.

Van Niekerk (2001:A3-2 – A3-9) indicates that both adults' and children's memories weaken over time, but that children's memories appear to become more incomplete over time compared to adults in relation to peripheral events, rather than to central or salient events. This underlines the importance of ensuring speedy resolution of the legal process for children.

Concentration

It is important to be aware that the ability to concentrate is affected by the child's level of cognitive development and also by the child's physiological development. Emotional distress and trauma may significantly affect concentration.

Concentration time periods need to be assessed when working with children and periods of focused questioning need to be linked to the ability of the child to attend and concentrate. Generally, concentration and attention spans increase with age and developmental progress but, for some children, concentration fails to develop.

The submissions by UNICEF Innocenti Research Centre (2005:9-13) relating to the conventional theories on children's development are especially applicable to our country with its diversity of cultures, beliefs, social and economical status and traditions. The conventional theories provide guidelines for the assessment of the cognitive development but it is of utmost importance that all professionals, especially those dealing with children in conflict with the law, take cognizance of the role that cultural, social and economical factors play in the cognitive development of children in our society. It is suggested that further research, with the specific needs of our country be conducted with the view of developing assessment measures/theories of the cognitive development of children, which will specifically apply the children in South Africa.

4.3.2 Emotional Development

Van Niekerk (2001:A3-2 – A3-9) gives the following guidelines regarding emotional development of children:

Although emotions are experienced at all ages, the ability to describe and manage feelings may differ across age groups. They may be related to other developmental factors; and they may also be linked to cultural issues.

It is important to note that the child's demeanour (appearance) and/or ability to describe feelings may not be congruent with what the child may have experienced.

Children from 5 to 12 years

From the age of 5 to 12 years, children learn to label the emotions they are experiencing, and events are responded to with more appropriate emotional responsiveness (by adult definition).

Suppression may often be a successful defence against uncomfortable emotion. Children of this age are also aware that they should have some level of control over their feelings, that they are capable of appropriate and even strong feelings of guilt, and that they may actually fear the loss of control of emotion.

The National Scientific Council on the Developing Child (2005:1) states that the core features of emotional development include the ability to identify and understand one's own feelings, to accurately read and comprehend emotional states in others, to manage strong emotions and their expression in a constructive manner, to regulate one's own behaviour, to develop empathy for others and to establish and sustain relationships. Emotional development is actually built into the architecture of young children's brains in response to their individual personal experience and the influences of the environments in which they live. As young children develop, their early emotional experiences literally become embedded in the architecture of their brains. By the end of the preschool years, children who have acquired a strong emotional foundation have the capacity to anticipate, talk about and use their awareness of their own and others' feelings to better manage everyday social interaction. Their emotional repertoires have expanded dramatically and now include such feelings as pride, shame, guilt and embarrassment – all of which influence how individuals function as contributing members of a society.

The National Scientific Council on the Developing Child (2005:2) points out that when feelings are not well managed, thinking can be impaired. Recent scientific advances have shown how the interrelated development of emotion and cognition relies on the emergence, maturation and interconnection of complex neural circuits in multiple areas of the brain. The circuits that are involved in the regulation of emotion are highly interactive with those that are associated with executive functions, such as planning, judgment and decision making, which are intimately involved in the development of problem-solving skills during the preschool years. In terms of basic brain functioning, emotions support executive functions when they are well regulated but interfere with attention and decision making

when they are poorly controlled. Young children are capable of surprisingly deep and intense feelings of sadness (including depression), grief, anxiety and anger (which can result in unmanageable aggression), in addition to the heights of joy and happiness for which they are better known. For some children, the preschool years mark the beginning of enduring emotional difficulties and mental-health problems that may become more severe than earlier generations of parents and clinicians ever suspected.

The emotional health of young children – or the absence of it – is closely tied to the social and emotional characteristics of the environments in which they live, which include not only their parents but also the broader context of their families and communities. Young children who grow up in homes that are troubled by parental mental-health problems, substance abuse or family violence, face significant threats to their own emotional development. In fact, the experience of chronic, extreme and/or uncontrollable maltreatment has been documented as producing measurable changes in the immature brain.

According to the National Scientific Council on the Developing Child (2005:3) there is no credible scientific evidence that young children who have been exposed to violence will invariably grow up to be violent adults themselves. Although these children clearly are at greater risk for adverse impacts on brain development and later problems with aggression, they are not doomed to poor outcomes, and they can be helped substantially if provided with early and appropriate treatment, combined with reliable and nurturing relationships with supportive caregivers. Science does not support the claim that infants and toddlers are too young to have serious mental-health problems. In fact, young children who have experienced significant maltreatment exhibit an early childhood equivalent of post-traumatic stress disorder, which presents a predictable array of clinical symptoms that are amenable to successful therapeutic intervention.

The emotional development of children is a very important aspect when assessing criminal capacity in children because the way children deal with their emotions, as indicated above, plays an important part in how they behave and act. Children's emotional wellbeing is usually one of the aspects that are neglected in society and in some cultures and traditions children, especially boys, are taught not to show how they feel. Professionals dealing with children in the criminal justice system should be informed of the different levels of emotional development of children to be able to effectively assess and communicate these

children. They should also be sensitive towards the different approaches of the different cultures regarding this issue (National Scientific Council on the Developing Child 2005:3).

4.3.3 Psychological Development

As indicated above, in terms of section 56(1) of the Child Justice Bill, 2002, the State has to prove beyond reasonable doubt that a child had the ability to distinguish between right and wrong and that the child had the ability to conduct himself/herself in accordance with this insight into right and wrong, at the time of the commissioning of the offence.

Snyman (2002:161–163) referred to the second leg of the test as the conative mental function. This consist of a person's ability to control his behaviour in accordance with his/her insights. The conative function therefore means that unlike an animal, the person is able to make a decision, set himself a goal, to pursue it, and to resist impulses or desires to act contrary to what his insights into right and wrong reveal to him.

The Rumpff Report (1967:43–45) states that the psychologist makes a study of the mind in general and attempts to determine the influences, either external or originating within the personality itself, which affect all human actions. After examination he is able to indicate the emotions, considerations and tendencies which contributed to the performance of a specific action. In law the question of non-responsibility is solved by means of an inquiry into pathological mental abnormalities, but even where none such are found, the psychologist's evidence may nevertheless be of great importance in regard to the question of diminished responsibility.

Psychology defines the human personality as a dynamic integration of psycho-physical functions by which purposeful behaviour is made possible. This means in the first place that mind and body constitute a whole: the mental functions are very closely integrated with the physiological and biochemical reactions in the body. Physical changes can influence mental functions, and similarly mental processes can cause physical changes. Most physical reactions are reflexive, i.e. involuntary, a person having no control over most of these internal reactions (e.g. palpitations, blushing, pain in the pit of the stomach). But when it comes to a voluntary muscular activity it is a different matter altogether, for then the person is able to control his behaviour by exercising his will. The normal personality is

therefore not the slave of morbid urges or impulses welling up within him. He is able deliberately to inhibit them (Rumpff Report 1967:43–45).

The definition implies that every normal person is able to set himself an aim and to pursue it purposefully – or he may even decide not to pursue it. An animal cannot do this. An animal acts instinctively. It is precisely because of this difference between men and animals that a human being can be held responsible for his pre-planned actions. For other forms of behaviour – reflex actions, automatisms – where volition does not enter, a person can hardly be held accountable. So-called impulsive tendencies, however, cannot simply be included in the latter group of activities. To elucidate this point a brief reference is made to the normal mental functions of the adult personality (Rumpff Report 1967:43–45).

For the sake of convenience the report distinguish three categories of mental functions in human beings, namely, the cognitive, the affective, and the conative.

With reference to conative activities the Rumpff Report (1967:43) states that man, unlike an animal, is capable of controlling his behaviour by voluntarily exercising his will. He is able to set himself an aim and to decide to pursue or to reject it, depending on his own insight into the value of this aim. Such acts of volition on the part of human beings, and especially on the normal adult personality, are of paramount importance when it comes to judging his behaviour in terms of ethical, moral and social standards or criteria. This brings us to the question of freedom of the will, and immediately also to man's responsibility for his acts of volition, i.e. voluntary behaviour.

The Rumpff Report (1967:45) points out that “Two psychological factors render a person responsible for his voluntary acts: First, the free choice, decision and voluntary action of which he is capable, and second, his capacity to distinguish between right and wrong, good and evil, (insight) before committing the act. Insight or understanding presupposes intelligence. The more intelligent person also has better insight, is better able to reason abstractly and to plan ahead (and therefore also to foresee the consequences of his actions) than the less intelligent or mentally retarded person. The IQ can be measured by means of standardised intelligence tests, in this connection particularly in order to determine whether at the time the act was committed the person had the necessary insight into his actions and their consequences. If, for instance, he is intellectually within the normal limits, and was not mentally ill or in a state of confusion (amnesia, fugue,

automatism) at the time when he committed the act, then it may be assumed that he also had the necessary volitional control over his actions and may be held responsible. The two psychological factors which render a person responsible for his voluntary actions, namely free choice and the capacity to distinguish between right and wrong, are factors which have given rise to the establishment in the various legal systems of the two psychological criteria of criminal responsibility, namely insight and self-control or powers of resistance. With regard to the concept of self-control or powers of resistance, it is stated that, self-control is to be understood a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive. In normal non-criminal persons the idea of committing an unlawful act arouses aversion. Only where very strong motives are present to promote the execution of such an act, is a crime actually committed. But where insight into the unlawfulness of the act, even though present, arouses no aversion at all, so that such insight cannot operate as a counter-motive, there is no self-control.”

In their most recent work, Cauffman and Steinberg (2000:743) adapt the term maturity of judgment to describe the interface of cognitive, social and emotional influences on juvenile functioning and decision making. The authors elaborate on the meaning of maturity of judgment. The first is that judgment refers to the process of decision-making, and not to any particular decision outcome. Maturity of judgment, then, refers to the way that the process of decision-making changes with development. The question of whether a juvenile offender, ought to have known better, cannot be answered by looking only at the nature of his or her behaviour. The second point about maturity of judgment is that judgment is neither exclusively cognitive nor exclusively psychological; it is the by-product of both sets of influences. Accordingly, an individual can exhibit poor judgment because of some sort of intellectual deficiency, such as faulty logic or ignorance of some crucial piece of information; because of some emotional or social shortcoming, such as impulsivity or susceptibility to peer pressure; or both. Cauffman and Steinberg (2000:743) argue that a young teen who robs a liquor store with his friends exhibits poor judgment regardless of whether he does so because he miscalculates the likelihood of violence, or whether he does so because he was encouraged by his friends or feared their disapproval. The question is not whether robbing a liquor store is a bad decision. The question is whether

this decision arose from factors that put adolescents, relative to adults, at an inherent disadvantage when faced with choices in potentially antisocial situations.

According to Cauffman and Steinberg (2000:744) there may well exist psychosocial factors that affect the sorts of decision individuals make that follow a developmental progression between adolescence and adulthood. They propose a model of maturity of judgment that emphasizes three broad categories of psychosocial factors that are likely to affect the ways in which individuals make decisions, including decisions to commit antisocial or criminal acts. These three categories of psychosocial factors include (1) responsibility, which encompasses such characteristics as self-reliance, clarity of identity, and independence; (2) perspective, which refers to one's likelihood of considering situations from different viewpoints and placing them in broader social and temporal contexts; and (3) temperance, which refers to tendencies to limit impulsivity and to evaluate situations before acting. These categories are not mutually exclusive, nor are they without some cognitive elements. The ability to appreciate the long term consequences of an action, for example, is an important element of perspective, but requires the cognitive ability to weight risks and benefits, and is related to the ability to forgo immediate gratification, which is an element of temperance.

Cauffman and Steinberg (2000:757) believe that risk-taking is the by-product of an interaction between cognitive and psychosocial factors. It is adolescents' deficiencies in the psychosocial domain, not the cognitive domain, that lead them to take more chances and to get into more trouble.

The authors conclude that psychosocial characteristics continue to develop during late adolescence, and that these changes result in significant declines in antisocial decision-making.

4.3.4 Social Development

Van Niekerk (2001:A3-2 – A3-9) gives the following guidelines regarding social development of a child:

The social group, particularly the family, is essential to the holistic development of children.

Children from 3 to 12 years

Children from 3 to 12 years of age have a stronger desire to please, and during this phase, learn to share and to give and take. Peer relationships take on an important value and friendships outside the immediate family take on great importance. However, the immediate family is experienced as the “secure base” from which to explore the world and to which one returns for support and resources.

Children from 13 years to early adulthood

Children over the age of 12 are acutely aware of peer relationships and usually attach great importance to belonging to and having an identity with a peer group. Peer group pressure is therefore a powerful force and the need to be seen as “grown up” is strong and often gives a sense of status to the teenager. This age group may also experience a return to egocentric preoccupation with the self, particularly with physical body image. Separation from close family and the need for independence may begin during this phase, and power struggles between caretakers on one hand and children in this stage of development on the other are a normal part of the struggle for independence and autonomy.

In a consultation document by the Home Office of the United Kingdom Government (Home Office (b)1997:1) it is stated that people are influenced throughout their lives, especially as they grow up, by a variety of factors which may lead them towards, or away from, crime. The single most important influence on a child’s development is that of the family. Those children who show signs of criminal behaviour at an early age are those who are most likely to end up as serious or persistent offenders. Such children often come from communities and families which are unstable, chaotic and suffer from a number of problems. Their parents are likely to have a criminal record, to neglect their children, or to exercise low levels of supervision and harsh and erratic discipline, and themselves come from similar families. Children who are exposed to abuse and neglect within a climate of hostility at home are particularly at risk of becoming violent offenders.

According to the consultation document (Home Office (b)1997:2) children’s behaviour and attitudes are shaped and influenced by their experiences at school. Children who offend

are more likely than others to fail at school, to play truant persistently, to behave disruptively or be permanently excluded from school.

The consultation document (Home Office 1997:3) points out that juvenile offenders often commit offences with others. The use of leisure time, and peer pressure, can influence the likelihood of offending. Those who spend their leisure time in unstructured and unsupervised activity on the streets are more at risk of offending.

According to Earl-Taylor (Maughon & Geduld 2004:1) children who kill are not born violent, but are created by their social circumstances. He indicates that most children who kill have themselves been subjected to violence. According to Earl-Taylor, murders committed by groups of children usually involves one principal instigator, whose behaviour is followed by the other. Children become socialised into violent behaviour in four stages. First, they are the subjects of physical, sexual or emotional abuse or neglect. They then witness violent behaviour, which is frequently committed by their father against the mother in the child's home. In the third stage, the child becomes involved in violent coaching, modelling role-playing behaviour on the violence they witness in their immediate surroundings. In the final stage, they start enacting violent behaviour.

The Australian Institute of Criminology (1990:77–84) states that all human behaviour results from the interaction of genetic and environmental factors, and violent behaviour is no exception. Evidence strongly suggest that such behaviour is largely determined by the interaction of constitutional characteristics, such as temperament and intelligence, and factors within the family, which is the environment in which the child grows up. Observers of young children have noted that a high proportion of their social interchanges are hostile in character, but that normally the proportion of aggressive actions decreases with age. This change is a result of the socialisation process which every child undergoes: a combination of observational learning – seeing how the people around cope with situations where aggression is one possible reaction – and conditioning – learning what behaviour is approved via the routine interactions of child and parents.

According to the Australian Institute of Criminology (1990) child physical abuse is not usually intentionally gratuitous. Rather, it occurs in the course of punishment, when parents are responding to some perceived misbehaviour on the child's part. The circumstances in which physical punishment is used against children contributes to a

learning process. Children learn to associate love with physical punishment. The child is struck by those human beings to whom he or she is the closest. As physical punishment is most typically employed as a means of redress for misbehaviour on the part of the child, the child may come to accept it as morally justifiable to use violence against a wrongdoer. Because of the acknowledged importance of family experiences in children's development, it is often assumed that the rupture of the family may easily result in delinquency in general and aggression in particular. However, the evidence is inconclusive. Even a traumatic break-up of the family may be no more damaging than its cause: a miserable prevailing atmosphere in the home may affect the child more than parental supervision (Australian Institute of Criminology: 1990).

Studies support the commonsense view that abuse and neglect make an important difference in a child's behaviour. However, beatings or psychological abuse may be only one feature of child-rearing practices in abusive families which may result in aggressive behaviour in children. It is commonly held that abused children will inevitably become abusive parents. Evidence confirms that abusive parents themselves tend to have been abused or neglected, physically or emotionally, as children (Australian Institute of Criminology: 1990).

According to Crofts (2002:60) the social environment of the child is of importance, for the child may not regard certain forms of criminal behaviour to be seriously wrong if they are part of his/her daily environment. Family life plays a central role in the development of aggressive behaviour in children, and in the control of such impulses as well. However, there are many other social influences which may affect aggression, including television, schooling and peers. There is strong evidence to suggest that the onset of delinquency precedes participation in delinquent groups and that much juvenile crime occurs in a group setting for reasons that do not necessarily have anything to do with the influences of peers on one another.

The Australian Institute of Criminology (1990) also indicates that the more delinquent a boy, the less value he attaches to the opinion of his friends, and that delinquent groups seem to be the refuge of boys with little respect for the opinions of friends. The company of delinquent or aggressive peers, in school or out, may influence individuals to misbehave. However, the magnitude of the effect is difficult to estimate and in any case, such behaviour seems usually to predate communal factors. School experience and friends, it

seems, are largely incidental to the more important factors or personal traits and family experience in determining criminality in general, and violent behaviour in particular.

Cohen (2002:4–5) indicates that the classic texts in child psychology – especially those of the great Swiss psychologist, Jean Piaget (1896 – 1980) – come from a time when education was more formal, when there was less competition, when children’s TV didn’t exist, when there was no Internet and when no commercial genius had dreamed of the idea of marketing to children and using focus groups of 6-year-old consumers. Even anodyne heroes like Babar and Winnie the Pooh appeared later (at least as major television and radio personalities) than Piaget’s key books. The effect of exposure to the media on children’s intellectual development is only now starting to infiltrate psychology.

Many children have to cope with divorce and with living in stepfamilies which can make them more emotionally agile, and fragile, than ever before. It is not unusual for a 5-year-old child to be in a family that includes a new baby by her blood mother and a new man, an older sibling who was born to her blood parents and step siblings whose blood parents are her mother’s new partner and his ex-wife.

Child psychology cannot afford to ignore these changes if a person is to understand the developmental pattern. Further, in the West, people should be sensitive to issues like poverty. It has been estimated that 5 million children die of malnutrition every year; millions more survive but suffer profound intellectual and emotional consequences. All the theories tend to be about how well-fed children develop and developmental psychologists in the West pay too little attention at present poverty and malnutrition making – or breaking – the mind of a child (UNICEF Innocenti Research Centre 2005:9-13).

Cohen (2002:74) also states that today children commit crimes at a younger age and that preteen criminals are common now.

Reference was made to the provisions of the Child Justice Bill, 2002 providing that if the Child Justice Court orders an evaluation of the child that the evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child a statement indicating that these factors are sufficient to establish criminal capacity of the child. They responded as follows:

Table 8: These factors are adequate to establish the criminal capacity of the child.

View	Motivation	Problems	Suggestions/Advice
<p>Subjects 2,3,6,7,9,13,14, 15,16 and 17 agreed</p>	<p>Subject 2: Adequate</p> <p>Subject 3: All factors should be considered</p> <p>Subject 6: Factors are adequate</p> <p>Subject 7: Basic factors</p> <p>Subject 9: Statement supported</p> <p>Subject 13 Looks into all aspects the affect children's development and children of the same age do differ</p> <p>Subject 14: Holistic approach needed</p> <p>Subject 15: Also proposes a holistic approach</p> <p>Subject 16: Other factors which may facilitate the process may have to be used</p> <p>Subject 17: Provides for thorough assessment</p>		<p>Subject 2: Must be evaluated within cultural context</p> <p>Subject 6: Person who perform assessment must possess required skills</p> <p>Subject 7: Need to develop expertise in country to carry out evaluations and giving evidence. Need to develop evaluation/assessment method more culturally appropriate in SA context</p> <p>Subject 14: If professional is not clued up you will get very superficial and meaningless evaluation</p>
<p>Subjects 1,4,5,8,10,11 and 12 disagreed</p>	<p>Subject 1: Not adequate</p> <p>Subject 4: Full history as well as consultations with significant others i.e. parents, teacher etc.</p> <p>Subject 5: Various influences make you what you are</p> <p>Subject 8: Not only developmental issues may have impact</p> <p>Subject 10: Previous trauma and family background also important</p> <p>Subject 11: These are important but other factors should also be considered</p> <p>Subject 12: Would add cultural background</p>		<p>Subject 1: Educational development and cultural influences evaluated</p> <p>Subject 4: All spheres of development need to be included also sexual and language development</p> <p>Subject 5: Must include home circumstances, assessment of values that have been taught, presence or absence of religious beliefs in the home and assessment of norms</p> <p>Subject 8: Moral, contextual issues may impact on assessment of children</p>

Table 8 shows a clear distinction between the opinions of the subjects. Ten of the subjects agreed with the statement that an evaluation of the cognitive, emotional, psychological and social development of a child is adequate factors to establish the criminal capacity of a child. Seven disagreed with this statement.

The subjects who agreed include five lawyers, three social workers and two criminologists.

The subjects who disagreed stated that a full history and consultations with significant others like parents and teachers is important and that not only developmental issues have an impact on criminal capacity. It was further noted that previous trauma and family background are also important issues to take into account. The subjects who disagreed include two lawyers, one psychologist, two criminologists and two social workers.

Some of the subjects suggested that cultural context should also be taken into account. Other suggestions included educational development, sexual, language and moral development. The importance of the skill of the person who performed the assessment was also pointed out. Furthermore the need to develop expertise in our country to conduct the evaluations and testifying in Court was also expressed. The need for the development of an evaluation/assessment method that is more culturally appropriate, especially in our country was expressed.

None of the different disciplinaries held the same view regarding the statement that an evaluation of the cognitive, emotional, psychological and social development of a child is adequate factors to establish the criminal capacity of a child. The criminologists, social workers and lawyers also differed in their views from each other.

The fact that seven of the subjects were of the opinion that the cognitive, emotional, psychological and social development of the child are not adequate to establish the criminal capacity of the child indicates that it might be necessary for the Legislature to amend the provisions in the Child Justice Bill, 2002 to specifically include other developmental and environmental factors as well.

4.4 Conclusion

In the Child Justice Bill, 2002, introduced into Parliament during August 2002, the common law presumption regarding the criminal capacity of children has remained unchanged except for the increase of the minimum age for criminal capacity to 10 years. The Child Justice Bill, 2002 makes provision for the evaluation of the criminal capacity and prescribes specific aspects of the development of children that must be assessed during the evaluation. These aspects – cognitive, emotional, psychological and social development of a child – are important factors that should be taken into account when deciding whether or not a child between the ages of 10 years and under 14 years had the necessary criminal capacity at the time of the commission of the offence.

The next chapter will deal with the proving of criminal capacity on the merits of the case. Other important factors relating to the development of children that should also be taken into consideration when assessing the criminal capacity of children will be highlighted.

CHAPTER 5

MERITS OF THE CASE AND OTHER IMPORTANT FACTORS

5.1 Introduction

In terms of section 56(2) of the Child Justice Bill, 2002, the prosecutor or the child's legal representative may request the Child Justice Court to order an evaluation of the child by a suitably qualified person. An evaluation of the child's criminal capacity is therefore not compulsory. Criminal capacity can therefore, by implication, still be proved merely on the merits of the case. There is no legal obligation to prove the criminal capacity of the child before putting charges or at any specific stage during the proceedings. It can be regarded as one of the elements the State has to prove before closing its case.

In this chapter the important factors, that should be considered or taken into account, when deciding whether or not criminal capacity has been proved beyond reasonable doubt on the merits of the case, will be highlighted. A practical illustration in this regard will be furnished. Other important aspects regarding the development of children that should also be taken into account will be discussed.

5.2 Merits of the State's case

As indicated in the introductory paragraph of this chapter, it is clear that it is still possible, though not desirable, that the criminal capacity of a child offender can be decided upon by merely assessing the evidence placed before the Court in proving the criminal charges.

It is therefore implied that in this regard the facts of the case, the circumstances surrounding the offence, the nature of the offence and the child's conduct before and after commission of the offence, will play an important role. However, care should be taken not to rely only on the child's conduct directly after commission of the offence. As stated in R v Tsutso (*supra*), the fact that the child offender ran away after stabbing a person with a knife, is not an indication that he knew what he had done was wrong. It may also be an indication that he was afraid of the person he stabbed. In R v K (*supra*) the review Court

also indicated that the child might have ran away because he was too frightened to go back home because his mother (the deceased whom he stabbed) might be waiting for him.

A statement that criminal capacity can be proved and decided upon by taking the facts of the case, surrounding circumstances before and after commission of the offence, nature of the offence and the conduct of the child before and after the commission of the offence into consideration, was included in the questionnaire and responded to as follows.

Table 9: Criminal capacity can be proved and decided upon on merits/facts of the case.

View	Motivation	Problems	Suggestions/Advice
<p>Subjects 1,2,3,5,6,9,10,11,14,15 and 16 agreed</p> <p>Subjects 4, 7,8,12,13 and 17 disagreed</p>	<p>Subject 1: Logical aspects to take into account</p> <p>Subject 2: Observation and evaluation of child before and after essential</p> <p>Subject 3: Agreed</p> <p>Subject 5: If objectively and professionally done by specifically trained persons</p> <p>Subject 6: Relevant facts will speak for itself</p> <p>Subject 9: Statement Supported</p> <p>Subject 10: That should also be taken into account</p> <p>Subject 11: This is the best way to determine criminal capacity. Some crimes are calculated and planned. Children run away sometimes and hide the stolen goods</p> <p>Subject 14: Should however not be seen in isolation to the development of the child</p> <p>Subject 15: The child's social context is very important</p> <p>Subject 16: Agreed</p> <p>Subject 4: Not Solely</p> <p>Subject 7: This is how Courts do it now.</p> <p>Subject 8: No needs far more comprehensive assessment</p> <p>Subject 12: Circumstances after commission of the offence and the conduct of the child after the commission of the offence can not be taken into account regarding the offence</p> <p>Subject 13: This is not enough to prove criminal capacity but it should assist in the pre-trial assessment of the child and for the pre-sentence report</p> <p>Subject 17: Those factor relates to the guilt of the accused and not to criminal capacity</p>	<p>Subject 6: Sometimes evidence lacks</p>	<p>Subject 3: Assessment factor should also be taken into account</p> <p>Subject 4: A combination of all factors influencing behaviour should be considered</p> <p>Subject 7: Need for evaluation and evidence of that. Other factors will be taken into account by Court but evidence on individual child's development needed</p> <p>Subject 8: Child's developmental history, opportunities of development etc. need to be included. Workshop issue and develop list of factors as well as process of collecting information that should be taken into account will serve as guide to Courts and professionals</p>

Table 9 indicates that eleven of the subjects agreed with the statement that criminal capacity can be proved and decided upon by taking the facts of the case, surrounding circumstances before and after commission of the offence, nature of the offence and the conduct of the child before and after the commission of the offence into consideration. Six disagreed with the statement.

The eleven subjects who agreed with the statement indicated that if this is done objectively and professionally by specifically trained persons it can be done. One subject stated that the facts will speak for itself. Another subject is of the opinion that this is the best way to determine criminal capacity and further indicated that some crimes are calculated and planned. In some instances the children run away from the crime scene and hide the stolen goods for example. These subjects include four lawyers, three criminologists and four social workers.

The six subjects that disagreed motivated it by stating that it is how it is being done now and there is a need for an evaluation and evidence of it. One subject pointed out that a far more comprehensive assessment is needed. Another subject was of the opinion that circumstances after the commission of the offence and the conduct of the child after the commission of the offence should not be taken into consideration. It was further noted that these factors are not enough to prove criminal capacity but could assist in pre-trial assessment of the child and for the pre-sentence report. One subject remarked that the facts of the case and the child's conduct before and after the commission of the offence related to the guilt of the child and not to his/her criminal capacity. Of these subjects one is a psychologist, three are lawyers, one is a criminologist and one a social worker.

It was mentioned that although the Court take these factors into account, the evidence on the individual child's development is still needed. A suggestion was made that a workshop should be held to develop and issue a list of the important factors as well as the process of collecting information that should be taken into account, to serve as a guide to the Court and other professionals.

Although it is possible for the State to prove criminal capacity and for the Court to decide on the criminal capacity of the child offender on the facts/merits of the case, the fact that six of the subjects disagreed with this statement, indicates that it might not be a desirable situation since the developmental factors do play an important role in the decision.

5.3 Practical Illustration

The consideration of the merits or facts of the case as well as the evaluation of the evidence of experts when deciding on the criminal capacity of a child offender is well illustrated in a recent case, The State v P (unreported case number 155/2003) in Pietermaritzburg, involving a twelve-year old girl accused of murder and theft. The involvement of the accused only became known after the two black males (Hadebe and Tshabalala), arrested for the murder, pleaded guilty and revealed her involvement. The murder was committed on 14 September 2002 and they pleaded guilty on 2 October 2002. The accused was questioned and subsequently arrested (Centre for Child Law 2006).

In this matter it was alleged that on 14 September 2002 the accused unlawfully and intentionally killed her grandmother (an adult female). It was further alleged that the accused, on the said date, unlawfully and intentionally stole various items, including jewellery, several wristwatches, a cellular phone, a video machine, a satellite decoder and several items of clothing from the deceased (Centre for Child Law 2006:2).

The accused pleaded not guilty on both counts and stated that she obtained the assistance of two black men on the night of 14 September 2002 to kill the deceased. She allowed them to take jewellery and other property from the house of the deceased in return for this. She stated that she had done this at the behest of one Dash, who had told her on the Wednesday preceding the day of the murder, that he wished her to do him a favour, that she should get people to kill the deceased, and further told her that if she did not do this, the deceased would kill her mother and her brother and she therefore had to choose between them. This gave rise to the defence that was raised that the influence by the said Dash was very strong, in that it affected the accused's capacity to control her conduct, she being twelve-years old at the time of the offence (Centre for Child Law 2006:2).

It was also submitted by the defence that the cognitive ability of the accused at the time of the incident, was such that the accused could not extract herself from the dilemma of choosing between the life of her grandmother on the one hand, and that of her mother and brother on the other, which she found herself in as a result of the intervention of the said Dash (Centre for Child Law 2006:3).

The accused's version was that Dash wanted the deceased killed as a favour. According to the accused, Dash gave her a total sum of R750 (a relatively big sum of money for a twelve-year old) and the only reasonable inference the Court could draw from this allegation is that Dash had an interest in having the deceased killed. The accused indicated that she did not know why Dash would have any interest in having the deceased killed and she agreed with the proposition that it would not do Dash any good. She also agreed that Dash did not suggest that he would harm the deceased, or the accused's mother and brother, and agreed she was not doing Dash a favour but doing her mother and brother a favour (Centre for Child Law 2006:6).

The accused stated that she knew at the time that theft was a crime and that killing was a crime and that people go to jail for killing. She said, however, that she was not sure that if you hired someone to get somebody killed, it was a crime. She said that in her mind the killer commits an offence, but not the person who hires them. She said she agreed with and understood that she had hired two people to kill. Later in her evidence the accused, however, said that at a later stage when she thought about it, she realised she had committed a crime. She however maintained she did not know it was a crime before she committed it, because she was really confused. She stated that she realised when she gave the jewellery to the killers and told them to take the items in the house, that they belonged to the deceased. She also realised that giving items that do not belong to you to someone else, was wrong. The Court regarded the accused's evidence as to what she told her brother after the murder, as significant. She agreed that she had said to her brother not to tell what had happened, otherwise they would get into big trouble. When asked what trouble, she replied trouble with the family and police (Centre for Child Law 2006:38).

The Court indicated that the evidence of the accused herself also has to be considered with the evidence as to how the murder was carried out. Certain aspects in the Court's view are relevant not only to the issue of whether the accused appreciated the wrongfulness of her act, but whether she had the ability to act in accordance with that appreciation. The Court referred to the following aspects (Centre for Child Law 2006:39):

(i) The accused must have decided to use sleeping tablets to ensure that the deceased did not resist her attackers. This was a central requirement of the plan which could only have been hatched during the week preceding the murder, as the deceased only obtained the pills in that week. When the accused gave the deceased her tea with the sleeping

tablets in it, the deceased complained that it tasted bitter and the accused told her there must be something wrong with her mouth. She took the tea back to the kitchen, added more sugar and handed the deceased the tea again. While drinking the tea the deceased read the newspaper and then fell asleep. In the Court's view this aspect indicates planning, and determination to proceed with the plan, regardless.

(ii) The accused stated that if there was a chance that the deceased's son was coming that weekend, she would have ignored the alleged signal by Dash. She stated that when deceased's son was coming for the weekend, he would come on a Friday, but said she knew he was not coming when she knew they were going to Durban on the Sunday. She said she knew this by Saturday. It is therefore apparent that the accused knew that deceased's son would not be there on Saturday night and there would be no danger of him arriving with two men in the house. In the absence of the influence of Dash, this indicates foresight and planning as to when it would be safe to carry out the plan (Centre for Child Law 2006:40).

(iii) It was admitted by the defence that the accused phoned a male friend at 8:26pm, but the accused was unable to get him. The accused said she was unable to remember this, but it must have been her. The said male friend stated she phoned him again later at 9:25pm, asking him to go to the movies, or something. She also said that the car was there with the keys, so they could use the car. He declined as he had a girlfriend, but she said they could go as friends as there was no one at home. She said her granny had gone out with friends. He then joked to her, saying that her granny probably went out with a boyfriend. The accused replied, "That bitch doesn't have a boyfriend." or "... won't have a boyfriend.", one of the two, the witness was not very clear. He then asked her how she could say a thing like that, which she didn't reply to. She then asked if he would still like to go out and he said no. In cross-examination he conceded that he had not said in his statement to the police, that the accused had called the deceased a "bitch". The accused in evidence admitted phoning him but denied referring to the deceased as a "bitch". The accused admitted the second phone call was made for the purpose of creating an alibi, whilst the killers were still in the house. The accused stated that if the said friend had gone with her she would have taken her brother with them, gone to the 10:00 pm show at the movies, and when she got home pretended that she had found the deceased murdered (Centre for Child Law 2006:41).

The purpose of the earlier call even before the murder must have had the same objective of creating an alibi. The wish to create an alibi in advance again indicates an appreciation of the consequences of her conduct and a wish to avoid them.

The Court pointed out that it is significant that both Hadebe and her male friend, between whom there is no possible connection, state that the accused used the same word to describe the deceased, respectively, before and after the murder. It is also significant that Hadebe states this was said in conjunction with the accused showing him the photos of her parents, which the accused denied, but which her defence has conceded.

Due consideration had been given to the failure by her male friend to mention this in his statement to the police. The Court was nevertheless satisfied that the accused described the deceased in this manner. This is an important insight into the accused's attitude towards the deceased immediately before and after the murder (Centre for Child Law 2006:42).

(iv) The accused stated that she closed and locked the front door and gate, so that no one would see after the killers had entered the house. Hadebe said that when they were leaving the house, the accused asked them to wait, as she wanted to check outside if no one was around who might see them leaving, and denied that they had asked the accused to check outside. The accused, however, maintained that it was one of the men who asked her to see outside if anyone was there, so she stood within the gates and saw nobody. It is difficult to see why if the accused was concerned to nobody should be able to see into the house when the killers entered, she would not be equally concerned that nobody saw them when they were leaving and she would wish to check first. This again indicates an appreciation of the wrongfulness of her conduct and the wish to avoid the consequences of it (Centre for Child Law 2006:43).

The Court indicated that although aware of the care that must be exercised in drawing inferences from the demeanour of a witness, but because of the issues involved in this case, it is particularly appropriate for it to do so. The Court's overriding impression was that the accused displayed a self-control and composure throughout the proceedings, which was far beyond her age of fourteen years, in an environment which would have been daunting even for an adult. Apart from one or two occasions when the accused shed a tear whilst giving evidence, the Court did not see the accused display any emotion, even

when Tshabalala and Hadebe were giving a graphic account of how they murdered the deceased. To the contrary, the accused followed the evidence closely, regularly writing notes for her defence team, without at any stage seeking reassurance from her mother who was seated next to her. The Court of course did not lose sight of the fact that it is two years since the incident and the accused has matured in the interim. Nevertheless, the Court continually had to remind itself that the accused was only fourteen years of age.

In considering the accused's capacity to appreciate the wrongfulness of her conduct, and act in accordance with such appreciation, it was necessary to consider the views of the experts. Professor Pillay was called by the State and Mr Willows was called by the defence. They are both clinical psychologists (Centre for Child Law 2006:44).

Professor Pillay was of the view that the accused functioned well above the median point in her intellectual development, and that in this regard her level of functioning was higher than the average twelve and a half year old. In summary, emotionally and socially she functioned well above her chronological age of twelve and a half years at the time of the murder. The age of the accused was twelve years and five months at the time of the murder (Centre for Child Law 2006:44).

By virtue of the defence raised by the accused, as to the influence and involvement of Dash, the major portion of his evidence was devoted to expressing his views on the ability of the accused to deal with this influence. For example, he expressed the view that the accused would have been able to deal with the influence of an older person in socially acceptable ways, and had the capacity to tell other adults, and think through the dilemma other than by violence. In short, in his opinion the accused had the cognitive capacity to solve the moral dilemma she claimed she was put in.

He did concede, however, that his brief when he interviewed the accused, was to determine in terms of section 77 and 78 of the Criminal Procedure Act, whether the accused had any mental illness or defect, which should affect her criminal responsibility, and that although the accused had said she was scared of Dash, he did not investigate this aspect because it was outside his brief. He conceded therefore that one had only one leg of the inquiry as to the issue of whether the accused could cope. Mr Willows expressed the view that the accused was appropriately emotionally and socially mature for her age, but he recognised that the accused was socialised into a lifestyle beyond her years. As

regards socialisation, the accused was more of a street-wise child. Her cognitive maturity was probably average/above average (Centre for Child Law 2006:45).

He agreed that intellectually the accused was at least of average intelligence and probably above average. He was of the view that the accused at the time of the incident lacked the ability to appreciate the long term consequences of her act, such as this trial. If she had been asked the question at the time, if you commit a crime do you go to jail, he thought her answer would have been yes. He expressed the view that because of the situation she had been placed in by Dash, her emotional turmoil at the time of the crime, overwhelmed her cognitive abilities. He stated the accused would have believed Dash because she viewed him as dangerous and influential. He stated that he did not investigate the truth of the allegations given to him, and the facts given to him may have leaned him towards a finding which he otherwise may not have made. The acceptance of Dash's involvement was a crucial part of his report, but he said that some factors may be true, nonetheless. He stated that his opinion would change if it was shown that the accused had deliberately lied to him and had not simply made an incorrect statement due to amnesia (Centre for Child Law 2006:45–47).

He stated that he never felt that the accused's periods of anger or irritation towards the deceased, was such that she would engineer to have her murdered. He stated the step from a child being angry at a disciplinary adult, towards getting people to murder that person, is a huge step. He was of the view that it was highly improbable that based upon her own anger towards the deceased, the accused could have, or would have come to the decision to kill the deceased purely on her own, because to do so would require a very noticeable behavioural conduct, an emotional disorder in a child to behave in that way. There was nothing in his view about her personality, outside of the few hours of the incident, that suggested she had the capability to behave in that way. His theory therefore was that there was adult influence on the accused. He further stated that to carry out the murder on her own, there would be many signs of the previous behaviour that would lead one to conclude that this sort of behaviour was a natural progression of her bad or misbehaviour. It was a type of behaviour that would place the accused far above her present state of maturity, being the age appropriate behaviour of a twelve and a half year old. He stated that if the accused had behaved out of her own volition and her own decision, he would put the accused at least fifty percent higher than that (Centre for Child Law 2006:45–47).

It is clear that the accused's version as to the involvement of Dash was a major influence on the views expressed by both Professor Pillay and Mr Willows. Although Professor Pillay's views were not based upon an acceptance of the accused's version, the thrust of his opinion deals with the ability of the accused to extricate herself from the dilemma, in which she had been placed by Dash. Mr Willow's views are expressed on the basis of the acceptance of the accused's version and he concedes that if it was shown to him that the accused had deliberately lied to him, his opinion would change, although with certain reservations.

The Court rejected the accused's version as to the involvement of Dash. The accused has deliberately lied to the Court and to Mr Willows. It is therefore self-evident that great care must be exercised in relying upon Mr Willow's views. The views of Professor Pillay as to the ability of the accused to extricate herself from the dilemma in which she was placed by Dash, likewise do not assume such importance.

The opinion of Mr Willows that the accused did not have the capacity to act of her own volition and murder the accused, has, however, to be considered against the evidence of the motivation the accused had for wishing the deceased dead, as well as the evidence as to the manner in which she must have planned and carried out the murder, as well as the fact that she has lied to Mr Willows and the Court (Centre for Child Law 2006:48).

It is trite law that in receiving the evidence of psychologists and psychiatrists, particularly in criminal Courts, the expertise of the witness should not be elevated to such heights that sight is lost of the Court's own capabilities and responsibilities in drawing inferences from the evidence.

When consideration is given to the use of sleeping tablets to drug the accused, the taking into consideration of the absence of the possibility of a visit by deceased's son, the attempt to create an alibi for herself before and after the murder, and the precautions taken to ensure that the killers were not seen, together with the evidence as to the motivation the accused had to have the deceased murdered and the elaborate lies the accused has told, the Court was satisfied, despite the opinion of Mr Willows, that the accused appreciated the wrongfulness of her act, and was able to act in accordance with such appreciation. Because of the antipathy the accused harboured towards the deceased, despite her protestations of love for the deceased, which had clearly built up over a period of time, the

accused, in the Court's view, planned and carried out the murder of the deceased. This could not have been an impulsive act. What finally caused the accused to carry out the murder of the deceased on the day in question remain unknown, as the accused has masked her activities in a web of lies and deceit, all designed to absolve her from the consequences of the heinous crime she committed in having her own grandmother murdered (Centre for Child Law 2006:47–48).

The Court was therefore satisfied that the State has succeeded in proving beyond reasonable doubt that the accused had the necessary criminal capacity and has therefore successfully rebutted the presumption that the accused was *doli incapax* at the time of the commission of the offences.

The Court was also satisfied on the evidence that the State has proved beyond a reasonable doubt that the accused had the necessary *mens rea* to commit the crimes of murder and theft. The accused's aim and object was to have the deceased murdered and reward the deceased's killers with the deceased's possessions. The accused was convicted on the charge of murder and on the charge of theft (Centre for Child Law 2006:48–49).

The accused was sentenced to thirty-six (36) months of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, 51 of 1977 on certain conditions, including that she was placed under house arrest, that she must attend the NICRO program the Journey, she must receive regular support therapy from Mrs Joan van Niekerk, she must render one hundred and twenty (120) hours of community service. If the accused fails to comply with the conditions of the sentence, the Director of Public Prosecutions can decide to bring the breach under the Court's attention for the imposition of an alternative sentence. The State was granted leave to appeal against the sentence. The appeal was heard in November 2005 and the Supreme Court of Appeal substituted the sentence by imposing a sentence of seven years imprisonment, suspended for five years (Centre for Child Law 2006:50).

5.4 Other Important Aspects Regarding the Development of Children

As indicated in chapter 4, in terms of section 56(4) of the Child Justice Bill, 2002, the cognitive, emotional, psychological and social development of the child must be assessed

during the evaluation process. Müller (2001:2) indicates that it is necessary to develop an approach to children in the legal system that will be fair to children while at the same time will protect the rights of the children as accused, and which will lead to a successful method of obtaining accurate information. Such an approach will have to view the process of testifying from all perspectives, ranging from the child's cognitive ability to the perceptions of the personnel involved. Müller (2001:2) suggests that an ecological approach be adopted in terms of which there is a constant interaction between systems, and any change in one system will have an effect on another system. In viewing the child as a source of information, the quality of the child's evidence will depend on a number of interacting factors: the child himself/herself (his/her cognitive ability, language development and perceptions), the context in which the evidence is given (in open Court), the personnel involved in the process (whether the personnel is trained and competent to deal with children). All these factors are interrelated and, therefore, any change introduced into one system will cause an effect in another system. Since these various systems are interlinked, an ecological systems approach professes that it is not possible to do just one thing in isolation.

It is submitted that the following developmental aspects are also of great importance when deciding whether or not a child between the ages of 10 years and under 14 years had the necessary criminal capacity at the time of commission of the offence:

5.4.1 Sexual Development

According to Serrao (2004:5) the face of child abuse is becoming younger with an increase in the number of children under the age of 14 appearing in Courts for rape and other sexual abuse charges. Statistics showed that 25 percent of sexual abuse was committed by child offenders. Young sexual abusers came mainly from problem families. It is believed that one of the main reasons children were being sexually active was because they lacked parental care and were exposed to pornography.

Due to the fact that it is clear that young sex offenders are increasing, it is important for all the role-players in the legal system to acquaint themselves with the sexual development of children. According to Van Niekerk (2001:A3-2 – A3-9) sexual development of children is an area of child development around which there are many myths. One of the most

pervasive is the myth that children are asexual beings who will experience any form of sexual touching as bad and/or traumatic.

Children from 5 to 12 years

Children from the age of 5 to 12 years have usually learned the rules about touching themselves sexually, and if this behaviour persists during this phase of development, it is usually very secret (Van Niekerk 2001:A3-2 – A3-9).

Children in puberty

Girls may reach puberty from anywhere between 9 and 13 years of age and boys from 10 to 14 years. Hormonal changes in male and female adolescents contribute to an increased interest in sexual activity. This increased interest may not coincide with a young person's access to further information on sexuality and how to cope with sexual impulses, or indeed, every human being's need for closeness and intimacy. It is important to note that children under the ages of 12 to 14, whether they are victims or perpetrators of sexual abuse, rarely have a full adult understanding of the implications and possible consequences of the sexual behaviour they have been involved in, especially where there are strong taboos in discussion of sexual issues between adults and children (Van Niekerk 2001:A3-2 – A3-9).

Sapa (2003:1) reports that a 10-year-old boy was arrested after a five-month old baby was raped at Elliotdale outside Umtata in the Eastern Cape on 10 January 2003. It is the matter of S v N Zanaye (unreported) being dealt with by the Sexual Offences Court in Umtata.

5.4.2 Physical Development

According to Van Niekerk (2001:A3-2 – A3-9), the child's physical appearance is important to observe, but it is essential not to conclude that the physically developed and mature child is developed and mature intellectually or emotionally.

Adults with whom the child interacts, often treat the child who is precocious in physical development in an adult way. This has obvious dangers when one is interacting with a child within the criminal justice system. As puberty and growth are occurring earlier and

earlier in each successive generation – due (in theory) to improved nutritional and medical care – one must be very careful not to assume that the child is adult in every other way. Particularly with girls, physical maturity precedes maturity in other aspects of development. Sometimes the physically smaller children come across in Court as more vulnerable and appealing. This may be to the advantage of the case as visual impressions have great impact both on our conscious and subconscious minds.

The physical vulnerability of a small child should not be exploited by the prosecution in a way that may compromise the psychological well being of the child. Sometimes a decision not to use the intermediary system may be made in order to capitalise on the visual impact of the small child witness on the Court. The best interests of the child should be the first consideration of the prosecutor.

Crofts (2002:61) warns that deducing criminal capacity from factors such as appearance or demeanour in Court is inadvisable. The child must have understood the wrongfulness of the act at the time of committing the act. The child may, however, not have understood the wrongfulness of the act at the time, but have come to understand the seriousness of the act purely through the dealings with the police and with the Court. How a child behaves in Court may then have little to do with how he/she behaved at the time of committing the act.

5.4.3 Language Development

Van Niekerk (2001:A3-2 – A3-9) indicates that language development is very clearly linked to the language to which the child is exposed in the home, the school and the learning environment, and also through the media.

Müller (2001:9) states that it is important to understand the development of language in children, so that questions can be framed in a manner understandable to the child.

Children from 6 to 12 years

From 6 to 12 years, vocabulary becomes more extensive and the ability to deal with complex sentence construction expands. However, children of this age may still use words out of context and without full understanding of meaning.

Children from 13 years to early adulthood

Children over the age of 12 are usually able to manage complex vocabulary and language constructs, depending on their exposure to the use of language as well as to their level of education. However, even at this age there may be misunderstandings about words relating to information that is taboo for discussion in the home or that is restricted to adult-only environments.

It is essential, therefore, when dealing with children of any age group that the specific meaning a child attaches to words and expressions is understood by both the child and the adult in question. A child's use of language may be very idiosyncratic, and may also be affected by trauma (Müller 2001:9).

According to Du Preez, Naudé and Pretorius (2004:25) more than three million children are neglected and/or abused each year in the United States. Neglect in particular, is a significant problem, not only in the United States, but also in the rest of the world, with South Africa being no exception. In South Africa, 17 million children live in deep poverty. Although not all children living in poverty are neglected, poverty may be an indicator of neglect. Neglect of children does not only pose a social problem for governments and institutions that need to create facilities to care for these children, but also has an impact on the intellectual functioning of these children. This is mainly because they do not only have a lack of provision of basic needs such as food, water, sanitation and a safe home, but also experience a lack of communication, intellectual stimulation and parental interaction.

Du Preez, Naudé and Pretorius (2004:26) point out that language capacity plays an important role in intellectual development, attention and readiness to learn, socio-emotional development, behavioural issues and academic achievement.

Du Preez, Naudé and Pretorius (2004:29) believe that neglected children have a verbal disadvantage because of lack of interaction and communication between caregivers and children. Neglected children's language capacity is therefore inadequately developed, and this impacts on intellectual development, socio-emotional development and behavioural issues.

Language development and the understanding thereof by role-players in the criminal justice system is a very important aspect, which can lead to various misunderstandings during the assessment of children and during the criminal trial.

Müller (2003:2) points out that children are perceived by the Courts to be miniature adults and their evidence is evaluated on this basis, often resulting in an injustice to the child. Müller (2003:2) emphasizes that cognizance needs to be taken of the fact that children differ dramatically from adults with respect to, among other, language development. In order for the Courts to communicate more effectively with children, it is necessary that experts inform judicial offices of the common misunderstandings involved in communicating with children. Müller (2003:5) points out that inconsistencies in a child's evidence which may lead to misunderstanding can be used to compromise the child's credibility in a devastating manner. Children are extremely literal in their use of language and this should be recognised by the Court, the prosecutor and the attorney, even the person assessing the child and this should be clarified during the Court proceedings (Louw 2005:30).

Müller (2003:6) states that children use vague, free-associative style of communication and this is particular evident in their description of places. Although children will reply in the affirmative when asked whether they know where a place is, they will be unable to provide directions or an address.

Another important issue, as pointed out by Müller (2003:6) found in children's communication is referred to as underextension. Children often attribute to a word only part of the meaning which the same word has for adults. This is a very common misunderstanding that arises especially in cases involving sexual abuse where the position of clothing becomes very important. A child may deny that she was wearing any clothing only to admit later that she was wearing a costume. To the child this is not a contradiction, because a costume is not considered to be clothing.

The importance of knowing and understanding the stages of language development can not and should not be underestimated, especially in an assessment situation. If the professional conducting the assessment do not understand what the child means when saying something or why he/she describes something in a specific manner, the essence of

what the child says will be lost and the interpretation thereof might not be correct and this will inevitably be to the disadvantage of the child.

5.4.4 Moral Development

Van Niekerk (2001:A3-2 – A3-9) states that young children have little sense of the moral code of their family and culture. Preschool children may conform to the moral teaching of their family and/or significant others, not because they understand the issue of morality, but because they experience the consequences of their own behaviour. As the child matures and thought processes become more sophisticated, it can be said that the child's "conscience" (or "superego") develops. This means that the child's control over its own behaviour becomes more internally rather than externally based: that is, the child begins to self-approve or self-disapprove, and is no longer entirely dependent on the cues and responses of significant others. Internal controls, however, do not develop without the presence and consistent use of external feedback – positive, negative or neutral – on the child's behaviour. A young child may thus have a "limited" sense of the wrongfulness of an act – but not necessarily the understanding of the morality of the act. Furthermore, young children may not necessarily have the behavioural controls and/or the prerequisite ability to act in accordance with society's view on a particular behaviour. It is important to note that although environment and formal teaching influence and support a child's social and moral development, formal education is not the only way in which this can be achieved. For example, in the areas of moral and social development, the rural child may be inducted at a fairly young age into taking responsibility for caring for the resources of the extended family (herding cattle and goats) and may have an advanced sense of morality and social responsibility in this area of functioning despite the lack of formal schooling.

Kohlberg (1984:170–172) indicates that to understand moral stage, it is helpful to locate it in a sequence of development of personality. We know that individuals pass through the moral stages one step at a time as they progress from the bottom (Stage 1) toward the top (Stage 6). After the child learns to speak, there are three major developmental stages of reasoning: the intuitive, the concrete operational, and the formal operational. At around age 7, children enter the stage of concrete logical thought; they can then make logical inferences, classify things and handle quantitative relations about concrete things. In adolescence, many but not all individuals enter the stage of formal operations, at which level they can reason abstractly. Formal operational thinking can consider all possibilities,

consider the relations between elements in a system, form hypotheses, deduce implications from the hypotheses, and test them against reality. Many adolescents and adults only partially attain the stage of formal operations; they consider all the actual relations of one thing to another at the same time, but do not consider all possibilities and do not form abstract hypotheses.

According to Kohlberg (1984:170–172), almost no adolescents and adults will still be entirely at the stage of concrete operations, many will be at the stage of partial formal operations, and most will be at the highest stage of formal operations. Since moral reasoning clearly is reasoning, advanced moral reasoning depends upon advanced logical reasoning. There is a parallelism between an individual's logical stage and his or her moral stage. A person whose logical stage is only concrete operational is limited to the pre-conventional moral stages, Stages 1 and 2. A person whose logical stage is only "low" formal operational is limited to the conventional moral stages, Stages 3 and 4. While logical development is a necessary condition for moral development, it is not sufficient.

In summary, moral stage is related to cognitive advance and to moral behaviour, but our identification of moral stage must be based on moral reasoning alone.

The six moral stages are grouped into three major levels: pre-conventional level (Stages 1 and 2), conventional level (Stages 3 and 4), and post-conventional level (Stages 5 and 6).

To understand the stages, it is best to start by understanding the three moral levels. The pre-conventional moral level is the level of most children under 9, some adolescents, and many adolescent and adult criminal offenders. The observance of rules and regulations is mainly based on the desire to avoid punishment. The conventional level is the level of most adolescents and adults in our society and in other societies. Rules and norms are generally accepted with an intent to avoid disapproval or dislike of others. The post-conventional level is reached by a minority of adults and is usually reached only after the age of 20. The term "conventional" means conforming to and upholding the rules and expectations and conventions of society or authority just because they are society's rules, expectations, or conventions. The individual at the pre-conventional level has not yet come to really understand and uphold conventional or societal rules and expectations. Someone at the post-conventional level understands and basically accepts society's rules, but acceptance of society's rules is based on formulating and accepting the general moral

principles that underlie these rules. These principles in some cases come into conflict with society's rules, in which case the postconventional individual judges by principle rather than by convention (Kohlberg 1984:172–173; Law Reform Commission of Hong Kong 2000:39).

In this regard Moffatt (2002:51) points out that children, who for example kill another person will only come to realize the significance of their actions in their mid- to late teens. Prior to late adolescence, the guilt and remorse that they may have experienced would almost exclusively relate to being in trouble and having people angry with them. By late adolescence, however, these children will be capable of understanding the permanence of their actions and the broad ramifications of the pain they have caused. Only then will they experience much deeper remorse, regret and guilt.

5.4.5 Cultural Context

The UNICEF Innocenti Research Centre (2005:12) points out that developmental psychologists are increasingly applying a theoretical framework in which child development is understood as a cultural process. Childhood is understood as a product of specific economic, social and cultural processes.

Moffatt (2002:20) points out that culture at large is a part of the teaching process through both words and action. Actions are usually clearer messages than words. Through movies, television, advertisements and music culture teaches that violence is acceptable or even expected. Culture influences the way people think and act.

Labuschagne and Van den Heever (1993:100) point out that chronological age limits for fixing criminal capacity did not exist in traditional indigenous law. Examples includes the Bafokeng in Rustenburg where the present position is that a boy who became a cattle herder, at approximately 15 years of age, may be summoned to appear before the traditional Court, the Northern Ndebele's attach criminal capacity to school attendance, approximately 8 years of age and according to the Northern Sotho's a small child is not considered as criminally responsible as it is believed that his brain is too weak and no specific chronological age exists for criminal capacity. The Courts determine criminal capacity on the ground of his mental ability.

In South Africa there is a diversity of cultures and traditions and some of the beliefs and traditions might have an influence on the criminal capacity of offenders and specifically on child offenders. In the African context, cultural practices pertaining to belief in witchcraft and *muti* and *muti* killings may very well have an impact on the ability of a child to distinguish between right and wrong and on the child's ability to act in accordance with his/her insight between right and wrong. Even in communities where there is no emphasis on ownership of property and there is no rules regarding the use of each other's property, a child might grow up not realizing that one is not supposed to take another person's property and this can have an impact on his/her criminal capacity.

This is a very important aspect that should be studied and incorporated in our criminal justice system, especially the juvenile justice system.

Other factors relating to the development of children were also furnished and it was stated that these should specifically be included in the assessment of the alleged child offender. The responses are shown in table 10.

Table 10: Physical, language, sexual and moral development should be specifically included in the assessment.

View	Motivation	Problems	Suggestions/Advice
<p>Subjects 1,2,4,5,8,10,11,13, 14,15 and 17 agreed</p>	<p>Subject 1: Should be included and considered with other</p> <p>Subject 2: Any aspect impacting on child's motivation, intent and liability</p> <p>Subject 4: All aspects must be included</p> <p>Subject 5: Some children are extremely advanced physically. Moral Development important</p> <p>Subject 8: Better to name separately</p> <p>Subject 10: Trauma assessment (sexual abuse – children tend to act out the same abuse) also important</p> <p>Subject 11: Cultural context, beliefs and traditional upbringing also important</p> <p>Subject 13: A holistic evaluation of the child is necessary to arrive at fair and reliable conclusion and to assist magistrates and prosecutors who are not experts in child development</p> <p>Subject 14: Definitely and more</p> <p>Subject 15: Agreed</p> <p>Subject 17: Because of our country's history children come from different backgrounds</p>		<p>Subject 5: Peer pressure and peer group situation needs to be included</p> <p>Subject 11: Each case must be considered on own merits and all factors that can have influence must be considered</p> <p>Subject 14: Current assessments are done one dimensional and do not really focus on the holistic functioning of the child. Assessments are done as a once off activity and that is why assessments in the majority of cases are inadequate</p> <p>Subject 15: Also important to ascertain with who the child has contact on a daily basis in his social context</p>
<p>Subject 3, 6, ,9,12 and 16 disagreed</p>	<p>Subject 3: Yes to moral development. No to language development</p> <p>Subject 6: Included in factor mentioned by Child Justice Bill, 2002</p> <p>Subject 9: Categories provided for in Child Justice Bill, 2002 are sufficient</p> <p>Subject 12: These aspects are included in the elements provided for in the Child Justice Bill, 2002</p> <p>Subject 16: Included in factors as provided for in Child Justice Bill, 2002</p>		

Eleven of the subjects agreed that the psychical, language, sexual and moral development of a child offender should specifically be included in the assessment of the child offender. Five disagreed with the statement.

Subject 7 (legally qualified) indicated he/she is not qualified to answer.

The eleven subjects who agreed motivated it by stating that any aspect having an impact on a child's motivation, intent and liability must be included and that it will be better if these factors are named separately. One subject indicated that trauma assessment is also important and another was of the opinion that a holistic evaluation of the child is necessary. The cultural context of the child and the traditions and beliefs he/she grew up with, were also mentioned. The subjects who agreed include four lawyers, four social workers, one psychologist and two criminologists.

One subject who disagreed, indicated that moral development is important but not language development. Four subjects indicated that these factors falls in broader categories mentioned above. The subjects who disagreed include two lawyers, one criminologist and two social workers.

A suggestion was made that peer pressure and peer group situations should also be included.

The fact that eleven subjects agreed that physical, language, sexual and moral development should specifically be included in the assessment of the criminal capacity of the child offender, indicates that these are important factors that can not be overlooked by the criminal justice system and the professionals working in the field and should specifically be included in the Child Justice Bill, 2002.

5.5 Conclusion

From the above it is clear that criminal capacity can be proved on the merits or facts of the case, the child offender's conduct before and after the offence, the nature of the offence and the surrounding circumstances. Physical, language, sexual and moral development are evidently very important factors that should also be taken into account when deciding on the criminal capacity of children. Another important aspect, which needs definite

attention, is cultural context, especially in a cultural diverse country like ours. These factors should definitely be included in the Child Justice Bill, 2002. It is suggested that the Child Justice Bill, 2002 be revised to include these factors as part of the evaluation of the criminal capacity of child offenders, before its passing in Parliament. However, it is furthermore submitted that the various developmental factors concerning children, to be taken into account, should not be a closed number. Room and scope should be left open to cater for other factors that might be important in certain cases, to ensure that all the needs of child offenders can be met, especially in our diverse country.

The UNICEF Innocenti Research Centre (2005:xiv) states that many different disciplines contribute to the understanding of how children acquire capacity. Developmental psychologists have long studied how, why and when children develop. Anthropologists have contributed to our understanding of how differences across cultures influence the understanding of childhood and consequent treatment of children. Lawyers and medical practitioners have grappled with methods of defining competence in order to determine when a child can assume responsibility for decision-making. Sociologists have begun to examine the concept of childhood and the extent to which it is socially rather than merely biologically constructed.

Crofts (2002:63) suggests that the best approach to determining a child's criminal capacity is to gather information on the child's level of understanding generally (for example from evidence of her home and social background) in relation to the concrete act (for example from evidence as to what the child said, how the child committed the act, what the child did before and after the act).

It is furthermore clear that the criminal capacity of children should be determined and assessed from a multi-disciplinary point of view and this needs to be addressed when developing a separate juvenile justice system. The Child Justice Bill, 2002 should also reflect this approach. To reserve this function to a specific profession will not only delay the assessment process, but it will also prejudice the children in the criminal justice system. It might result in a situation where some of the developmental factors are over emphasized at the expense of other equally important factors, due to the fact that the assessment is done from one point of view. In this regard criminologists, social workers, probation officers and psychologists can and must be trained and included in the assessment process.

In the next chapter other issues related to criminal capacity, namely the time and number of assessments, testimonial competency of the child offender, evolving capacities of children and age determination will be discussed.

CHAPTER 6

CAPACITY RELATED ISSUES

6.1 Introduction

There are other key issues closely linked to criminal capacity of children that also need attention namely: the time of the assessment and the number of assessments, the testimonial competency of the child offender, the evolving capacities of the child and age determination.

In this chapter these issues will be highlighted and discussed with a view of finding possible solutions for the problems arising from them.

6.2 The Time of the Assessment and the Number of Assessments

Both the common law presumption, as it is formulated in our law at present, and the proposed provisions of section 5(2) of the Child Justice Bill, 2002 requires that the State, in order to rebut the presumption of *doli incapax*, must prove beyond reasonable doubt that a child offender, between the age of 10 years and below 14 years, had the necessary criminal capacity at the **time of the commission** of the alleged offence (my own emphasis). This is a very important factor and the weight that the Court will attach to the evidence of any professional expert, who assessed the criminal capacity of a child offender, will to a great extent depend on the time lapse between the commission of the offence and the assessment of the child's criminal capacity. In the matter of the 12 year old girl that was convicted of murder, illustrated in chapter 4, this factor amongst others played an important role in the Court's acceptance of Mr Willows' evidence, when he testified on the criminal capacity of the accused on behalf of the defence. The State also argued that Mr Willows' evidence, that the accused was *doli incapax* at the time when the offence was allegedly committed, should be rejected on various grounds, including the fact that the murder was committed on 14 September 2002 and Mr Willows only assessed the accused during July/August 2003, about 10 – 11 months after the incident. Prof Pillay, on behalf of the State assessed the accused just over a month after the murder was committed.

The assessment of the criminal capacity of a child offender, between the age of 10 years and under 14 years, should be done as soon as possible after the commission of the offence. It is common knowledge that in our legal system there are various delays in the finalization of criminal trials and if the assessment on the criminal capacity is only done during the trial, in most instances some months after the commission of the offence, the criminal capacity of the child offender at the time of the commission of the offence will not be accurately determined. This leads to a dilemma for the assessment as the Court has before it a child looking and behaving in a very different way as to when the crime was committed. One cannot recover exactly what the child's criminal capacity was at the time of the commission of the offence. The fact that children are continuously developing, and this process of development cannot be put on hold, has some serious implications for assessment, especially if the assessment is only conducted during the trial and sometime after the commission of the offence. Furthermore, the processes children are exposed to after arrest are sometimes life perspective changing in themselves. For example, even the assessment processes can contribute to the maturing of the child. In the matter of S v N Zanaye (*supra*) where a 10-year old boy allegedly raped a five-month old baby, the alleged incident occurred on 10 January 2003 and the matter was postponed on various occasions and eventually transferred to the Sexual Offences Court in Umtata. In this Court the matter was further postponed until 29 June 2005 to obtain the Director of Public Prosecutions' decision on whether or not to proceed with the prosecutions. This is a clear example of the time delays that can and do occur in criminal cases against children and emphasizes the need to do an assessment as soon as possible after the commission of the offence. In this matter, if it were to proceed and an assessment is requested, it will be done more than two and a half years after the alleged commission of the offence and that is unacceptable.

Muntingh (2005:8) in this regard states that children's cases are taking very long to be adjudicated, with the result that there are now more awaiting-trial than sentenced children in South African prisons.

A statement that an evaluation of the child offender immediately after the commission of the offence should be made compulsory, was made and the comments indicated in table 11.

Table 11: Evaluation immediately after the commission of the offence should be compulsory.

View	Motivation	Problems	Suggestions/ Advice
Subjects 1,2,3,4,5,6,7,8,9, 10,12,13,14,15,16 and 17 agreed	<p>Subject 1: Seems to be in order</p> <p>Subject 2: Yes</p> <p>Subject 3: Yes</p> <p>Subject 4: Yes</p> <p>Subject 5: Yes ideally</p> <p>Subject 6: Yes the sooner the assessment, the more relevant the findings</p> <p>Subject 7: Important as soon as possible</p> <p>Subject 8; Definitely – arrest, detention alter child's presentation and development</p> <p>Subject 9: Statement supported</p> <p>Subject 10: I agree</p> <p>Subject 12: I agree</p> <p>Subject 13: Definitely</p> <p>Subject 14: Agreed</p> <p>Subject 15: Agreed</p> <p>Subject 16: Agreed</p> <p>Subject 17: Assessment should be kept to the minimum to prevent trauma for the child</p>	<p>Subject 1: Constitutional rights must be considered</p> <p>Subject 3: Access to child immediately after commission of offence might not be possible</p> <p>Subject 5: Resources not available</p> <p>Subject 7: if compulsory and at State expense, must be costed</p> <p>Subject 8: Assessments a year after commission of offence, unreliable and have to depend on recall of past events</p>	<p>Subject 2: If child pleads guilty, willing to accept responsibility and pay penalty for deed, no need to assess</p> <p>Subject 4: Follow-up later should be conducted to determine other factors that might influence behaviour</p> <p>Subject 7: Even if no prosecution there should be some intervention and evaluation will assists</p> <p>Subject 8: Assessment must be brief and must include collection of collateral information and not information on child alone</p> <p>Subject 9: Evaluation should include an assessment by the evaluator of the child's criminal capacity</p> <p>Subject 12: Multidisciplinary team should do evaluation as soon as possible after commission of the offence</p> <p>Subject 15: Not only of the child but also a profile of the people who are in contact with the child on a daily basis</p>
Subject 11 disagreed	Subject 11: It will not be practical. The child might incriminate himself/herself		

Table 11 shows that sixteen of the subjects agreed that an evaluation of the child offender immediately after the alleged commission of the offence should be made compulsory.

One subject disagreed and motivated it by stating that it will not be practical and that there is a possibility that the child might incriminate himself/herself. This subject is a lawyer.

The subjects who agreed stated that the sooner the assessment is done, the more relevant the findings will be. One subject submitted that the arrest and detention alter the child's presentation and development. It was pointed out that even if the prosecution of the child does not proceed, the evaluation will assist in the planning of the intervention.

The problems foreseen in this regard includes that it might be difficult to gain access to the child at that stage, there is not enough resources available and the State will have to cost it. Suggestions made relates to the fact that follow-up assessments should be done and that the assessment should be brief.

The fact that almost all the various disciplinaries agreed on this issue is an indication of the importance of conducting an assessment as soon as to ensure that the results are reliable.

With regard to the assessment of child offenders in general, the Child Justice Bill, 2002 provides in section 19 that a probation officer, upon receipt of the prescribed notice of the arrest of a child, must assess the child before the preliminary inquiry. Section 23(7) of the Child Justice Bill, 2002 provides that the probation officer must complete an assessment report and make recommendations as to the prospects of diversion, possible release of the child, the placement of the child and the transfer of the matter to a Children's Court, stating the reasons for such a recommendation. In terms of section 56(2) of the Child Justice Bill, 2002, referred to above, the Child Justice Court may order an evaluation of the criminal capacity of the child offender, upon request of the child's legal representative or the State. Section 62(1) of the Child Justice Bill, 2002 provides that before sentencing a child, the Child Justice Court must request a pre-sentence report prepared by a probation officer or any other suitable person, prior to the imposition of sentence. The Child Justice Court may deviate from this provision under certain circumstances, but not in cases where a sentence with a residential requirement is imposed, even if this sentence is suspended.

From the above it is clear that a child offender, between the ages of 10 years and under 14 years , has the potential of being assessed on three different occasions, probably by three different persons for three different reasons, throughout his/her trial. This can be a very traumatic experience for the child offender, especially if it is his/her first contact with the criminal justice system.

In the best interest of the child, it is suggested that the Child Justice Bill, 2002 be revised and amended, before its passing in Parliament, to provide for a comprehensive evaluation of the child offender, as soon as possible after the commission of the offence. This evaluation should include all the necessary information and recommendations relating to the placement of the child, the prospects of diversion, the release of the child, criminal capacity of the child (including the cognitive, emotional, psychological, social, sexual, physical, language and moral development as well the cultural context of the child) and all the necessary background information (social circumstances, level of education, motive for the offence etc.) of the child. This report can always be extended after conviction to serve as a pre-sentence report and, if the child is diverted and does not comply with the conditions for diversion, and the criminal trial proceeds, the necessary evaluation on his/her criminal capacity would be available. This will not only minimize the trauma for the child offender, but it will definitely put all the role players in the criminal justice system, who has to take decisions on how to deal to deal with a specific child offender, in a better position to act in the best interest of that child, and to make informed choices.

The statement that all child offenders under the age of 18 years should be assessed and evaluated to ascertain their criminal capacity was posed to the professionals and they responded as indicated in table 12.

Table 12: All offenders under 18 years should be assessed and evaluated to ascertain criminal capacity

View	Motivation	Problems	Suggestions/Advice
Subjects 2,3,4,5,7,9,10, 13,14 and 15 agreed	<p>Subject 2: Important to take all factors into account</p> <p>Subject 3: Criminal capacity should be assessed at all times</p> <p>Subject 4: More diversified picture needed. Proper individualised picture more appropriate and effective</p> <p>Subject 5: Best case scenario. Socio-economic background, upbringing, personal circumstances affect criminal capacity</p> <p>Subject 7: Information from US suggesting that large number of children under 16 lack criminal capacities. Large number of children with developmental problems, learning problems, low IQ</p> <p>Subject 9: Statement is supported</p> <p>Subject 10: That would be the best way to ascertain their capacity</p> <p>Subject 13: Assessment of each individual is important</p> <p>Subject 14: It will be wonderful</p> <p>Subject 15: A holistic approach should be followed</p>	<p>Subject 4: Might not be cost effective</p> <p>Subject 5: Thousands of offenders between 14-18 years. Might be impractical. Would require huge resources</p> <p>Subject 14: In South Africa with lack of capacity in the field and lack of proper professionals or experts to do the work it is highly unlikely to work</p>	<p>Subject 5: Assessment can be requested for 14-18 year old if necessary</p> <p>Subject 7: Should improve probation assessments to pick up problems and place criminal capacity in question</p> <p>Subject 9: Assessment should preferably done by trained officials in the Department of Social Development, for submission to and consideration by a judicial officer</p>
Subjects 1,6,8,11,13,16 and 17 disagreed	<p>Subject 1: Minor between 14-18 years should be regarded as <i>doli capax</i></p> <p>Subject 6: Children 14-18 years old possess criminal capacity. Assessment done if in doubt</p> <p>Subject 8: Given the levels of child offending, presumption of incapacity for children under 14 should stay</p> <p>Subject 11: It would cause problems in practice. 13-14 year old children know the difference between right and wrong and can act in accordance with this insight. Assessment would cause delays</p> <p>Subject 13: Children of 15 years and older generally meet the requirements for criminal capacity</p> <p>Subject 16: Only where there is reasonable doubt to believe the contrary</p> <p>Subject 17: Only children under 14 years should be assessed to ascertain their criminal capacity</p>	<p>Subject 8: Psychiatrists useful assessment of mental illness unless specialising in children otherwise limited experience</p>	<p>Subject 1: If child between 14-18 years dispute criminal capacity, he/she must prove incapacity</p> <p>Subject 6: All offenders under 15 years should be assessed</p> <p>Subject 8: 14-18 years should be assisted by competent helping professionals with training in law and child development</p>

Ten of the subjects agreed with the statement that all offenders under the age of 18 years should be assessed and evaluated to ascertain their criminal capacity and seven of the subjects disagreed with it.

The subjects that agreed with the statement indicated that according to information from the United States of America suggests that a large number of children under 16 years of age lack criminal capacity. There are also large numbers of children who have developmental and learning problems and low IQ's. They also indicated that all factors should be taken into account when deciding on the issue of criminal capacity and that criminal capacity should be assessed at all times. The socio-economic background and personal circumstances affect criminal capacity and must be considered. Three of the subjects are social workers, three are criminologists, one a psychologist and three are lawyers.

Seven of the subjects disagreed with the statement and motivated it by stating that children between 14 – 18 years should be regarded as *doli capax*, that they do possess criminal capacity and that assessments can be done if there is doubt of the child's criminal capacity in a specific case. Five of the subjects are lawyers and two are social workers.

The problems foreseen in this regard related to the costs involved in assessing all offenders under 18 years, the lack of resources and capacity to do the assessments.

Suggestions in this regard included a suggestion that if a child between the ages of 14 – 18 years disputes criminal capacity he/she must prove it. Another subject suggested that all offenders under 15 years should be assessed. The improvement of probation assessments was also suggested.

Ten of the subjects agreed with the statement that all offenders under the age of 18 years should be assessed and evaluated to ascertain criminal capacity and this indicates that there is a need for the assessment of all child/youth offenders in our country. This might be because there are so many factors that can impact on a child's criminal capacity and a lot of those factors are applicable in our country.

6.3 Testimonial Competence of the Child Offender

Due to the fact that criminal capacity can be decided upon by merely assessing the evidence placed before Court, it is inevitable that most child offenders will appear in Court. Issues relating to the assessment of the evidence of child offenders are therefore of equal importance.

Schmidt and Zeffertt (1997:87) point out that there is no statutory provision governing a child's capacity to give evidence and there is no recognized age limit for a witness, but a child who is so immature that he/she cannot communicate intelligibly with the Court or, even if he/she can, is unable to appreciate the duty to speak the truth, must obviously be disqualified as a witness (Schwikkard, Skeen & Van der Merwe 1997:281).

Zeffertt, Paizes and Skeen (2003:670) state that in terms of section 162(1) of the Criminal Procedure Act 51 of 1977, every witness must give his/her evidence under oath. In matters involving children, the first duty of the presiding officer is therefore to inquire whether a young child, tendered as a witness, understands the meaning and religious sanction of an oath. The usual procedure is for the presiding officer to question the child. In terms of section 164 of the Criminal Procedure Act, 1977, a person who is found not to understand the importance and nature of the oath due to *inter alia* the fact that he/she is too young, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation.

Schwikkard (2004:10) indicates that generally when talking about the testimonial competence of juveniles the focus is inevitably on the juvenile witness, who is not the juvenile offender. According to Schwikkard (2004:10) the question arises as to why the testimonial competence and cautionary rules are not an issue in relation to the child offender. The answer should be that these rules cannot and should not be applied to the child offender. However, the fact that they are applied to other child witnesses, be they called for the prosecution or the defence, reflects an approach to children's evidence and certain beliefs about it that will inevitably remain unarticulated in the mind of the person trying the facts when evaluating the child offender's evidence.

Schwikkard (2004:11) states that he has not encountered a reported case where the testimonial competence of a juvenile offender is an issue. The author asked whether we

can automatically assume that a child who has criminal capacity is a competent witness. The answer is no. First, when dealing with children under the age of seven years, the absence of capacity cannot be equated with an absence of testimonial competence. The irrebuttable presumption that children under the age of seven years lack criminal capacity is a statement of policy, not the result of an individual factual inquiry. Consequently, a child under the age of seven years who lack criminal capacity may still understand what it means to tell the truth. So the assumption that child offenders have testimonial competence cannot be based on the finding that they have criminal capacity. However, there is a very good reason for assuming that children who are deemed criminally responsible are also presumed to be testimonially competent – it would be untenable to have a child deemed fit for trial but insufficiently competent to speak in his or her own defence. It is also an expressed acknowledgement that a child's testimony – irrespective of whether he or she can articulate an appreciation of what it means to tell the truth – has value.

Schwikkard (2004:12) refers to the cautionary rule applicable to the child witness and indicates that this rule applies to the child witness who is not the offender. This rule provides that a presiding officer must be aware of the inherent dangers in assessing a child's evidence. As a consequence, a Court will seek corroboration in order to assist it in determining whether the witness is credible. However, corroboration is not essential for the requirements of the cautionary rule to be met. Reference is made to Woji v Santam Insurance Co Ltd 1981(1)SA1020(A) where the Court stated that the question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness depends on factors such as the child's power of observation, his power to recollection, and his power to narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated.

Schwikkard, Skeen and Van der Merwe (1997:388) explain that a cautionary rule is a rule of practice and must be followed whenever the evidence of certain witnesses (for example children) is evaluated. It serves as a constant reminder to Court that the facile acceptance of the credibility of those witnesses (i.e. children) may prove dangerous.

The South African Human Rights Commission (2000:29) defines cautionary rules as evidentiary rules of practice that require presiding officers to exercise caution prior to accepting the evidence of certain categories of witnesses and child witnesses fall into this

category. The South African Human Rights Commission (2000:30) indicates that in order to be responsive to the reality of children, the Courts need to take into account the cognitive and emotional developmental reality of children when assessing a child's evidence. The South African Law Commission (2002:176) recommends that the cautionary rule relating to children should be abolished statutorily in the Sexual Offences Bill. In fact the recommendation to abolish, refers to the cautionary rules relating to children, single witnesses, and complainants in sexual offences (Van Niekerk 2003:4)

Schwikkard (2004:12) states that he has been unable to find any authority on whether the cautionary rule applies to child offenders, but logic dictates that if presiding officers are instructed to treat children as inherently unreliable witnesses, it must colour their assessment of the child offender's testimony.

This aspect definitely needs attention. Concerted efforts should be made by the Legislature and Government to eliminate even the slightest possibility of the cautionary rules, in respect of child witnesses and single witnesses, being applied in respect of child offenders. If not, the application thereof in relation to child offenders will severely prejudice child offenders in that their fundamental right to a fair trial will definitely be infringed upon. It is suggested that the Child Justice Bill, 2002 should include a clear provision, specifically prohibiting the application of the cautionary rules by the Child Justice Court, in respect of child offenders, even if such an application is subconsciously.

6.4 The Evolving Capacities of the Child

The UNICEF Innocenti Research Centre (2005:vii) points out that the understanding of childhood varies significantly around the world. No universal consensus can be found as to what children need for their optimum development, what environments best provide for those needs, what form and level of protection is appropriate for children at a specific age.

Article 5 of the Convention on the Rights of the Child (1989:3) provides as follows:

“State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

The UNICEF Innocenti Research Centre (2005:ix) indicates that the Convention on the Rights of the Child (1989) recognizes that children in different environments and cultures who are faced with diverse life experiences will acquire competencies at different ages, and their acquisition of competencies will vary according to circumstances. It therefore also follows that children will require varying degrees of protection. The UNICEF Innocenti Research Centre (2005:x) concludes that the evidence that children do not acquire competencies merely as a consequence of age, but rather through experience, culture and levels of parental support and expectation, has implications for determining the most effective legal framework for respecting children's rights to participate in and take responsibility for those decisions they are capable of, while also providing appropriate protection. The UNICEF Innocenti Research Centre (2005:x) indicates that there are a number of possible models to address this problem:

(i) Provision in law of fixed, prescribed age-limits: to a large extent, this model exist in the majority of States Parties of he Convention on the Rights of the Child, 1989, where the law prescribes a broad range of rigid age limits for example the age of criminal responsibility. The advantages of this model includes the fact that all citizens, adults and children have a clear understanding of when certain rights and responsibilities can be exercised and that the model is relatively simple to understand and to implement. A disadvantage is that the uniformity on the exercise of rights does not reflect children's actual and differing capacities (UNICEF Innocenti Research Centre 2005:x).

(ii) Removal of all age-limits, substituting a framework of individual assessment to determine competence to exercise any particular right: the advantages of this model includes the fact that it enables judgments about children's capacities to reflect prevailing assumptions and experience, rather than legislation that may be outdated and out of touch, it will eliminate the fixed inconsistencies that may exist within and between different parts of civil and criminal law. The disadvantages includes that it will be a costly and burdensome administration to assess individual children on a very wide range of legal matters, considerable skill would be needed to judge children's individual capacity and the potential inconsistency in widely divergent assumptions and mechanisms for assessing competence. This model is furthermore at odds with the Convention on the Rights of the Child, 1989, which does propose the introduction of certain legal age-limits.

(iii) Introduction of a model that includes age-limits but entitles a child to demonstrate competence and acquire the right at an earlier age: this model combines the establishment of fixed age-limits, automatically entitling children to exercise certain rights, with recognition that children may be entitled to exercise certain rights earlier if they demonstrate the necessary capacity. The advantages of this model includes that it protects children while also acknowledging the need for flexibility in the application of age-limits and it provides a consistent basis for assessment of all children. It also establishes patterns in children's development associated with age, while recognizing that individual children can and do vary significantly in their levels of understanding and competence. The disadvantages includes that considerable resources are required to assess specific capacities of individual children and the fact that poor and marginalized children are less likely to have access to opportunities for challenging the legal age-limits. In this regard the UNICEF Innocenti Research Centre (2005:51) states that in the case of private and public law, it would be necessary to clarify that an application to exercise a right below the legally prescribed age-limit could only be instigated by the child. Even then it would have to be strictly enforced to prevent the possibility that adults might submit such application against the best interests of children, by for example recommending that a child below the minimum age for criminal responsibility could be held criminally responsible.

(iv) Providing age-limits only for those rights that are at risk of being abused or neglected by adults and introducing a presumption of competence in respect of other rights: the advantages of this model includes that it protects areas of potential vulnerability, while recognizing children's evolving capacities to participate in day to day decision-making, it provides flexibility and respects differences in children's evolving capacities and the assessment of the capacity of individual children is limited to those adults with whom they have personal or professional relationships for instance parents, doctors, teachers, judges and social workers. A disadvantage is that the imposition of some fixed age-limits in order to provide protection may be seen to limit children's opportunities to demonstrate capacity and take increased responsibilities for their lives

The UNICEF Innocenti Research Centre (2005:xi) points out that realizing children's rights in accordance with their evolving capacities can only be achieved through a holistic approach to implementing the Convention of the Rights of the Child, 1989. It represents a fundamental challenge to conventional attributes towards children, questioning some of

the deeply held assumptions about children's needs, children's development, protection of children and children's agency.

6.5 Age Determination

Another important issue closely linked to the criminal capacity is age determination, because it is important to know the exact age of a child when deciding to prosecute or not, and to know whether criminal capacity must be proved or not. It is not uncommon for South African children to be unaware of their ages and dates of birth (Child Justice Alliance 2001:6). In some cases even the parents of such children are unable to give particulars in this regard. One of the reasons for this is that in many instances births are not registered and the parents are illiterate. Another problem may be the fact that there are a lot of street children in South Africa who are more at risk of being in conflict with the law, and are on the streets because they are orphans with no family or official documents. Labuschagne and Van den Heever (1993:98), submits that traditionally in black communities the registration of births is unknown and the age of individuals, in the sense of a specific number of years of age is indeterminable.

6.5.1 Criminal Procedure Act, 51 of 1977

In terms of section 337 of the Children Procedure Act, 1977, the presiding judicial officer may estimate the age of a person if in any criminal proceedings the age of that person is a relevant fact of which no or insufficient evidence is available. The finding of the presiding officer may not be simply based on observation. There should be a proper attempt at finding evidence. The following can be used:

- (i) birth certificate
- (ii) evidence of the parents
- (iii) evidence of family or other persons knowing of the birth of the accused
- (iv) expert evidence

- (v) estimation of age

Section 337 of the Criminal Procedure Act, 1977 reads as follows:

“Estimating age of person –

If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available at the proceedings, the presiding judge or judicial officer may estimate the age of such person by his appearance or from any information which may be available, and the age so estimated shall be deemed to be the correct age of such person, unless –

- (a) it is subsequently proved that the said estimate was incorrect; and
- (b) the accused at such proceedings could not lawfully have been convicted of the offence with which he was charged if the correct age had been proved.

An estimation of age may only be made once it is established that no or insufficient evidence is available.”

Leggett (1999:27) refers to age determination and states that proving the age of a child in the first place is a problem in the South African context. Many births continue to occur unregistered, and street children rarely carry ID documents. At present, a cumbersome and expensive procedure is required to medically prove a child’s age, including skeletal x-rays.

In theory, the weight of this encumbrance should work to the advantage of the child, since borderline cases in which minor offences have been committed would rarely justify the cost and should thus be diverted to welfare. In practice, police officers often fudge the records and incarcerate the child anyway. The sword swings in both directions, however, and many youths above the minimum age are held with younger children, creating an additional hazard for the most vulnerable in state custody.

Since the deciding factor in the early stages of processing an accused child is physical age, the impact of physical deprivation on development must be considered. Malnutrition has been demonstrated to retard development both physically and mentally. And this calls

into question a whole range of issues surrounding the ways South Africa's history and present inequality have affects its young people.

6.5.2 Case Law Relating to the Age Determination of Accused

(i) In S v Swartz 1970(2)SA240(NC) the Court stated that seldom ought there be no evidence available in a magistrate's Court as the help of the district surgeon or any other doctor can be invoked.

(ii) In S v Sibisi 1976(2)SA162(N) James JP stated: "... it is not only desirable but essential that, in all cases in which the age of the accused become relevant... the magistrate should ... record what his finding is in regard to the age of the accused; and ... he should further record briefly his grounds for (his) finding..."

(iii) In S v Swato 1977(3)SA992(O) the Court held that the section could only be applied when it had been established that no or insufficient evidence is available and that it could not be invoked merely to avoid inconveniencing the district surgeon.

(iv) In S v Ngoma 1984(3)SA666(A) the Court indicated that the general rule is that the best admissible evidence must be used to determine a juvenile accused's age.

(v) In S v Khumalo 1991(2)SACR694(W) the Court stated that in all cases where the age of an accused was of material importance, either in respect of conviction or in regard to sentence, magistrates should properly record everything so that the method by which the accused's age was determined appeared adequately from the record.

(vi) In the matter of S v Mbelo 2003(1)SACR84 the ages of both the accused and the victim were material issues which could impact on whether or not the minimum sentence for rape of a victim under 16 years in terms of the Criminal Law Amendment Act, 105 of 1997, must be considered. The Court decided that where the determination of age is of material importance and hearsay evidence is inadmissible, a baptismal certificate is not sufficient proof of age. The information furnished by the accused and his father could also not be regarded as evidence because it was unattested. The accused's legal representative had made admissions conceding the truth of the alleged age on behalf of the accused. The Court accepted this evidence because as with any other admission, an

accused would be bound by the admissions properly furnished on his/her behalf by a legal representative.

(vii) In S v Dial case number 021/2004 the Eastern Cape Division of the High Court made it clear that section 337 of the Criminal Procedure Act, 1977 is not to be resorted to out of convenience, but rather out of necessity. In this case the Court *a quo* estimated the age of the accused as being 19 years of age. When queried about this the presiding officer indicated that there is no district surgeon in Aliwal North who could have examined the accused and that the accused mother would have been of no assistance as she is a unsophisticated person. In these circumstances the presiding officer decided that there was no or insufficient evidence as to the accused's age and he made the estimation of the accused's age as older than 18 years.

6.5.3 Proposed Provisions in the Child Justice Bill, 2002

As indicated above, many children accused of crimes in South Africa do not know their exact ages. The Child Justice Bill, 2002 proposes a solution to this problem by providing that where a child's age is uncertain or is in dispute –

- (i) the probation officer should gather available information and make an estimation of the age of the child and should submit such information on a prescribed form. The legislation provides a list of documents or other forms of information relevant to the estimation of age;
- (ii) the magistrate presiding at a preliminary inquiry should make a determination of age based on all available evidence, and the age so determined should be considered to be the child's age until contrary evidence is placed before a Court;
- (iii) the child may be taken to a medical practitioner for estimation of age by the probation officer.

Sections 24, 31 and 82 deal with the various procedures to be followed by the probation officer, inquiry magistrate and presiding officer in a criminal Court when determining the age of an accused:

“Estimation of child’s age by probation officer

24.(1) If the age of a child who must be assessed is uncertain, the probation officer must make an estimation of the child’s age and must complete the prescribed form.

(2) In making the estimation, the probation officer must consider any available information in the following order of cogency, subject to subsection (3):

(a) A previous determination of age by a magistrate under this Act or under the Criminal Procedure Act or an estimation of age in terms of the Child Care Act, 1983 (Act No 74 of 1983);

(b) statements made by a parent, the legal guardian or any other person likely to have direct knowledge of the age of the child or a statement made by the child himself or herself;

(c) a baptismal certificate, school registration form or school report, or other information of a similar nature; or

(d) an estimation of age by a medical practitioner.

(3) If the probation officer is unable to make an estimation by virtue of information contemplated in subsection (2)(a), (b) or (c), the probation officer must refer the child in the prescribed manner to a medical practitioner for an estimation of the child’s age.

(4) The probation officer must submit the estimation on the prescribed form together with any relevant documentation to the inquiry magistrate before the child’s appearance at a preliminary inquiry.”

The Community Law Centre ((c)2003:2) points out, with reference to S v Mbelo (*supra*) that in terms of the above provisions, the use of statements by the child, the child's parents or other persons likely to have direct knowledge of the age of the child, as well as baptismal certificates and school reports may be utilized by the probation officer when estimating a child offender's age.

“Age to be determined by inquiry magistrate

31.(1) If the age of a child is uncertain, the inquiry magistrate must determine the age of the child after considering the form and any documentation submitted by the probation officer in terms of section 24(4).

(2) (a) For the purposes of a determination –

(i) an inquiry magistrate may require any relevant documentation, information or statement from any person;

(ii) an inquiry magistrate may *subpoena* any person to produce the documentation, information or statements contemplated in subparagraph (i); and

(iii) section 24(2) applies with the changes required by the context.

(b) Chapter 23 of the Criminal Procedure Act applies with the changes required by the context to the issue of a *subpoena* contemplated in paragraph (a)(ii).

(3) The inquiry magistrate must enter the age determined in terms of subsection (1) into the record as the age of the child, which age must be regarded as the correct age of the child until the contrary is proved on a balance of probabilities.

(4) If the inquiry magistrate determines that the person was over the age of 18 years at the time of the alleged commission of the offence, he or she must close the preliminary

inquiry and postpone the proceedings as contemplated in section 50(6) of the Criminal Procedure Act.

(5) If the inquiry magistrate makes a determination of age that is not supported by a valid birth certificate, identity document or passport, a copy of the record of the determination must be forwarded to the Department of Home Affairs for the issue of an identification document to the person concerned.”

“Age Assessment of Person Claiming to be Child

82.(1) If a person who is charged with an offence in a Court at any time before the imposition of sentence alleges that he or she was under the age of 18 years at the time of the alleged commission of the offence, the presiding officer must refer the person to a probation officer in the prescribed manner.

(2) The presiding officer of a Court contemplated in subsection (1) may at any time before the imposition of sentence of his or her own accord refer a person charged with an offence in that Court to a probation officer if it appears to the presiding officer that the person is under the age of 18 years.

(3) The probation officer must make an estimation of the age of the person in accordance with section 24 and submit the prescribed form and any relevant documentation contemplated in that section to the presiding officer concerned.

(4) The presiding officer must determine the age of the person, and for that purpose section 31 applies with the changes required by the context.

(5) If the age of the person is determined to be under the age of 18 years and the trial has -

(a) not yet commended, the presiding officer must transfer the matter to an inquiry magistrate having jurisdiction; or

(b) already commenced, the proceedings must continue before the presiding officer, but the remainder of the proceedings must be conducted in terms of this Act and the Court must be regarded as a child justice Court.”

It is suggested that as part of the recommended comprehensive investigation to be done as soon as possible after the arrest of the child, and in cases where the age of the child offender is uncertain, the age determination of the child should also be thoroughly investigated at that stage. This will play an important role in the decisions taken about the child's position and future at a very early stage of the proceedings. In this regard knowledge and understanding of the physical development of children is very important to the probation officer, social worker or criminologist who has to make recommendations regarding the estimated age of the child, to the presiding officer.

6.6 Conclusion

There are various important issues closely linked to criminal capacity and these include the time and number of assessments, the testimonial competency of the child offender, evolving capacities of the child and age determination. These issues must be considered and should be addressed in the new juvenile justice system proposed and provided for in the Child Justice Bill, 2002.

CHAPTER 7

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

In this chapter the findings of the project will be furnished, the relevant conclusions will be highlighted and the recommendations will be made. The findings will include the current position in South African law with regard to the issue of criminal capacity, as well the proposed provisions in the Child Justice Bill, 2002.

7.2 Findings

There are guidelines regarding the establishment of a minimum age for criminal capacity in the International Instruments although no specific age is suggested.

Australia, the United Kingdom and Hong Kong investigated the position relating to the issue of criminal capacity of children during recent years. Australia decided to keep the *doli incapax* presumption and only amended the minimum age for criminal responsibility to 10 years in all its jurisdictions. In the United Kingdom of Great Britain there are differences. England and Wales abolished the *doli incapax* presumption 1998 and Scotland, although recommendations for changes have been made by the Scottish Law Commission in 2002, has not amended their position. In Hong Kong the decision was taken to increase the minimum age for criminal responsibility to 10 years and to retain the *doli incapax* presumption for children between the ages of 10 and below 14 years.

The current position in our law regarding the criminal capacity of children is formulated in the common law presumptions. In terms of the common law there is an irrebuttable presumption that children under 7 years of age are *doli incapax* and they can therefore not be prosecuted for any crime. There is a rebuttable presumption that children between the ages of 7 and 14 years are *doli incapax*. Children between the ages of 7 and 14 years can

therefore be prosecuted if the State can prove beyond reasonable doubt that they had the necessary criminal capacity at the time of the commission of the offence.

The test for criminal capacity has two legs. The first leg requires that the child must have had the ability to distinguish between right and wrong and the second leg requires that the child must have had the ability to conduct himself/herself in accordance with this insight into right and wrong, at the time of the commission of the offence.

Since the ratification of the International Instruments, the South African government has taken various initiatives to fulfill the duties and obligations placed upon it as a State Party. One of these initiatives includes the drafting of the Child Justice Bill, 2002 that was introduced into Parliament in August 2002. Once promulgated, it will establish a separate juvenile justice system for the adjudication of juvenile offenders. The Child Justice Bill, 2002 codifies the common law presumption on criminal capacity and raises the minimum age for criminal capacity to 10 years. The need to raise the age for criminal capacity is clear from the fact that the majority of the professionals, who participated in the study, were of the opinion that the minimum age of 7 years for criminal capacity is too low.

Criminal capacity of children can be proved and decided on through the merits/facts of the case.

Physical, language, sexual and moral development are very important factors that should also be taken into account when deciding on the criminal capacity of children. Another important aspect, which needs definite attention, is cultural context, especially in a cultural diverse country like ours.

Many different disciplines contribute to the understanding of how children acquire capacity. Developmental psychologists have long studied how, why and when children develop. Anthropologists have contributed to our understanding of how differences across cultures influence the understanding of childhood and consequent treatment of children. Lawyers and medical practitioners have grappled with methods of defining competence in order to determine when a child can assume responsibility for decision-making. Sociologists have begun to examine the concept of childhood and the extent to which it is socially rather than merely biologically constructed.

From the provisions of the Child Justice Bill, 2002 it is clear that a child offender, between the ages of 10 years and under 14 years, has the potential of being assessed on three different occasions, probably by three different persons for three different reasons, throughout his/her trial. This can be a very traumatic experience for the child offender, especially if it is his/her first contact with the criminal justice system.

There are various issues closely linked to criminal capacity and these include the time and number of assessments, the testimonial competency of the child offender, evolving capacities of the child and age determination.

7.3 Conclusions

Although various authors criticise the manner in which the issue of criminal capacity is being dealt with by the Courts it is clear from the case law that the Courts do exercise caution in most cases where children between the ages of 7 and 14 years are involved. It is furthermore important to link criminal capacity to a specific chronological age to prevent very young children from appearing unnecessary in Courts and to give a guideline to all the roll players in the criminal justice system. The general feeling is that not enough is being done in our criminal justice system to ensure that children between the ages of 7 – 14 years have criminal capacity before they are prosecuted.

From the above it is clear that the majority of the various professionals agreed on the fact that the minimum age of 7 years for criminal capacity is too low and that it should be raised, as provided for in the Child Justice Bill, 2002.

The need for certainty as to when a child can be held criminally liable for an offence and to prevent the unnecessary exposure of too young children to the trauma of appearing in Court, is evident from the fact that ten out of the seventeen professionals, who participated in the study, were of the opinion that criminal capacity should be linked to a specific age. In this regard, however, there was a difference of opinion, even within the various professions.

All the various professionals who responded to this question held the same point of view indicating that not enough is being done in our legal system to ensure that child offenders between the ages of 7 – 14 years have criminal capacity before being prosecuted.

The fact that three criminologists preferred not to answer some of the questions because they have not been involved with children in conflict with the law, in the criminal justice system is an indication that criminologists in general should be encouraged to become involved in this process as they can offer a valuable contribution to assist the Court in reaching a decision on criminal capacity.

The majority of the participating professionals agreed with the statement that the provisions of the Child Justice Bill, 2002 will adequately protect child offenders and this is an indication that our country need a separate criminal justice system for juvenile offenders, and that the Child Justice Bill, 2002, in principle, will protect juvenile offenders.

Fifteen of the subjects agreed with the statement that the evaluation should be done before the appearance in the Child Justice Court. It is clear that there is a need for an assessment of the child offender as soon as possible to enable all the relevant role players to make the right and informed decisions about the child offender at the beginning of the process. This will be in the best interest of the child.

Each of the various professionals agreed that an evaluation immediately after the commission of the offence should be compulsory. The fact that the various professionals agree on this issue is an indication of the importance of doing an assessment as soon as to ensure that the results are reliable.

The United Nations Committee on the Rights of the Child remained concerned that the minimum age for criminal capacity of 10 years, as proposed in the Child Justice Bill, 2002 is still too low and recommended that the provisions be revised with a view to increase it even further.

Both Australia and Hong Kong have retained the rebuttable presumption of *doli incapax* and the fact that only one of the professionals, who participated in the study, was of the opinion that the United Kingdom (where the rebuttable presumption was abolished) offers

the best protection for child offenders with reference to the establishment of criminal capacity, is a clear indication that there is a definite need to retain the rebuttable presumption of *doli incapax*.

The Child Justice Bill, 2002 was introduced into Parliament in August 2002 and the public hearings and deliberations started in February 2003. The provisions in the Child Justice Bill, 2002 will definitely provide better protection to children in conflict with the law.

The Child Justice Court can order the evaluation of the criminal capacity of a child offender. The evaluation must include the assessment of the cognitive, emotional, psychological and social development of the child and the report must be furnished to the Court within 30 days after the order was made.

The traditional theories regarding the development of children, including those developed by Piaget were based on research originating from Europe and the North American contexts and reflect presumptions about childhood in those societies. These presumptions are not the reality for millions of children throughout the world and do not take account of the impact of factors such as family, age of siblings, culture, status or social and economic contexts, on the process of the child's development.

Physical, language, sexual, moral development and cultural context should definitely be included in the assessment of the criminal capacity of children.

It is clear that the criminal capacity of children should be determined and assessed from a multi-disciplinary point of view and this needs to be addressed when developing a separate juvenile justice system.

The sooner the assessment of the criminal capacity of a child offender is conducted after the commission of the offence, the more reliable will the assessment be.

As indicated in paragraph 6.3 (*supra*) the issue of the application of the cautionary rules in relation to child offenders definitely needs attention. Concerted efforts should be made by the Legislature and Government to eliminate even the slightest possibility of the cautionary rules, in respect of child witnesses and single witnesses, being applied in respect of child offenders. If not, the application thereof in relation to child offenders will severely prejudice child offenders in that their fundamental right to a fair trial will definitely be infringed upon.

7.4 Model of Practical Guidelines

7.4.1 Introduction

The purpose of this model is not to furnish an assessment tool for criminal capacity but rather to give the Court and other role players a better understanding of the different factors that should be considered when assessing the criminal capacity of children. It also furnishes a brief overview of what each factor entails, what to expect from children in each age group, what important aspects to keep in mind when assessing a child's evidence, appearance, responses (verbal and non-verbal) and actions in Court and to give some practical guidelines in this regard. Finally, some questions and statements are also suggested to the Court to assist in determining the level at which the child before the Court, is functioning at.

The chronological ages, during which children can be expected to develop and behave and be representative of a particular stage, are not fixed. These guidelines and notes are a general indication of what to expect from children at a specific age, and all the factors should be taken into account and assessed as a whole.

7.4.2 Criminological Model for Assessing *Doli Incapax*

The following criminological model for the assessment of *doli incapax* can be derived from the findings and the conclusions:

Table 13: Criminological model for assessing *doli incapax*

Physical aspects	Psychological aspects	Sociological aspects	Judicial aspects
Determining age between 10 and 14 Physiological development	Psychological development Emotional development Moral development Intellectual development Volitional development	Social development Sexual development Language development Cultural context of upbringing	Ability to differentiate between right and wrong Ability to behave and act in accordance with insight between right and wrong Testimonial competency of the child offender Merits of the case and the child's conduct before, during and after the commission of the offence Evolving capacities of the child Time of the assessment after the alleged offence The maturing effect of the arrest, appearance in Court, the interviews by the police and the assessment

The model can be briefly explained as follows:

The physical aspects of determining *doli incapax* include that the physical development (appearance) of the child should be considered and the age of the child determined beyond reasonable doubt to be between 10 and less than 14 years of age. The physical appearance and the determined age should be in reasonable harmony. The fact that some children can look older than they are should be taken into account.

Next, the psychological aspects that need to be taken into account to determine *doli incapax*, include the emotional, moral, intellectual, volitional, cognitive and overall psychological development of the child. These should be in harmony with the psychological aspects of the developmental stage of the 10 to 14 years old child.

To follow up on the psychological issues, the sociological aspects (where the child's functioning is measured in his socio-cultural setting) that need consideration to determine *doli incapax*, include the sexual development, language development and the cultural setting of the child. All these aspects should also be considered.

The judicial aspects include the capacity of the child to distinguish between right and wrong, to act in accordance with that insight, the facts of the criminal case and the child's conduct before, during and after the commission of the offence, the competency of the child to testify, the evolving (of the physical, psychological, sociological and judicial) capacities of the child, and the maturing effect the arrest, the appearance in Court, the interviews by the police and the assessment might have had on the child. Finally, the time that transpired between the alleged offence and the assessment should also be considered by the Court.

Criminologically it makes sense to insist that all the above-mentioned aspects should be harmonised in assessing *doli incapax*.

The aspects identified in the above model can further be illustrated and explained as follows:

7.4.3 Cognitive Development

The ability to distinguish between right and wrong forms part of a person's cognitive mental function. It relates to a person's reason or intellect, in other words a person's ability to perceive, to reason and to remember (Snyman 2002:162).

According to Piaget (1967:88–99; Wadsworth 1996:26; Campbell 1976:1–4), children between the ages of 7 years to 11 years are in the concrete operational period. They gain the abilities of conversation (number, area, volume, orientation) and reversibility. Their thinking is becoming organized, rational and less egocentric. They can solve problems in a logical fashion, but are typically not able to think abstractly or hypothetically. Children in this age group will interpret questions literally. They experience difficulty explaining their own thinking or answering questions like “why are you unhappy?”

Hypothetical questions will in all likelihood result in the proverbial “I don’t know” reply. This means that children in this age group will not be able to answer questions about how other people think or feel or experience an event.

Piaget (1967:88–99; Wadsworth 1996:11; Campbell 1976:1–14) states that the formal operational period begins at about the age of 11 – 12 years. Children in this period gain the ability to think in an abstract manner, they have the ability to combine and classify items in a more sophisticated way and they have the capacity for higher-order reasoning. Children can formulate hypotheses.

To assess the cognitive development of the child, the Court can consider putting a problem to the child for solution and then follow the arguments of the child and prompt the child for more information. Arguing from the hypothesis that most children from most cultures in South Africa at this age should have a good idea of personal possessions, the Court could consider engaging the child to argue about a problem regarding possessions.

As indicated above, a person’s cognitive mental function relates to, amongst others, a person’s ability to remember. Important factors to keep in mind when assessing a child’s memory of events:

- a) The more relaxed the child is in the situation of recall, the more likely it is that the child will remember the relevant information or facts. This can be achieved by putting the child at ease in Court and by explaining everything that happens in Court in an age appropriate manner. Court personnel (the presiding officers, prosecutors, attorneys) should be trained specifically to deal with children;
- b) Use language that the child understands. An example in this regard would be that instead of telling the child that “Mr X testified the following...”, rather state that “Mr X said that...”;
- c) Be wary of certain distortions by suggestions. In this regard questions with too much unnecessary detail in particular can bring the child under the impression that the person posing the question expects him/her to say something specific, or to use a term that the child might not be familiar with.

General questions to ascertain whether or not the child knows and understands the difference between right and wrong will include the following:

- a) Do you know that what you did was wrong?
- b) When will something be wrong?
- c) What happens when you do something wrong?
- d) Who taught you the difference between right and wrong?
- e) What did this person say about, for example, taking another person's belongings?

Although this information will never be enough to make a decision on the criminal capacity of a child, it will serve as an indication of the child's understanding of what he/she has done, why he/she did it, of what is going on (in Court), and why he/she is in Court or charged with an offence.

7.4.4 Emotional Development

Emotions are experienced at all ages but the ability to describe and manage feelings may differ across age groups. The child's demeanour (appearance) and/or ability to describe feelings may not be congruent with what the child may have experienced. The child may tell the Court of a very sad or frightening experience while he/she is smiling because he/she may not be able to control or recognise his/her emotions.

As discussed in paragraph 4.3.2 (*supra*), children between the ages of 5 to 12 years learn to label the emotions they are experiencing, and events are responded to with more appropriate emotional responsiveness. The child in this age group starts to identify their emotions more accurately and displays the correct emotions during their evidence, for example cry when talking about a sad experience.

Suppression may often be a successful defence against uncomfortable emotions. Children between the ages of 5 to 12 years are also aware that they should have some level of control over their feelings, they are capable of appropriate and strong feelings of

guilt, and they may actually fear the loss of control of emotion. In this instance the child may deny a very embarrassing incident or pretend that it happened to a friend and not to him/her.

Children who grow up in homes that are troubled by parental mental-health problems, substance abuse or family violence, face significant threats to their own emotional development (National Council on the Developing Child 2005:2). These children lack appropriate emotional responses and maturity. Expert testimony is therefore of utmost importance to bring these facts and circumstances under the Court's attention.

The Court should take notice of how the child acts when he/she describes the details of the offence or the circumstances under which it occurred. The child must be asked about his/her actions during the commission of the offence, before the offence was committed, and afterwards. This will give the Court an indication on whether or not the child can express himself/herself accurately and give the correct sequence of the event as well. The evidence of the child can be measured against the facts of the case and the evidence led by the State.

It is also important that the Court recognises the fact that girls often have a greater ability to describe feelings accurately than boys, who are discouraged from an early age from expressing feelings. Some children get too scared to allow themselves to identify their feelings or even to feel their own emotions (Van Niekerk 2001:A3-2 – A3-9).

One should assess the child's emotional responses throughout the process and constantly compare the child's visible emotions to what he/she says, and the way it is said. The Court should take cognisance of the child's emotions and the way he/she displays it when giving evidence. Does the child look frightened when testifying about a frightening experience or cry/look sad when testifying about a sad incident? This will once again give the Court an indication of the child's emotional development and his/her ability to express his/her emotions appropriately.

The child offender may experience anxiety in the Court environment. This should be acknowledged and not be interpreted as an indication of unwillingness to cooperate or stubbornness. The child may not be able to concentrate, laugh a lot, pretend that he/she does not understand what is going on or refuse to answer a question. The training of

presiding officers to deal with children, to understand the different developmental stages of children and to relate to children of various ages is of utmost importance in this regard.

In circumstances where the child is requested to elaborate on a specific incident or topic which he/she perceives as bad or naughty, a natural reaction would be for the child to deny the allegations, to minimise them as much as possible, or not to want to talk. The child may be too embarrassed or shy to talk about the incident or may be afraid of being reprimanded.

7.4.5 Psychological Development

The second leg of the test for criminal capacity relates to the conative mental function. The most important aspect in this regard is whether the child has the ability to conduct himself/herself in accordance with this insight into right or wrong, at the time of the commissioning of the offence (Snyman 2002:177-178).

The conative function of a person relates to a person's ability to make a decision, set a goal, to pursue the goal and to resist impulses or desires to act contrary to what his/her insights into right and wrong reveal to him (Snyman 2002:162). The possibility of coercion from an adult or older child to commit the crime is important when considering the child's free will or choices. This fact will usually emerge from the evidence during the trial, but if it doesn't the Court should specifically address this issue through questions to the child.

7.4.6 Social Development

The single most important influence on a child's development is that of the family. Children between the ages of 3 and 12 years have a strong desire to please and are learning to share, and to give and take. Crimes may be committed to fit in with social relations. Peer relationships take on an important value and friendships outside the immediate family take on great importance.

Children over the age of 12 years are acutely aware of peer relationships and usually attach great importance to belonging to and having an identity with a peer group. A child in this age group may experience a return to egocentric preoccupation with the self. The egocentric stage of development relates to the fact that the child is unable to separate their

own perspective from that of others. Separation from close family and the need for independence may begin during this phase (Van Niekerk 2001:A3-9).

Important factors that should be specifically addressed in this regard include:

- a) Communities or families which are unstable or chaotic;
- b) Parents who have criminal records, have problems with alcohol abuse, drug abuse or neglect their children;
- c) Harsh discipline or low levels of supervision;
- d) Children who are exposed to abuse or family violence;
- e) The way the family functions and the values of the family;
- f) The relationship between the child and his/her parents, the relationship between the parents, and the relationship between the child and his/her siblings;
- g) The experiences of the child in school, the child's performance in school, his/her attendance at school, the friends of the child, influences of subcultures or gangs, peer pressure and the child's ability to resist peer pressure.

The above factors should be presented to the Court either through the evidence of an expert witness or through the evidence led by the State or the defence attorney.

7.4.7 Sexual Development

Young sex offenders are increasing and knowledge of the general manner in which sexual development occurs is important.

Children are not asexual beings who experience any form of sexual touching as bad and/or traumatic. The child may not be traumatised by sexual abuse in its self but by the reaction of the adult who finds out about it. This reaction, if not controlled in the presence of the child can cause the child to believe that he/she did something bad or wrong. An

uncontrolled outburst can cause more trauma to the child than would have been the case if the revelation of the abuse was reacted to in a calm and controlled manner.

Children from the age of 5 to 12 years have usually learned the rules about touching themselves sexually, and this behaviour during this phase of development is usually very secretive. Children in puberty – girls from anywhere between 9 and 13 years of age, and boys from 10 to 14 years of age – usually have an increased interest in sexual activity.

The exposure of the child to sexual encounters, be it personally or through watching third parties, is important. Exposure to pornography should also be considered. The Court should make enquiries in this regard if these facts are not presented during the course of the trial. Expert evidence should however cover these aspects.

Other important factors that should be considered include:

- a) The living arrangements in the family;
- b) Where do everyone sleep, does the child share a room with adult couples;
- c) Has the child been exposed to sexual encounters by watching adults; and
- d) What was explained to the child in this regard.

Children under the age of 12 to 14 years, rarely have a full adult understanding of the implications and possible consequences of the sexual behaviour they have been involved with.

Another important aspect here is the fact that children who commit sexual violence usually lack close bonds, depersonalise emotion, have often been exposed to pornography and have been victimised themselves, not just in relation to sexual abuse but also in relation to physical and emotional abuse and deprivation. Questions in this regard are very important in cases where children are accused of sexual offences as this will give the Court some insight into the child's motivation or justification for the act.

7.4.8 Physical Development

Physical appearance is important but it is essential to remember that a physically developed and mature child is not always intellectually or emotionally developed and mature. Physically smaller children may come across in Court as more vulnerable and appealing and a physically bigger child may be treated more like an adult although he/she is of tender age (Van Niekerk 2001:A3-2 – A3-9).

The Court should constantly remind itself of the chronological age of the child and should deal with the child in a manner appropriate to the child's age and not to the child's demeanour or physical appearance.

7.4.9 Language Development

Language development of a child is linked to the language to which the child is exposed in the home, the school and the media.

From the ages of 6 to 12 years children's vocabulary becomes more extensive and the ability to deal with sentence construction expands. Children in this age group may still use words out of context and without full understanding of the meaning.

Children over the age of 12 years are usually able to manage complex vocabulary and language constructions, depending of their exposure to the use of language as well as to their level of education. There may still be misunderstandings about words relating to information that is taboo for discussion in the home or that is restricted to adult-only environments.

Children are extremely literal in their use of language and this should be recognised by the Court. The child may deny that a person (perpetrator) is a friend of him/her and his/her family. When it later transpires that the person often visited their home, the child may explain it by saying that the person is not a friend of him/her but knows his mother/father.

Children use vague, free-associative style of communication and this is particular evident in their description of places. A child may indicate that he/she knows where a place is but will be unable to provide directions or an address.

Children often attribute to a word only part of the meaning that the same word has for adults. For example, when asked whether he/she was wearing clothes, the answer may be negative. When it later emerges that the child wore a costume, it may seem like a contradiction but it is not. Upon further enquiry the child may indicate that a costume is not regarded as clothing. It is important that each answer the child gives are understood in the contexts that the child uses it in and not in the context that the adults in the case would use it. If the Court is uncertain as to the exact meaning the child attributes to a word, it must seek clarity from the child.

Language development is also linked to a child's perception of time, the absence or presence of other people and the different relationships they have with other children and/or adults.

The Court should always ensure that it attaches the same meaning as the child to the words the child uses. If the child refers to someone as a friend, what does it mean? If the child contradicts himself/herself, is it really a contradiction or does the word has another more literal meaning to the child? It is suggested that the Court should request explanations for comments or answers by the child, which the Court does not understand or is unsure of.

Dates, locations, times or sequence of events are often perceived by younger children as being peripheral. The issue of centration also plays a role. Centration is when a child focuses on certain aspects of a situation to the exclusion of others. A child may be able to describe a car, the colour, the make, but be unable to say whether anybody was sitting in the car. It is more appropriate to use general life experiences carefully as an indication of meaningful events for younger children. Examples include meal times, weekdays as compared to weekends and birthdays. Rather ask whether an incident occurred during the week or on a weekend. Do not expect specific dates/days. A child may state that he/she knows where a specific place is but when asked for directions or an address he/she may not be able to furnish it (Müller 2003:6).

Children can answer questions relating to what, where and who better than those relating to how, when and why.

The following phrases or word constructions should be avoided when communicating with child offenders (Louw 2005:31):

- a) Long, constructed questions- rather use short sentences. Ask one question at a time. Use the active form of speech rather than the passive form of speech, for example rather say “when John and Ken were fighting” instead of “while the fighting between John and Ken was going on”;
- b) Three to four syllable words like “identify” – rather use one to two syllable words like “tell” or “show”;
- c) Complex time-forms like “I would like to know” – rather use simple time-forms like “I want to know”;
- d) Unfamiliar words like “juveniles” – rather use a familiar word like “children”;
- e) Questions in the negative like “Is it not true?” – rather use positive constructions like “Is it true?”.

7.4.10 Moral Development

A young child may have a limited sense of the wrongfulness of an act, but not necessarily the understanding of the morality of the act.

Kohlberg (1984:170–172) formulated a model to explain moral development. The first is the preconventional moral level and this is the level of most children under 9 years of age. The observance of rules and regulations is mainly based on the desire to avoid punishment.

The conventional level, according to Kohlberg (1984:170–172), is the level of most adolescents and adults in our society. Rules and norms are generally accepted with an interest to avoid disapproval or dislike of others.

7.4.11 Cultural Context

Childhood is understood as a product of specific economic, social and cultural processes.

Chronological age limits for fixing criminal capacity did not exist in traditional law. Traditions and beliefs within a specific culture may influence the criminal capacity of child offenders. The belief in witchcraft, *muti* and *muti* killings may have an impact on the ability of a child to distinguish between right and wrong and on the child's ability to act in accordance with his/her insight between right and wrong (Labuschagne & Van den Heever 1993:100).

Factors that should be considered is

- a) How the community in which the child stays perceive the child's actions and the offence;
- b) What are the family of the child's opinion or values in this instance;
- c) What are their beliefs or perceptions;
- d) What is the child's perception of his/her action, and how does he/she justify it.

7.4.12 Merits and/or Facts of the Case

Although the onus rests on the prosecution to prove the criminal capacity of a child offender, there is no legal obligation to prove this prior to putting the charge or at any specific stage of the proceedings. It is one of the elements necessary to be proved and needs only be proved prior to closure of the State's case. It is therefore possible to rely on the evidence presented on the merits for purposes of arguing that this element has, in fact, be proved (Meintjies 2001:B3-3).

One of the important aspects that became clear during the course of this research is the fact, however, that the sooner the assessment of the criminal capacity of a child offender is conducted after the commission of the offence, the more reliable will the assessment be.

In many instances the facts of the case itself will prove criminal capacity. Important aspects in this regard include:

- a) The age of the child at the time when the offence was committed;
- b) The nature of the offence. In this regard it appears that if the offence is heinous, the criminal capacity of the child may be more apparent;
- c) The child's actions before, during and after the commission of the offence;
- d) Whether the child acted alone or under coercion of older offenders;
- e) Motivation of the child when committing the offence (Meintjies 2001:B3-3).

Although the facts and/or merits may be an indication of the child's criminal capacity, it should not be assessed in isolation and all the circumstances of each case must be considered together.

7.4.13 Illustration

The Court could consider applying a simple test like the following (including all the relevant aspects in a question and answer and discussion format to accommodate the capacities of the child):

Table 14: Practical suggestions of questions*

Question / Statement	Testing / Measuring / Ascertaining	Phase of development	Note
Are the clothes you are wearing yours?	Concept of ownership	Cognitive Language	Ensure that the child attaches the same meaning to the concept. For example the child might not regard a costume as clothes.
And the watch you have on? (or any other ornament the child is wearing) Does it also belong to you?	Make sure the concept of ownership is understood correctly.	Cognitive Language	Questions should refer to concrete objects/ornaments. Children between 7-11 years of age can not think abstractly.
If someone would take away your watch (ornament) and not ever give it back, would that be OK or not?	Expecting an answer that demonstrates the child knows what is right or wrong.	Psychological Language	Caution should be taken not to ask too many hypothetical questions. Children between the ages of 7-11 years are typically not able to think hypothetically.
Why do you say that it is OK / not OK?	Expecting an answer that will demonstrate logical reasoning and insight based on the previous answers.	Cognitive Psychological Language	Keep in mind that children are extremely literal in their use of language and ensure that the same meaning is attached to the words.
If it has happened, what do you think should happen to the person who took the watch/ornament?	Expecting an answer referring to punishment – indicative of what happens to someone who does something wrong.	Cognitive Language Psychological Social	Caution should be taken not to ask too many hypothetical questions. Children between the ages of 7-11 years are typically not able to think hypothetically.
If you yourself have the opportunity to take a watch/ornament that belongs to someone else and you know that no-one will know about it, would you still take it?	Expecting an answer that will reveal the child can conduct himself/herself in accordance with his/her insight into what is right or wrong.	Psychological Language	Try to use short sentences and words familiar to the child to ensure that he/she understands what the question is.
If some does take something that belongs to you and does not return it, how would you feel about it?	Human emotions can be reduced to six: happy, surprise, fear, anger, disgust and sad. The child may not be able to articulate his/her emotion(s) as such. The Court will have to infer the reduction.	Emotional Language	The child's emotional responses and the child's expressions should be monitored throughout the process.
Now let us take the situation where your best friend takes your watch/ornament and does not give it back. It is called stealing. Right? How would you feel about that?	Expecting answers that will reveal consistency in arguments for what is right or wrong.	Cognitive Language Social	Try to use short sentences and words familiar to the child to ensure that he/she understands what the question is.
In matters where a sexual offence has been committed by the child it is important to also ascertain the sexual development of the child, a transitional sentence would be appropriate at this point. Something like the following could be used: I also want to ask you about more sensitive matters. Is that OK? I want to know what you think about sexual matters. Can I ask you some questions about it? Thank you.			
Can you explain to me: do you know what intercourse/sex is ?	Expecting either a vague or a (very) technical and explicit answer.	Cognitive Psychological Emotional Social Sexual	Sexual behaviour between the ages 5-12 years is usually very secretive in this phase of development. Children under the age of 12-14 years rarely have a full adult understanding of the implications or consequences of sexual behaviour.
When do you think is it OK for people to get involved with sex? Why do you say so?	Expecting a simple yes or no answer. The explanation, if any, can be very vague or explicit.	Sexual knowledge Social	Children in puberty usually have an increased interest in sexual activity.
Have you ever seen people 'doing sex'?	Ascertaining watching of sexual activity	Sexual knowledge	Exposure to sexual encounters, directly or indirectly, is important.
Should children be doing it? Why do you say so?	Expecting a simple yes or no answer. The explanation might be a simple "I don't know".	Sexual knowledge Cognitive Psychological Emotional	The child may be uncomfortable in answering this question due to the secretiveness of sexual behaviour between the ages of 5-12 years.

* This model was created by the researcher

7.5 Recommendations

The practise in the Courts to call the parents or guardians of the child offender to testify on behalf of the State to prove the criminal capacity of the child is unacceptable and should be prohibited by including such a prohibition into the Child Justice Bill, 2002. It is also recommended that if a child pleads guilty to the charges put to him/her, an inquiry into his/her criminal capacity should be compulsory. The Court must be satisfied that every element of the offence has been admitted. If the child pleads guilty and no specific reference is made to the criminal capacity of the child in the statement in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977, one can argue that not all the elements of the offence have been acknowledged (Skelton 2006:1–5).

The Government should prioritise the finalization and promulgation of the Child Justice Bill, 2002 since the process has been dragging on since its introduction into Parliament in August 2002.

It is recommended that the Child Justice Bill, 2002 be revised to specifically include factors such as physical, language, sexual, moral and culture as part of the evaluation of the criminal capacity of child offenders, before its passing in Parliament. However, it is furthermore submitted that the various developmental factors concerning children, to be taken into account, should not be a closed number. Room and scope should be left open to cater for other factors that might be important in certain cases, to ensure that all the needs of all child offenders are be met, especially in our diverse country.

Another important aspect that emerged from this research is the fact that the assessment of the criminal capacity of children should not and could not be approached, in isolation, from only a legal, psychological, social or criminological point of view. A multi-disciplinary approached has to be followed to ensure that the best interest of the child is adequately protected and to ensure that justice is served in every matter involving a child. In view of this any attempt to develop an assessment tool from a criminological point of view only will be a futile exercise. The Child Justice Bill, 2002 should therefore reflect the fact that the criminal capacity of children should be approached from a multi-disciplinary point of view. To reserve this function to a specific profession will not only delay the assessment

process, but it will also prejudice the children in the criminal justice system as it might result in a situation where some of the developmental factors are over emphasized at the expense of other equally important factors due to the fact that the assessment is done from one point of view. In this regard criminologists, social workers, probation officers and psychologists can and must be trained and included in the assessment process. Preferably – in the best interest of the child – they should function as a multi-disciplinary team in the service of the Court.

It is recommended that the Child Justice Bill, 2002 be revised and amended, to provide for a comprehensive evaluation of the child offender, as soon as possible after the commission of the offence. This evaluation should include all the necessary information and recommendations relating to the placement of the child, the prospects of diversion, the release of the child, criminal capacity of the child (including the cognitive, emotional, psychological, social, sexual, physical, language and moral development as well the cultural context of the child) and all the necessary background information (social circumstances, level of education, motive for the offence etc.) of the child. This report can always be extended after conviction to serve as a pre-sentence report and, if the child is diverted and does not comply with the conditions for diversion, and the criminal trial proceeds, the necessary evaluation on his/her criminal capacity would be available. This will not only minimize the trauma for the child offender, but it will definitely put all the role players in the criminal justice system, who has to take decisions on how to deal with a specific child offender, in a better position to act in the best interest of that child, and to make informed choices.

It is suggested that a workshop should be held with all the different professionals involved with children in conflict with the law, to develop and issue a list of the important factors as well as the process of collecting information that should be taken into account, to serve as a guide to the Court and other professionals.

It is furthermore suggested that the Child Justice Bill, 2002 should include a clear provision specifically prohibiting the application of the cautionary rules, by the Child Justice Court, in respect of child offenders, even if such an application is subconsciously.

The proposed criminological model for the assessing of *doli incapax* should be refined through further research, which should include the different approaches by other

professionals in the field. Its applicability in real cases should be thoroughly investigated. The development of an applicable assessment tool or scale to determine the presence or absence of the indicated issues could be developed as a standardized measuring instrument for the use of the Courts.

7.6 Final remark

The Courts are the upper guardian of the children in our country and a child's best interest is of paramount importance in every matter concerning the child. This is applicable whether the child is the victim or the perpetrator. The determination of the criminal capacity of children and the decision regarding it, is one of the life altering decisions our Courts have to make on a daily basis. It is therefore of the utmost importance that all the professionals involved with children in conflict with the law, in the criminal justice process, work together as a team, to place the Court in the best position it can be, to make this important decision in the best interest of the child.

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ADDENDUM

P O Box 11720
ERASMUSKLOOF
0048

11 July 2005

Dear Prof / Dr / Adv / Mr / Mrs

D LITT et PHIL RESEARCH: THE CRIMINAL CAPACITY OF CHILDREN

I am a student at UNISA and are currently conducting empirical research as part of my D Litt et Phil Criminology degree. I am employed by the Department of Justice and Constitutional Development and serve as a Senior Legal Administration Officer in the Directorate: Law Enforcement.

My dissertation deals with criminal capacity of children. I want to ascertain what the views of different professionals (lawyers, psychologists, social workers, criminologists and police officials) are about the criminal capacity of children.

A questionnaire with 11 questions is listed hereunder. It will be appreciated if you could share your views on the issue of criminal capacity with me to enable me to incorporate the different professions' views into my theses.

Please save the questionnaire, complete it and, sent same back to cbadenhorst@justice.gov.za.

Your kind assistance in this regard will be highly appreciated.

Yours faithfully

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QUESTIONNAIRE:

CRIMINAL CAPACITY OF THE CHILD OFFENDER

1. In terms of South African common law presumptions, children under the age of 7 years are *doli incapax* and can therefore not be prosecuted. Children between the ages of 7 years and 14 years are rebuttably presumed to be *doli incapax* and if any such child is to be prosecuted, the prosecution must prove beyond reasonable doubt that the child had the required criminal capacity at the time of committing the offence.

(a) The minimum age indicated above under which prosecution cannot be conducted is too low. Please give your comment.

Comment:

(b) Criminal capacity should be linked to a specific chronological age. Please give your comment.

Comment:

(c) All child offenders under 18 years should be assessed and evaluated to ascertain their criminal capacity. Please give your comment.

Comment:

(d) Enough is being done in our legal system to ensure that all child offenders between the ages of 7 years and 14 years have the necessary criminal capacity before they are prosecuted. Please give your comment.

Comment:

2. In all Australian jurisdictions the statutory minimum of criminal capacity is 10 years. Between the ages of 10 and 14 years, a rebuttable presumption operates to deem a child between these ages incapable of committing a criminal act. Only if the prosecution can rebut this presumption, by showing that the accused child was able, at the relevant time, adequately to distinguish between right and wrong, can a contested trial result in a conviction. In the United Kingdom this rebuttable presumption was abolished in 1998 and this has the effect that children between the ages of 10 and 13 years are treated in the same way as juveniles aged between 14 and 17 years. In Hong Kong in 2003, the minimum age of criminal capacity has been raised to 10 years of age, and the rebuttable presumption of *doli incapax* continue to apply to children on 10 years and below 14 years of age.
- (a) In your opinion which one of these countries offers the best protection to child offenders with reference to the establishment of criminal capacity, and why do you say so?

Comment:

3. The Child Justice Bill, 49 of 2002, was introduced into Parliament in August 2002. Deliberations on the Bill by the Portfolio Committee on Justice and Constitutional Development followed in March 2003. In terms of the proposed provisions of the Child Justice Bill, 2002, the minimum age of criminal capacity is raised to 10 years and the rebuttable presumption of *doli incapax* applies to children between the ages of 10 and below 14 years. If the criminal trial of a child offender between the ages of 10 years and below 14 years proceeds, the prosecutor or the child's legal representative may request the Child Justice Court to order an evaluation of the child to establish criminal capacity.
- (a) These provisions will adequately protect child offenders. Give your comments on this statement please.

Comment:

- (b) The evaluation of the child should be done before he/she appears in the Child Justice Court. Give your comment, please.

Comment:

4. If the Child Justice Court ordered an evaluation of the child, the Child Justice Bill, 2002 provides that the evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child.

- (a) These factors are adequate to establish the criminal capacity of the child. Please give your comment.

Comment:

- (b) Factors like psychical, language, sexual (where applicable in sexual offences) and moral development should be specifically included in the assessment of the (alleged) child offender. Give your comment, please.

Comment:

5. Criminal capacity can be proved and decided upon by taking the facts of the case, surrounding circumstances before and after commission of the offence, nature of the offence and the conduct of the child before and after the commission of the offence into consideration.

- (a) Please give your comment on this statement.

Comment:

- (b) An evaluation of the child offender immediately after the commission of the offence should be compulsory. Your comments, please.

Comment:

Thank you for your participation