

REPUBLIC OF SOUTH AFRICA

CHILD JUSTICE AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No 41952 of 2 October 2018)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 32—2018]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Child Justice Act, 2008, so as to amend a definition; to further regulate the minimum age of criminal capacity; to further regulate the provisions relating to the decision to prosecute a child who is 12 years or older but under the age of 14 years; to further regulate the proof of criminal capacity; to further regulate the assessment report by the probation officer; to further regulate the factors to be considered by a prosecutor when diverting a matter before a preliminary inquiry; to further regulate the factors to be considered by an inquiry magistrate when diverting a matter at a preliminary inquiry; to further regulate the orders that may be made at the preliminary inquiry; to amend wording in order to facilitate the interpretation of a phrase; and to further regulate the factors to be considered by a judicial officer when diverting a matter in a child justice court; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Amendment of section 1 of Act 75 of 2008, as amended by section 25 of Act 39 of 2014

1. Section 1 of the Child Justice Act, 2008 (hereinafter referred to as the principal Act), is hereby amended by the substitution for the definition of “appropriate adult” of the following definition: 5

“ ‘**appropriate [adult] person**’ means any member of a child’s family, including a sibling who is 16 years or older, or care-giver referred to in section 1 of the Children’s Act;” 10

Amendment of section 4 of Act 75 of 2008

2. Section 4 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and— 15

- (a) was under the age of [10] 12 years at the time of the commission of the alleged offence; or
- (b) was [10] 12 years or older but under the age of 18 years when he or she was—
 - (i) handed a written notice in terms of section 18 or 22;

- (ii) served with a summons in terms of section 19; or
- (iii) arrested in terms of section 20, for that offence.”.

Amendment of section 5 of Act 75 of 2008

3. Section 5 of the principal Act is hereby amended by the substitution for subsections (1), (2) and (3) of the following subsections, respectively:

“(1) Every child who is alleged to have committed an offence and is under the age of **[10] 12** years, must be referred to a probation officer to be dealt with in terms of section 9.

(2) Every child who is **[10] 12** years or older, who is alleged to have committed an offence and who is required to appear at a preliminary inquiry in respect of that offence must, before his or her first appearance at the preliminary inquiry, be assessed by a probation officer, unless assessment is dispensed with in terms of section 41(3) or 47(5).

(3) A preliminary inquiry must be held in respect of every child referred to in subsection (2) after he or she has been assessed, except where the matter—

- (a) has been diverted in accordance with Chapter 6;
- (b) involves a child who is **[10] 12** years or older but under the age of 14 years where criminal capacity is not likely to be proved, as provided for in section 10(2)(b); or
- (c) has been withdrawn.”.

Amendment of section 7 of Act 75 of 2008

4. Section 7 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) A child who commits an offence while under the age of **[10] 12** years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9.

(2) A child who is **[10] 12** years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity in accordance with section 11.”.

Substitution of section 8 of Act 75 of 2008

5. The following section is hereby substituted for section 8 of the principal Act:

“Review of minimum age of criminal capacity

8. In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the administration of justice must, not later than five years after the commencement of **[this section]** section 5 of the Child Justice Amendment Act, 2018, submit a report to Parliament, as provided for in section 96(4) and (5).”.

Amendment of section 9 of Act 75 of 2008

6. Section 9 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

“**Manner of dealing with child under the age of **[10] 12** years**”; and

(b) by the substitution for subsections (1), (2) and (3) of the following subsections, respectively:

“(1) Where a police official has reason to believe that a child suspected of having committed an offence is under the age of **[10] 12** years, he or she may not arrest the child, and must, in the prescribed manner, immediately hand the child over—

(a) to his or her parents or an appropriate **[adult] person** or a guardian; or

(b) if no parent, appropriate **[adult] person** or a guardian is available or if it is not in the best interests of the child to be handed over to the

parent, an appropriate **[adult]** person or a guardian, to a suitable child and youth care centre, and must notify a probation officer.

(2) A probation officer who receives notification from a police official in terms of subsection (1), must assess the child in terms of the provisions of Chapter 5 which are applicable to children under the age of **[10] 12** years as soon as possible but not later than seven days after being notified. 5

(3) (a) After assessing a child in terms of subsection (2), the probation officer may, in the prescribed manner— 10

- (i) refer the child to the children’s court on any of the grounds set out in section 50;
 - (ii) refer the child for counselling or therapy;
 - (iii) refer the child to an accredited programme designed specifically to suit the needs of children under the age of **[10] 12** years; 15
 - (iv) arrange support services for the child;
 - (v) arrange a meeting, which must be attended by the child, his or her parent or an appropriate **[adult]** person or a guardian, and which may be attended by any other person likely to provide information for the purposes of the meeting referred to in subsection (4); 20
- or
- (vi) decide to take no action.

(b) Any action taken under paragraph (a) does not imply that the child is criminally liable for the incident that led to the assessment.”

Substitution of section 10 of Act 75 of 2008 25

7. The following section is hereby substituted for section 10 of the principal Act:

“Decision to prosecute child who is [10] 12 years or older but under the age of 14 years

10. (1) A prosecutor who is required to make a decision whether or not to prosecute a child referred to in section 7(2) must take the following into consideration: 30

- (a) The educational level, **[cognitive ability,]** domestic and environmental circumstances, age and maturity of the child;
- (b) the nature and seriousness of the alleged offence;
- (c) the impact of the alleged offence on any victim; 35
- (d) the interests of the community;
- (e) a probation officer’s assessment report in terms of Chapter 5;
- (f) the prospects of establishing criminal capacity in terms of section 11 if the matter were to be referred to a **[preliminary inquiry] child justice court** in terms of Chapter **[7] 9**; 40
- (g) the appropriateness of diversion; and
- (h) any other relevant factor.

(2) If a prosecutor decides in respect of a child referred to in subsection (1) that criminal capacity is—

- (a) likely to be proved in terms of section 11, he or she may [— 45
 - (i) **divert the matter in terms of Chapter 6 if the child is alleged to have committed an offence referred to in Schedule 1; or**
 - (ii)] refer the matter to a preliminary inquiry as provided for in Chapter 7; or 50
- (b) not likely to be proved in terms of section 11, he or she may cause the child to be taken to a probation officer to be dealt with in terms of section 9.

(3) A prosecutor may divert the matter in terms of Chapter 6, if the matter is suitable for diversion.” 55

Substitution of section 11 of Act 75 of 2008, as amended by section 2 of Act 14 of 2014

8. The following section is hereby substituted for section 11 of the principal Act:

“Proof of criminal capacity

11. (1) The State must, for purposes of plea and trial, prove beyond reasonable doubt the capacity of a child who is **[10] 12** years or older but under the age of 14 years to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation. 5

(2) In making a decision regarding the criminal capacity of the child in question— 10

- (a) (i) **the inquiry magistrate, for purposes of diversion; or**
 (ii) **if the matter has not been diverted,** the child justice court[, **for purposes of plea and trial,**]

must consider— 15

(a) **[the assessment report of the probation officer referred to in section 40 and]** all evidence placed before the **[inquiry magistrate or]** child justice court **[prior to diversion or conviction, as the case may be]**, which evidence may include a report of an evaluation referred to in subsection (3); and 20

(b) **[the inquiry magistrate or child justice court must consider]** the cognitive, moral, emotional, psychological and social development of the child. 20

(3) **[An inquiry magistrate or]** A child justice court may, on own accord, or on the request of the prosecutor or the child’s legal representative, order an evaluation of the criminal capacity of the child referred to in subsection (1), in the prescribed manner, by a suitably qualified person. 25

(4) If an order has been made by the **[inquiry magistrate or]** child justice court in terms of subsection (3), the person identified to conduct an evaluation of the child must furnish the **[inquiry magistrate or]** child justice court with a written report of the evaluation within 30 days of the date of the order. 30

(4A) The provisions of section 77(2), (3) and (4) of the Criminal Procedure Act apply with the changes required by the context to a report referred to in subsection (4). 35

(5) Where **[an inquiry magistrate or]** a child justice court has found that a child’s criminal capacity has not been proved beyond a reasonable doubt, the **[inquiry magistrate or]** child justice court may, if it is in the interests of the child, cause the child to be taken to a probation officer for any further action in terms of section 9.”. 40

Substitution of section 12 of Act 75 of 2008

9. The following section is hereby substituted for section 12 of the principal Act:

“Responsibility of police official where age of child is uncertain

12. If a police official is uncertain about the age of a person suspected of having committed an offence but has reason to believe that— 45

- (a) the person may be a child under the age of **[10] 12** years, the police official must act in accordance with the provisions of section 9; or
 (b) the person may be a child who is **[10] 12** years or older but under the age of 14 years, or a child who is 14 years or older but under the age of 18 years, the police official must treat the person as a child with due regard to the provisions relating to— 50

(i) arrest in terms of Chapter 3; or

(ii) release or detention in terms of Chapter 4, and, in particular, section 27 relating to placement options before a child’s first appearance at a preliminary inquiry, 55

until a probation officer or medical practitioner has expressed an opinion on the age of the person or until the determination of that person's age at the preliminary inquiry or child justice court, after which the police official must treat the person in accordance with the opinion or determination.”.

Amendment of section 24 of Act 75 of 2008 5

10. Section 24 of the principal Act is hereby amended by the substitution in subsection (3) for paragraph (c) of the following paragraph:

“(c) the fact that the child is [10] 12 years or older but under the age of 14 years and is presumed to lack criminal capacity;”.

Substitution of section 27 of Act 75 of 2008 10

11. The following section is hereby substituted for section 27 of the principal Act:

“Placement options for child who has not been released before first appearance at preliminary inquiry

27. If, at any stage before a child's first appearance at a preliminary inquiry, the child has not been released from detention in police custody and is charged, in the case of a child who is— 15

- (a) (i) [10] 12 years or older but under the age of 14 years, with any offence; or
(ii) 14 years or older, with an offence referred to in Schedule 1 or 2, 20

the police official must give consideration to the detention of the child in an appropriate child and youth care centre, if a centre is available and there is a vacancy, or if a centre or vacancy is not available, in a police cell or lock-up; or

- (b) 14 years or older, with an offence referred to in Schedule 3, the police official must cause the child to be detained in a police cell or lock-up.”. 25

Amendment of section 34 of Act 75 of 2008

12. Section 34 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: 30

“(3) A probation officer who has been notified by a police official that a child under the age of [10] 12 years has been dealt with in terms of section 9, must make arrangements to assess the child within seven days of the notification.”.

Amendment of section 35 of Act 75 of 2008

13. Section 35 of the principal Act is hereby amended— 35

- (a) by the substitution for paragraph (f) of the following paragraph:
“(f) in the case of a child under the age of [10] 12 years or a child referred to in section 10(2)(b), establish what measures need to be taken in terms of section 9;”; and

- (b) by the deletion of paragraph (g). 40

Amendment of section 40 of Act 75 of 2008

14. Section 40 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (e) of the following paragraph:

“(e) in the case of a child under the age of [10] 12 years, establish what measures need to be taken in terms of section 9;”; and

- (b) by the deletion in subsection (1) of paragraph (f).

Amendment of section 41 of Act 75 of 2008

15. Section 41 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) A prosecutor may divert a matter involving a child who is alleged to have committed an offence referred to in Schedule 1 and may, for this purpose, select any level one diversion option set out in section 53(3) or any combination thereof, if the prosecutor is satisfied—
- (a) that the factors referred to in section 52(1)(a) to (d) have been complied with; and
 - (b) in the case of a child who is [10] 12 years or older but under the age of 14 years, that **[criminal capacity is likely to be proved in terms of section 11] the child will benefit from diversion.**”.

Amendment of section 43 of Act 75 of 2008, as amended by section 36 of Act 42 of 2013

16. Section 43 of the principal Act is hereby amended— 15

- (a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:
 - “(a) consider the assessment report of the probation officer, with particular reference to—
 - (i) the age estimation of the child, if the age is uncertain; 20
 - [(ii) the view of the probation officer regarding the criminal capacity of the child if the child is 10 years or older but under the age of 14 years and a decision whether an evaluation of the criminal capacity of the child by a suitably qualified person referred to in section 11(3) is necessary;]** and 25
 - (iii) whether a further and more detailed assessment of the child is needed as referred to in section 40(1)(g);”;
- (b) by the substitution in subsection (3) for paragraph (a) of the following paragraph: 30
 - “(a) A preliminary inquiry must be held in respect of every child who is alleged to have committed an offence, except where—
 - (i) the matter has been diverted by a prosecutor in terms of Chapter 6;
 - (ii) the child is under the age of [10] 12 years; or 35
 - (iii) the matter has been withdrawn.”.

Amendment of section 49 of Act 75 of 2008

17. Section 49 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) (a) An inquiry magistrate may, subject to paragraph (b), make an order that the matter be diverted in terms of section 52(5). 40
- (b) An inquiry magistrate may[, **in the case of a child who is 10 year or older but under the age of 14 years,**] only make an order that the matter be diverted in terms of paragraph (a) if he or she is satisfied **[that the child has criminal capacity]**— 45
- (i) that the factors referred to in section 52(1)(a) to (d) have been complied with; and
 - (ii) in the case of a child who is 12 years or older but under the age of 14 years, that the child will benefit from diversion.”.

Amendment of section 52 of Act 75 of 2008 50

18. Section 52 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (c) of the following paragraph:

- “(c) there is [a] *prima facie* **[case against the child]** evidence that the child committed the offence;”.

Amendment of section 58 of Act 75 of 2008

19. Section 58 of the principal Act is hereby amended by the addition of the following subsection:

“(5) If the prosecutor decides to proceed with the prosecution in terms of subsection (4)(a) in the case of a child who is 12 years old but under the age of 14 years, criminal capacity of that child must be proved in terms of section 11.” 5

Amendment of section 67 of Act 75 of 2008

20. Section 67 of the principal Act is hereby amended by the insertion in subsection (1) after paragraph (a) of the following paragraph:

“(aA) A child justice court may only make an order for diversion in terms of paragraph (a) if the court is satisfied— 10

- (i) that the factors referred to in section 52(1)(a) to (d) have been complied with; and
- (ii) in the case of a child who is 12 years or older but under the age of 14 years, that the child will benefit from diversion.” 15

Amendment of section 71 of Act 75 of 2008

21. Section 71 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) (a) A child justice court imposing a sentence must, subject to paragraph (b), request a pre-sentence report prepared by a probation officer prior to the imposition of sentence. 20

(b) A child justice court may, subject to paragraph (c), dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child[, but no child justice court sentencing a child may impose a sentence involving compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)(j) of the Children’s Act or imprisonment, unless a pre-sentence report has first been obtained]. 25

(c) A child justice court may not dispense with a pre-sentence report where the court may— 30

- (i) impose a sentence involving compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)(j) of the Children’s Act or imprisonment; or
- (ii) make an order referred to in section 50(2)(c)(ii) of the Criminal Law (Sexual Offences) Matters Amendment Act, 2007 (Act No. 32 of 2007).” 35

Substitution of section 92 of Act 75 of 2008

22. The following section is hereby substituted for section 92 of the principal Act:

“**[Children used by adults] Persons using children to commit crime**

92. If it comes to the attention of any court official or probation officer that a child has been used by **[an adult] another person** to commit a crime referred to in Schedule 1 or 2 of the Criminal Procedure Act, that **[adult] person** must be reported to the South African Police Service for the consideration of a prosecution as provided for in section 141(1)(d), read with section 305(1)(c), of the Children’s Act, and the fact of the **[adult’s] person’s** involvement must be taken into account when determining the treatment of the child in the child justice system.” 40
45

Amendment of section 96 of Act 75 of 2008, as amended by section 19 of Act 24 of 2015

23. Section 96 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection: 50

- “(4) In order for Parliament to review the minimum age of criminal capacity, as provided for in section 8, the Intersectoral Committee must, not later than five years after the commencement of **[this Act] section 5 of the Child Justice Amendment Act, 2018**, submit a report to the Cabinet member responsible for the administration of justice, setting out the following: 5
- (a) The statistics of the following categories of children who are alleged to have committed an offence and the offences they are alleged to have committed: 10
- (i) **Children who are 10 years at the time of the commission of the alleged offence;**
 - (ii) **children who are 11 years at the time of the commission of the alleged offence;** 15
 - (iii) children who are 12 years at the time of the commission of the alleged offence;
 - (iv) children who are 13 years at the time of the commission of the alleged offence; 15
- (b) sentences imposed on the children in the categories referred to in paragraph (a), if they were convicted;
- (c) the number of children referred to in paragraph (a) whose matters did not go to trial, as provided for in section 10(2)(b) on the grounds that the prosecutor was of the view that criminal capacity would not be proved and reasons for that decision in each case; 20
- (d) the number of children referred to in paragraph (a) whose matters were dealt with in accordance with section 11, whether expert evidence was led, and the outcome of each matter regarding the establishment of criminal capacity;
- (e) an analysis of the statistics referred to in paragraphs (a) to (d); and 25
- (f) a recommendation based on the analysis as to whether the minimum age of criminal capacity should remain at **[10] 12** years as provided for in section 7(1) or whether the minimum age of criminal capacity should be raised.”.

Amendment of table of contents of Act 75 of 2008

- 24.** The table of contents of the principal Act is hereby amended— 30
- (a) by the substitution for item 9 of the following item:
- “**9.** Manner of dealing with child under the age of **[10] 12** years”;
- (b) by the substitution for item 10 of the following item:
- “**10.** Decision to prosecute child who is **[10] 12** years or older but under the age of 14 years”; and 35
- (c) by the substitution for item 92 of the following item:
- “**92.** **[Children used by adults]** Persons using children to commit crime.”.

Amendment of principal Act

- 25.** The principal Act is hereby amended by the substitution for the expression “appropriate adult”, wherever it occurs, of the expression “appropriate person”. 40

Amendment of Act 51 of 1977

- 26.** The Criminal Procedure Act, 1977 (Act No. 51 of 1977), is hereby amended by the substitution in sections 73, 77 and 78 for the expression “appropriate adult”, wherever it occurs, of the expression “appropriate person”. 45

Transitional arrangement

- 27.** Any criminal proceedings in which the age of criminal capacity of a child is applicable which were instituted before the commencement of section 4 of this Act, must be continued and concluded as if this Act had not been passed.

Short title and commencement 50

- 28.** (1) This Act is called the Child Justice Amendment Act, 2018, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.
- (2) Different dates may be so fixed in respect of different provisions of this Act.

MEMORANDUM ON THE OBJECTS OF THE CHILD JUSTICE AMENDMENT BILL, 2018

1. PURPOSE OF BILL

The primary objective of the Child Justice Amendment Bill, 2018 (“the Bill”), is to amend the Child Justice Act, 2008 (Act No. 75 of 2008) (“the Act”), in order to increase the minimum age of criminal capacity of a child, to remove the requirement to prove criminal capacity for purposes of diversion and preliminary inquiries and to provide for consequential amendments.

2. OBJECTS OF BILL

- 2.1 The Act creates a criminal justice system for children who are in conflict with the law, in accordance with the values underpinning the Constitution of the Republic of South Africa, 1996 (“Constitution”), and the international obligations of the Republic. Some of the main features of the Act are to provide for a minimum age of criminal capacity of children, a mechanism for dealing with children who lack criminal capacity outside the criminal justice system and preliminary inquiries.
- 2.2 Section 7 of the Act deals with the minimum age of criminal capacity of children and provides for the following: A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence; and a child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity unless the State proves that he or she has criminal capacity in accordance with section 11 of the Act (the rebuttable presumption). Section 8 of the Act provides that, in order to determine whether or not the minimum age of criminal capacity should be raised, the Cabinet member responsible for the administration of justice must, not later than five years after the commencement of section 7 of the Act, submit a report to Parliament.
- 2.3 The Report on the Review of the Minimum Age of Criminal Capacity (“Report”) concludes that the minimum age of criminal capacity should be increased from 10 years to 12 years and that the rebuttable presumption be retained for children who are 12 years and older but younger than 14 years. The Report further recommends that the provisions in the Act which require the State to prove the criminal capacity of a child who is 10 years or older but under the age of 14 years for purpose of diversion and preliminary inquiries should be removed. A few other amendments to the Act are also proposed in the Report. The amendments in the Bill seek to give effect to the recommendations in the Report.
- 2.4 *Clause 1* of the Bill is a technical amendment and amends the definition of “appropriate adult” in section 1 of the Act. The definition of “appropriate adult” in the Act includes a sibling or family member who is 16 years or older. A sibling or family member who is 16 years cannot be said to be an “appropriate adult”. The inclusion of a family member or sibling who is 16 years old was informed by the reality that there are many children living on their own and in child-headed households. The phrase “appropriate adult” is therefore substituted with the phrase “appropriate person” in order to cater for children living with, or taking care of, other children.
- 2.5 *Clause 2* of the Bill amends section 4 of the Act, dealing with the application of the Act. Section 4(1) provides that the Act applies to a person who was under the age of 10 years at the time of the commission of the alleged offence or was 10 years or older but under the age of 18 years when he or she was served with a written notice or summons or was arrested for that offence. Section 4(1) is being amended to substitute the reference to 10 years with a reference to 12 years, in line with the amendments to section 7, discussed below, regarding the increase of the minimum age criminal capacity of children, from 10 years to 12 years.

- 2.6 **Clause 3** of the Bill amends section 5 of the Act regulating the manner of dealing with children who are alleged to have committed offences. The section provides for the manner of dealing with a child, depending on the age of the child, from the time of arrest, to assessment, preliminary inquiry and until trial at the child justice court. Amendments to section 5(1), (2) and (3), are consequential, and similar to the amendments to section 4, substituting the reference to 10 years with a reference to 12 years, in line with the increase of the minimum age of criminal capacity of children to 12 years.
- 2.7 **Clause 4** of the Bill amends section 7 of the Act, dealing with the minimum age of criminal capacity of children. On the basis of the recommendations in the Report, section 7 is being amended to increase the minimum age of criminal capacity from 10 years to 12 years. Section 7 is therefore being amended to provide that a child under the age of 12 years does not have criminal capacity and cannot be prosecuted, and a child who is 12 years or older but under the age of 14 years is presumed not to have criminal capacity, unless the State proves beyond reasonable doubt that the child has criminal capacity (the rebuttable presumption). The amendment to increase the minimum age of criminal capacity of a child from 10 years to 12 years has necessitated a number of consequential amendments in various sections of the Act.
- 2.8 **Clause 5** of the Bill substitutes section 8 of the Act, dealing with the review of the minimum of age of criminal capacity. The Report recommends that section 8 be retained but amended to provide for a further review of the minimum age of criminal capacity. The Report noted that the African Commission on Human and People's Right Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, in respect of criminal capacity, provides that: "States shall establish laws and procedures which set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law. The age of criminal responsibility should not be fixed below 15 years of age." Section 8 is being amended to make provision for another review after five years from the commencement of the Child Justice Amendment Act, 2018, if the Bill is enacted.
- 2.9 **Clause 6** of the Bill amends section 9 of the Act regulating the manner of dealing with a child under the age of 10 years who, in terms of section 7, does not have criminal capacity and cannot be prosecuted. The section is being amended to align it with amendments in section 7. The section, including the heading, is being amended to substitute the reference to 10 years with a reference to 12 years.
- 2.10.1 **Clause 7** of the Bill amends section 10 of the Act. Section 10 regulates the decision on the prosecution of a child who is 10 years or older but under the age of 14 years and who is presumed not to have criminal capacity. Section 10 is being amended so as to align it with the amendments in section 7. The heading, is being amended to reflect that the minimum age of criminal capacity of children is being increased to 12 years.
- 2.10.2 Section 10(1) lists the "cognitive ability" of a child as one of the factors that a prosecutor must take into consideration in determining whether to prosecute a child who is 10 years or older but under the age of 14 years. It has been submitted that a prosecutor is not equipped to consider the cognitive ability of a child, which should be evaluated by a suitably qualified person. Subsection (1) is therefore being amended to remove the reference to the "cognitive ability" of a child as one of the factors to be considered by a prosecutor.
- 2.10.3 Section 10 is also amended to give effect to one of the recommendations in the Report that diversion be de-linked from the issue of criminal capacity and that criminal capacity be addressed during plea and trial in a child justice court. This recommendation is motivated on the basis of unintended consequences in the implementation of the rebuttable presumption,

resulting in operational challenges which, in turn, give rise to unacceptable delays in the finalisation of matters involving children who are older than 10 years but under the age of 14 years. In practice, the Act is interpreted as requiring criminal capacity to be dealt with both at the preliminary inquiry and before a matter is diverted by a prosecutor. As a result, virtually every child who is 10 years or older but under the age of 14 years that comes into the criminal justice system is referred for evaluation in terms of section 11. This results in a clogging of the system due to the numbers of children being referred. There are insufficient resources, both financial and human, to deal with the increased number of referrals and there is also a lack of facilities where evaluations can be conducted. Children are moreover “pathologised” and are brought unnecessarily into contact with the mental health system, an undesirable outcome which is not in the best interests of children. This situation also exacerbates the burden on the already overstrained mental health system. Criminal capacity will only become relevant when a matter is referred to a child justice court for plea and trial. Section 10(2)(a)(i) is being removed because it links criminal capacity to diversion by a prosecutor in terms of section 6 of the Act. A new section 10(3) is proposed which provides in broad terms that a prosecutor may divert a matter in terms of Chapter 6 if the matter is suitable for diversion. Section 10(1)(f) removes the reference to a “preliminary inquiry” for purposes of establishing criminal capacity and replaces it with a reference to a “child justice court”.

- 2.11 **Clause 8** of the Bill amends section 11 of the Act regulating proof of criminal capacity. Section 11 is being amended to align it with the amendments to section 7 to reflect the revised minimum age of criminal capacity. The amended section provides that the State must prove criminal capacity of a child who is 12 years or older but under the age of 14 years, when a matter is in the child justice court for purposes of plea and trial. Section 11 is also being amended to remove the references to the inquiry magistrate and the preliminary inquiry, because of the proposal to do away with need to prove criminal capacity of a child at a preliminary inquiry, as discussed above. Section 11(2)(a), which requires the child justice court to consider the assessment report of a probation officer, is also being amended. This requirement is being deleted because, in terms of section 36(1)(b), the information obtained at an assessment is inadmissible as evidence for purposes of bail, plea or trial.
- 2.12 **Clauses 9, 10, 11 and 12** of the Bill amend sections 12, 24, 27 and 34 of the Act, respectively. The amendments to these sections are purely consequential to the amendments to section 7, increasing the minimum age of criminal capacity.
- 2.13 **Clause 13** of the Bill amends section 35 of the Act which regulates the purpose of the assessments of children by probation officers. Section 35(f) is being amended to in order to substitute the reference to 10 years with a reference to 12 years. Section 35(g) provides that one of the purposes of the assessment is to express a view on whether expert evidence referred to in section 11(3) would be required. A concern has been raised that probation officers are not qualified to express a view on issues relating to the criminal capacity of a child. It is therefore proposed that section 35(g) be deleted.
- 2.14 **Clause 14** of the Bill amends section 40 of the Act. Section 40 of the Act regulates the content of an assessment report to be compiled by a probation officer after assessing a child. Section 40(1)(f) requires a probation officer to include in the assessment report a recommendation on the possible criminal capacity of a child as well as measures to be taken to prove criminal capacity. As indicated in paragraph 2.13 above, probation officers are not qualified to express a view on criminal capacity. It is therefore proposed that section 40(1)(f) be deleted.

- 2.15 **Clause 15** of the Bill amends section 41 of the Act which constitutes Chapter 6 of the Act, dealing with diversion of a matter by a prosecutor before a preliminary inquiry. Section 41 is being amended to align it with the amendments to section 10, discussed in paragraph 2.10 above. The amendment inserts an additional requirement for the prosecutor to consider when diverting a matter involving a child who is 12 years or older but under the age of 14 years, namely whether the child will benefit from diversion.
- 2.16 **Clause 16** of the Bill amends section 43 of the Act which deals with the nature and objectives of a preliminary inquiry. Section 43 is being amended to substitute the reference to 10 years with a reference to 12 years. Section 43(2)(a) provides that one of the objectives of a preliminary inquiry is to consider the assessment report, including the view of the probation officer regarding the criminal capacity of a child. As discussed above the probation officer is not ideally placed to express a view on criminal capacity. Section 43(2)(a)(ii) is therefore being deleted, in line with the amendments in sections 35 and 40.
- 2.17 **Clause 17** of the Bill amends section 49 of Act dealing with orders that may be made at a preliminary inquiry. The amendment is in line with the amendments to sections 10 and 11, namely to remove the requirement to prove criminal capacity at a preliminary inquiry. The inquiry magistrate need not refer or order the evaluation of the criminal capacity of a child when considering diverting the matter during a preliminary inquiry. An additional requirement for the inquiry magistrate to consider when considering diversion is inserted in section 49(1), similar to that in respect of a prosecutor in terms of section 41. The amendment provides that an inquiry magistrate may only divert a matter involving a child who is 12 years or older but under the age of 14 years, if the magistrate is satisfied that the child will benefit from diversion.
- 2.18 **Clause 18** of the Bill amends section 52 of the Act dealing with consideration of diversion. Section 52(1)(c) is being amended by substituting the expression “*prima facie* case against the child” with “*prima facie* evidence that the child committed the offence”.
- 2.19 **Clause 19** of the Bill amends section 58 of the Act dealing with the failure of a child to comply with a diversion order. As a result of the amendments in sections 41 and 49 to remove the requirement to prove criminal capacity for purposes of diversion and preliminary enquiries, section 58 is being amended to provide that if a child who is 12 years or older but under the age of 14 years, fails to comply with a diversion order, and the prosecutor intends to proceed with prosecution, the criminal capacity of that child must be proved in terms of section 11. A new subsection (5) to this effect is being inserted in section 58.
- 2.20 **Clause 20** of the Bill amends section 67 of the Act, which regulates diversion at a child justice court. The amendment is intended to align the section with the amendments to sections 41 and 49 regarding the diversion of a child who is 12 years or older but under the age of 14 years. A new paragraph is inserted in subsection (1) which provides that a child justice court may make an order of diversion if the court is satisfied that the factors referred to in section 52(1)(a) to (d) have been complied with and that the child will benefit from diversion.
- 2.21 **Clause 21** of the Bill amends section 71 of the Act regulating pre-sentence reports. Currently, section 71 allows a child justice court to dispense with a pre-sentence report in certain circumstances. Section 50(2)(c)(ii) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) (“the SORMA”), requires the court to consider the report by the probation officer where the court may order that the particulars of the child be included in the National Register for Sex Offenders. Section 71 is therefore being amended to align it with this provision and to ensure that the child justice court does not dispense with a pre-sentence report where the court may impose a sentence involving compulsory residence in a child and

youth care centre or imprisonment, or where the court makes an order that the particulars of the child be included in the National Register for Sex Offenders in terms of section 50(2) of the SORMA.

- 2.22 **Clause 22** of the Bill amends section 92 of the Act dealing with children used by adults to commit crimes. In some instances young children are used by older children to commit crimes. The heading and the section are being amended to substitute the word “adult” with “persons” which will include a child using another child to commit a crime.
- 2.23 **Clause 23** of the Bill amends section 96(4) of the Act dealing with statistics to be submitted to Parliament for the purposes of the review of the minimum age of criminal capacity. Section 96(4) is being amended to align it with the amendments proposed to sections 7 and 8 as discussed above, and to remove the requirement to submit statistics in respect of children younger than 12 years, since the minimum age of criminal capacity of children is to be increased to 12 years.
- 2.24 **Clause 24** is a technical amendment amending the table of contents of the Act. The headings to sections 9, 10 and 92 of the Act are to be amended. The table of contents of the Act is therefore amended to reflect the amendments to the headings.
- 2.25 **Clause 25** of the Bill is a consequential amendment, as a result of the amendment referred to in clause 1 above. Clause 25 thus seeks to substitute the phrase “appropriate adult” with “appropriate person” wherever it appears in various sections in the Act.
- 2.26 **Clause 26** of the Bill is also a consequential amendment in that it substitutes the phrase “appropriate adult” with “appropriate person” in sections 73, 77 and 78 of the Criminal Procedure Act, 1977, as a result of the amendment of the definition of “appropriate adult” in section 1 of the Act.
- 2.27 **Clause 27** of the Bill provides for a transitional arrangement. It is important to make provision for any proceedings relating to criminal capacity of a child that are pending when the Bill becomes law in order to ensure legal certainty. The clause provides that any proceedings in terms of the Act which are pending when the Bill becomes law must be processed and concluded in terms of the law as it was before the commencement of the Act.
- 2.28 **Clause 28** of the Bill contains the short title and commencement provision. The clause provides that the Child Justice Amendment Act, 2018, will commence on a date proclaimed by the President and empowers the President to fix different dates for different sections of the Act.

3. FINANCIAL IMPLICATIONS

The amendments are intended to alleviate financial constraints related to evaluations into the criminal capacity of children.

4. DEPARTMENTS AND PARTIES CONSULTED

- 4.1 The Department consulted the academia, psychologists, psychiatrists, the judiciary, Civil Society Organisations specialising in children’s issues and the National House of Traditional Leaders.
- 4.2 The Departments of Social Development, Health, Correctional Services and Basic Education, Legal Aid South Africa, the National Prosecuting Authority and the South African Police Service were consulted.
- 4.3 The memorandum was finalised in consultation with JCPS Directors-General Cluster.

5. PARLIAMENTARY PROCEDURE

- 5.1 The Department of Justice and Constitutional Development and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies. In other words, the Bill does not deal with any matters listed in Schedule 4 to the Constitution (functional areas of concurrent national and provincial legislative competence) wherein the procedure set out in section 76 of the Constitution would apply.
- 5.2 The Constitutional Court, in *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* CCT 100/09 [2010] ZACC 10 (11 May 2010), paragraph 72, stated that the procedure envisaged in section 75 of the Constitution remains relevant to all Bills that do not, in substantial measure, affect the provinces. It stated that whether a Bill is a section 76 Bill is determined in two ways. Firstly by the explicit list of legislative matters in section 76(3)(a) to (f) of the Constitution, and secondly by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.
- 5.3 The State Law Advisers are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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