



CHILDREN BELOW THE AGE OF CRIMINAL RESPONSIBILITY IN SOUTH AFRICA: MEASURES, RIGHTS, PROCEDURE, PARTICIPATION

National Report for AIMJF's Comparative and Collaborative Research.

Niños por debajo de la edad de responsabilidad penal en Sudáfrica: medidas, derechos, procedimiento, participación

Informe nacional para la investigación comparativa y colaborativa de la AIMJF

Enfants n'ayant pas atteint l'âge de la responsabilité pénale en Afrique du Sud: mesures, droits, procédure, participation

Rapport national pour la recherche comparative et collaborative de l'AIMJF

Judiciary of South Africa

Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on children below the age of criminal responsibility. The article explains the applicable measures and the procedure adopted, the child's rights and his or her participation in the Protective and Justice System in South Africa

Resumen: El documento es parte de una investigación colaborativa organizada por la Asociación Internacional de Juventud y Familia (AIMJF) sobre niños por debajo de la edad de responsabilidad penal. El artículo explica las medidas aplicables, el procedimiento adoptado, los derechos del niño y su participación en el sistema de protección y de justicia en Sudáfrica.

Résumé: Le document fait partie d'une recherche collaborative organisée par l'Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF) sur les enfants n'ayant pas atteint l'âge de la responsabilité pénale. L'article explique les mesures passibles d'application et la procédure adoptée, les droits des enfants et leur participation dans le système de protection et de justice en Afrique du Sud

Introduction

The International Association of Youth and Family Judges and Magistrates (IAYFJM or AIMJF, in the French and Spanish acronym) represents worldwide efforts

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to establish links between judges from different countries, promoting transnational judicial dialogue, in order to provide better conditions for a qualified attention to children based in a human rights approach.

To do so, AIMJF organizes research on international problems facing the operation of the courts and various laws relating to youth and family and training programs.

The aims of this research are to identify similarities and discrepancies among countries and to develop a cartography of measures, procedure, rights and participation of children below the minimum age of criminal responsibility.

This national report is based on a questionnaire prepared by AIMJF.

QUESTIONNAIRE:

1. general information

1.1. What is the minimum age of criminal responsibility in your country (the **age of criminal responsibility** is the age below which a child is deemed incapable of having committed a criminal offence, it can also be referred as age of accountability, **age of responsibility**, and **age of liability for children and it is different of the age when a person becomes an adult**)?

1.1. In South Africa, the minimum age of criminal responsibility is 12 years - **Section 7(1) of the Child Justice Act 75 of 2008**, which states: "A child who commits an offence while under the age of 12 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9."

1.2. Is there more than one minimum age of criminal responsibility?
Which one? Is it possible to apply the 'doli incapax rule' in your country

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(possibility of demonstration that the child is sufficiently mature and capable to understand that the behavior was an offense and therefore could be criminally responsible)?

1.2. Previously, there was a presumption (*doli incapax*) for children aged 10–14, but since 2022, the minimum age is 12. For children aged 12–14, the prosecution must prove criminal capacity - **Section 7(2) of the Child Justice Act 75 of 2008**: "A child who is 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."

2. age assessment

2.1. In case of application of the ‘*doli incapax* rule’, how is this assessment made? Is there a specific methodology for this evaluation? A protocol on how to evaluate? Who assesses the child? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

2.1 Not applicable for children under 12. For those aged 12–14, assessment of criminal capacity is required, involving social workers, psychologists, and sometimes psychiatrists (Section 11(3) of the CJA - "suitably qualified person").

2.2. In case of necessity of age assessment (due to a lack of birth registration), how is this assessment made? Is there a procedure? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

2.2 A social worker, medical practitioner, or other expert assesses the child’s age, considering available evidence and hearing the child. (The child has legal assistance and can challenge the outcome).

3. police intervention

3.1. In case a child under the minimum age of criminal responsibility commits an act considered as a crime, is he/she brought to a police station? Is it mandatory to do so? If not, in which situations is it necessary to be brought to the police station?

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3.1 Children under 12 who commit an offence are not arrested or detained. Police will take the child to a parent, guardian, or social worker, and must notify the Department of Social Development for them to conduct the report needed for the Court.

3.2. In case the child is brought to the police station, what is expected from the police to do? What are the legal guarantees for the child in this context? Is it possible, in any circumstance, that the child be imprisoned, even for a very short time? In this case, how long is it possible for the child to be deprived of liberty?

3.2 Section 9(1) of the Child Justice Act prohibits arrest and detention for children under 12, which inherently protects their safety and dignity from police custody. The general principles of the Act, as outlined in Section 2(e), state: "Every child should be treated in a manner which takes into account his or her cultural values and beliefs," and Section 2(i) refers to "The rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child," which include rights to dignity and protection from arbitrary detention.

4. measures

4.1. In case a child below the minimum age of criminal responsibility has committed an act considered as a crime, is it possible to impose any kind of measure? Which one?

4.1 No criminal measures can be necessarily imposed unless criminal capacity is proven. Instead, the child may be referred to Children's Court for care and protection interventions, working hand in hand with the Department of Social Development.

4.2. Is it possible to impose an out-of-home placement (such as alternative care, in institution or foster family; in health facilities, for instance)? in which circumstances? For how long?

4.2 YES. This becomes possible when the child is found to be in need of care and protection, under the Children's Act 38 of 2005. Placement may be in foster care – usually with a suitable person, depending on the child's needs and risk factors.

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5. procedure

5.1. Who imposes such measures?

5.1 Children's Court or Department of Social Development, not criminal courts unless found to have criminal capacity and an order made in the Child Justice Court.

5.2. Is there a legal procedure for the determination of these measures? What is the nature of these procedures? Can you describe it shortly?

5.2 A Children's Court inquiry determines if the child is in need of care and protection.

5.3. Is it possible to adopt alternative resolution mechanisms in these situations, such as mediation or restorative justice?

5.3 Yes. Family and Group conferencing are specific orders that can be made at the preliminary inquiry process, as well as in Child Justice Court. This is an ADR mechanism.

6. assessment

6.1. Is there any kind of assessment of the child for the imposition of such measures (on vulnerabilities, risk, rights violations)? Who assesses the child? Is there a protocol or guideline on how to assess the child? Can you please share it?

6.1 Social workers under the Department of Social Development are meant to assess the child's vulnerabilities, risks, and needs, following protocols under the Children's Act. (Assessments are multidisciplinary depending on how the child presents and the factual matrix of the criminal act).

7. legal and procedural guarantees

7.1. What are the rights of the child in this procedure (legal and procedural guarantees)?

7.2. Does the child have the right to refuse any of these measures? Or to challenge in court any of these measures?

7.3. What happens if the child does not fulfill the obligations inherent to these measures?

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8. the role of the justice system

8.1. Is it possible in your country that the justice system gets involved in these situations? In which situation (vg. to impose the measure or to review it, in case of resistance by the child or his/her family, or to impose some child protection order)? For what purpose? Which branch of the justice system is involved (youth court, family court, child protection court, criminal court...)?

8.2.. In case of involvement of the justice system, can you briefly describe the procedure?

8.2 The procedure is as follows:

Stage 1 - Initial Response: Police refer the child to parents/guardians or social workers.

Stage 2 - Notification: Department of Social Development is notified to conduct necessary reports.

Stage 3 - Assessment: Social workers assess the child's vulnerabilities, risks, and needs following Children's Act protocols.

Stage 4 - Children's Court Inquiry: Determines if the child is in need of care and protection.

Stage 5 - Multidisciplinary Approach: May involve psychologists, psychiatrists, and other experts depending on the case.

Stage 6 - Alternative Mechanisms: Family and group conferencing available as alternative dispute resolution.

8.3.. What are the rights of the child in this procedure? Does the child have the right to legal assistance? The right to appeal against any kind of decision?

8.3 In terms of the Constitution the child has the following rights:

- Right to be heard in all proceedings
- Right to Legal Representation including legal aid
- Right to Appeal by challenging assessments and decisions
- Right to safety and dignity (cannot be detained in police custody if under 12)
- Right to have their best interests considered as primary – Section 28(2) of the Constitution.

9. assistance or support

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9.1. Besides the measures imposed to children, are there other kind of assistance available on a voluntary basis (social, psychological, medical)?

9.2 The Teddy Bear Clinic for Abused Children (child abuse counseling and legal support) — teddybearclinic.org.za.

FAMSA (Family and Marriage Society of South Africa) (family counseling and support) — famsa.org.za.

The National Association of Child Care Workers (NACCW) (child care and protection services) — naccw.org.za.

Childline South Africa (Child protection, abuse reporting - childlinesa.org.za).

10. child participation

10.1. Is the child heard in this procedure? By whom? At which stage of the procedure?

10.1 Yes, the child is heard in the procedure. By whom: Children's Court Presiding Officer; social Workers, Psychologists, Psychiatrists and in consultation with his/her/their legal representative

10.2. Is the child heard more than once in this procedure? How many times?

10.2 The child is given an opportunity to be heard as follows:

- Initial assessment by a probation officer or social worker.
- In a criminal capacity assessment - the panel of expert psychiatrists and psychologists and social workers.
- At court proceedings - Children's Court or Child Justice Court.
- In alternative resolution mechanisms like family and group conferencing.

10.3. Is there a protocol or guideline on how to hear the child in this situation? Can you please share it?

10.3

Children's Act 38 of 2005

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- Section 61(1) - Participation of children: "The presiding officer in a matter before a children's court must— (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so; (b) record the reasons if the court finds that the child is unable to participate in the proceedings or is unwilling to express a view or preference in the matter; and (c) intervene in the questioning or cross-examination of a child if the court finds that this would be in the best interests of the child."
- Section 61(2): "A child who is a party or a witness in a matter before a children's court must be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977) if the court finds that this would be in the best interests of that child."
- Section 60(3) - Conduct of proceedings: "Children's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings."

Child Justice Act 75 of 2008

- Section 63(4)(b): A child justice court "must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child."
- Section 2(e): "Every child should be treated in a manner which takes into account his or her cultural values and beliefs."

11. legal implications

11.1. Is there any record of legal infringement committed by children below the age of criminal responsibility? When the child reaches the age of criminal responsibility, are these records taken into consideration?

11.1 Section 60(1) of the *Child Justice Act* authorizes the Director-General: Social Development must establish and maintain a register of children in respect of whom a diversion order has been made. This register includes "the personal details of each child" and "details of the offence in relation to which the diversion order was made."

A diversion record is not a criminal record.

However, convicted children, 12 years or older with proven criminal capacity will have to apply for the expungement of records for certain convictions and diversion orders (Section 87 of the *Child Justice Act*).

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For Schedule 1 offences, the record can be expunged after 5 years, and for Schedule 2 offences, after 10 years, provided the child is not convicted of a similar or more serious offence during that period.

11.2. In case of damages, what kind of rights and remedies does the victim have regarding the child and the family? Besides financial reparation, does the victim have the possibility to have a say on the measures applied to the child?

11.2 The following are available:

- Financial compensation
- Restorative Justice mechanisms such as Family Group Conferencing

12. [reforms in progress](#)

12.1. Are there ongoing reforms on this subject?

12.1 Last amendment -Child Justice Amendment Act 28 of 2019

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