

REPUBLIC OF SOUTH AFRICA

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# CHILD JUSTICE AMENDMENT BILL

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*(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)*

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(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

**[B 32—2018]**

ISBN 978-1-4850-0517-9

No. of copies printed ..... 800

## 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.

**P**ARLIAMENT 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